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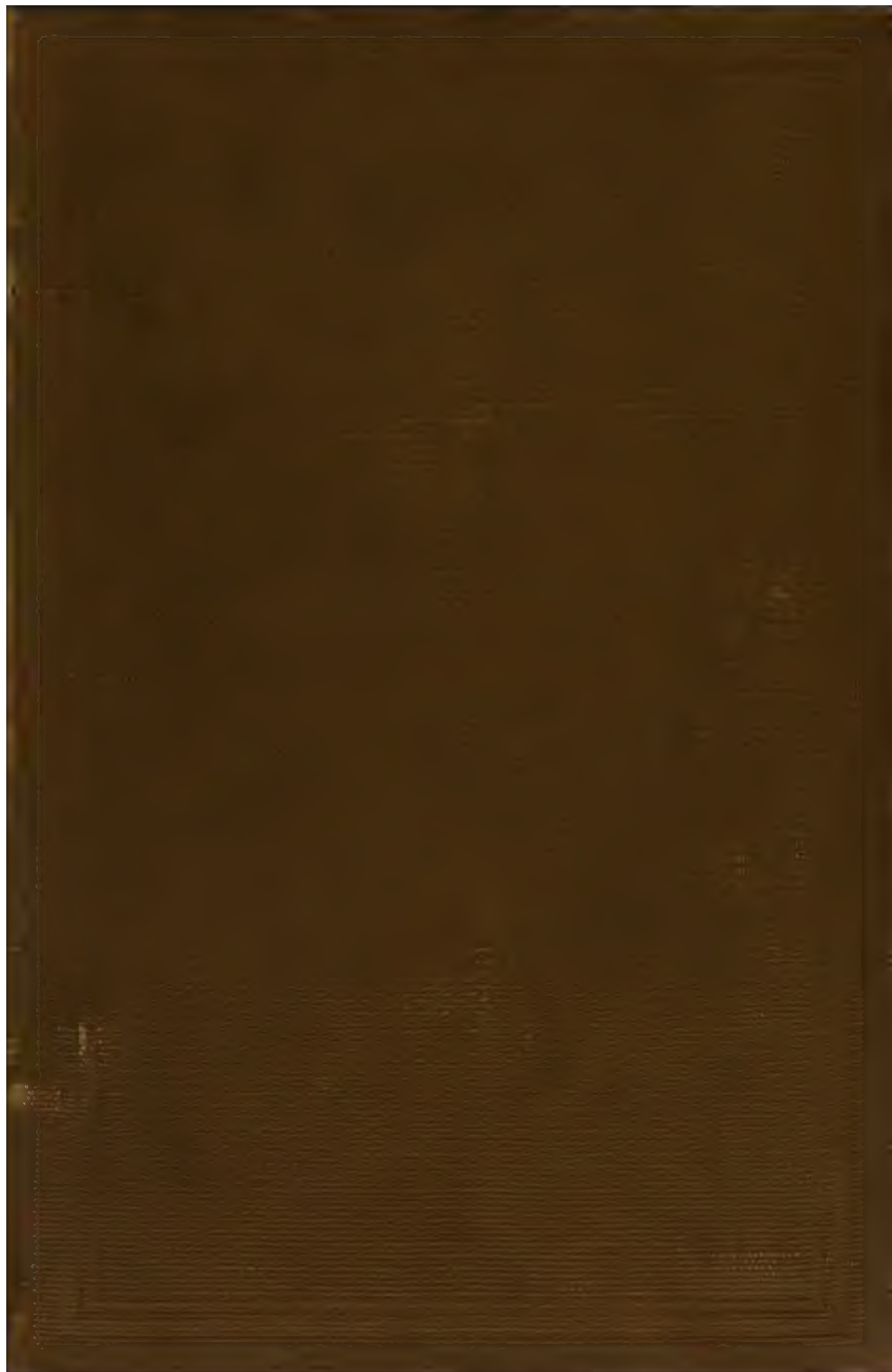
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# INSTRUCTIONS TO JURIES

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**INST. TO JURIES**

**(1019) •**



# PART TWO

## FORMS OF INSTRUCTIONS

### CHAPTER XXXIX

#### ABDUCTION

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See, also, Seduction; Rape.

##### A. CRIMINAL PROSECUTION

#### § 540. Elements of offense

##### § 540(1). Kentucky

The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, ———, in this



county and before the finding of this indictment, unlawfully and willfully took and detained the prosecuting witness, ———, against her will and consent, with the intent to have carnal knowledge of her himself, then and in that event the jury will find the defendant guilty.<sup>1</sup>

The court instructs the jury that if they believe from the evidence beyond a reasonable doubt the defendant, ———, in ——— county, ———, state of ———, before ———, did unlawfully, willfully and feloniously take and detain ———, a female, and not the wife of him the said ———, against her will, with intent to have carnal knowledge with her, they should find the defendant guilty and fix his punishment at confinement in the state penitentiary for a period of time not less than ——— nor more than ——— years, in their discretion.

If upon the entire case the jury have a reasonable doubt of the defendant having been proven guilty from the evidence, they should find him not guilty.<sup>2</sup>

**§ 540(2). Missouri**

You are instructed that by the word "concubinage," as used in the information and in these instructions, is meant the act or practice of a man cohabiting in sexual intercourse with a woman—a female with whom he is not married. If the jury believe and find from the evidence that the defendant, ———, did take the prosecuting witness, ———, from her father, and that she was at the time a female under the age of ——— years, for the purpose of cohabiting with her in sexual intercourse for any length of time for more than one single act of sexual intercourse, then the defendant is guilty of the crime charged in the information. If you find that the defendant did not so take the said ——— from her father, or did not take her for the purpose or with the intent to practice sexual intercourse with her, as explained in these instructions, or if you find that said ——— was at the time ——— years of age, or over, then the defendant is not guilty of the crime charged, and you will so find.<sup>3</sup>

**§ 541. Custody from which female taken**

**§ 541(1). California**

The court instructs the jury that, within the meaning of the statute, a girl may be in the custody of a person having the legal

<sup>1</sup> Black v. Commonwealth, 156 S. W. 1043, 154 Ky. 144.

<sup>2</sup> Smith v. Commonwealth, 127 S. W. 790.

<sup>3</sup> State v. Baldwin, 113 S. W. 1123, 214 Mo. 290.

charge of her person, although she is absent from him with his consent in the care of another for some proper purpose, and that if you believe from the evidence that the complaining witness had been temporarily committed to the care of the defendant by her legal guardian for a proper purpose, and that he subsequently conceived the intent to use the girl for a purpose prohibited by the statute, and interposed his will between her and her guardian in order to accomplish such prohibited purpose, he took her from such guardian for that purpose.<sup>4</sup>

**§ 541(2). Michigan**

The court instructs the jury that the letters of guardianship did not make B. guardian of the girl's person, but that they are properly in the case for the bearing they may have on the actual custody. The court further instructs the jury that the parent having a right to the custody of a child may delegate the authority; that this right is primarily in the father, but in his absence belongs to the mother, who may if she see fit give the custody to a third person for a longer or shorter period, resuming the control at will; that it was not necessary in this case that B.'s right should be of that character that the mother would be precluded from resuming her control; it was enough if, while the girl lived at B.'s, the mother had consented to his exercising the same control over her in respect to her liberty that the mother herself could exercise for the time being. If she had done so and had not revoked that permission, then B. had that right to the custody and control which in contemplation of law amounts to a legal charge of the girl.<sup>5</sup>

**§ 541(3). Missouri**

The court instructs the jury that, if you believe and find from the evidence that ——— was the daughter of ———, and that she was under the age of ——— years, and if you further find that she was in the habit of working out as a domestic servant, and had so worked out a number of places during the past year, and that when out of work she made her home with her father, and if you further find that during the fall of ——— she came to the city of ———, to the home of her uncle, and that her coming to ——— was with the consent of her father, and that she was under the control of her father while in ———, and if you find that the defendant took her from her uncle's house in ——— to the city of ———, for the purpose of concubinage, or that she went to ———, by reason of an agreement with the de-

<sup>4</sup> People v. Lewis, 75 P. 189, 141 Cal. 543.

<sup>5</sup> People v. Carrier, 9 N. W. 487, 46 Mich. 442.

fendant, or by reason of inducements held out by the defendant, then you should find the defendant guilty, if you believe he induced her to go for the purpose of concubinage.<sup>6</sup>

**§ 542. What constitutes taking, enticement, or detention**

**§ 542(1). Kansas**

The court instructs the jury that, in order to constitute a taking by the defendant under the law, it is not necessary that the defendant should have used any force, or have exercised any physical control over the girl in taking her away, or have been personally with her at the time of her leaving, or have gone in person with her. It is sufficient if he procured or caused her to go away by any persuasion, enticement, or inducement offered, exercised, or held out by him to the girl, or by furnishing her the means or money with which to go away. It is not necessary that the persuasion, enticement, or inducement should have been made or offered, or the money or means furnished, at the time of the girl's leaving; but if the defendant, for the purposes charged, persuaded, or enticed, or offered inducements to the girl to leave her father and mother, and furnished her means with which to go away, and she did not go away at that time, but went away at a subsequent time, and such going away was caused by, and was the result of, the persuasion, enticement, or inducements offered, or money or means furnished, by the defendant, such facts would show a taking within the meaning of the law.<sup>7</sup>

**§ 542(2). Kentucky**

The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant laid his hands upon or took hold of said ——— against her will and consent, and with the intent to have carnal knowledge of her himself, this would be a taking and detaining in the meaning of the instructions.<sup>8</sup>

You are instructed that the application of physical force by a man to the person of a woman with the intent, on the part of the man, to prevent free locomotion on the part of the woman, is a detention of such woman by such man if such application of force is sufficient to, and does in fact, prevent to any extent the power of free locomotion in such woman, and does to any extent

<sup>6</sup> State v. Jones, 90 S. W. 465, 191 Mo. 653.

<sup>7</sup> State v. Bussey, 50 P. 891, 58 Kan. 679.

<sup>8</sup> Black v. Commonwealth, 156 S. W. 1043, 154 Ky. 144.

prevent her from going to or being wherever she wishes to go or to be. And, if there is such detention against the will and without the consent of the woman upon whom such detention is exercised, and if such detention is willfully and intentionally exercised by the man for the purpose of having sexual intercourse with the woman against the will of the woman, and if the man be not the husband of the woman, such detention is an unlawful detention within the meaning of the law.<sup>9</sup>

**§ 542(3). Michigan**

The court instructs the jury that, before you can convict the defendant, you must be satisfied beyond a reasonable doubt that he enticed the girl, ———, away, such enticement, if there was any, may have been done by open solicitation to go for one purpose or for another purpose. It may have been done by designedly portraying to her her situation, and the result of going back to Mr. ———, or the place from which she came, in such a light as to lead her to go to escape a return. If this were done with the design of getting her to go, it is an enticing although the defendant may not have asked her to go, and apparently only consented to go with her; but if he had no design to get her to go away, and did nothing to bring about such an end, it would not be an enticing, and the defendant could not be convicted.<sup>10</sup>

**§ 542(4). Missouri.**

In the case of *State v. Corrigan*, 171 S. W. 51, 262 Mo. 195, the court adopted the instruction given in *State v. Bussey*, 50 Pac. 891, 58 Kan. 679. See § 542 (1).

**§ 543. Character of cohabitation—What is marriage**

The court instructs the jury that marriage is the civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is founded on the distinction of sex. If the jury believe that the parties ——— and ——— did not intend to enter into the agreement of matrimony, but simply agreed to abide together for the purpose of illicit sexual intercourse, then there was no marriage between them.<sup>11</sup>

<sup>9</sup> *Robb v. Commonwealth*, 101 S. W. 918, 31 Ky. Law Rep. 246.

<sup>10</sup> *People v. Carrier*, 9 N. W. 487, 46 Mich. 442.

<sup>11</sup> *State v. Adams*, 78 S. W. 588, 179 Mo. 334.

**§ 544. Clandestine marriage**

The court instructs the jury that the act of inducing an unmarried female under the age of sixteen years to leave her home without the consent of her parents for the purpose of effecting a marriage with her is not the offense defined by the statute on which this indictment is based, so long as no fraud or deceit is practiced upon her.<sup>12</sup>

**§ 545. What constitutes concubinage and duration of cohabitation****§ 545(1). Kansas**

You are instructed that the word "concubinage," as used in the information and in these instructions, means for the purpose of living and cohabiting by defendant with —— as his wife; but it is not necessary that permanent, or even long-continued, cohabitation shall have been contemplated.<sup>13</sup>

**§ 545(2). Missouri**

The jury are instructed that by the word "concubinage," as used in the information and instructions, is meant the act or practice of a man cohabiting in sexual intercourse with a woman to whom he is not married. If the jury believe from the evidence that the defendant, ——, did take the witness —— away from her father, and that said —— was at the time a female under the age of —— years, for the purpose of cohabiting with her as a man and woman in sexual intercourse for any length of time, but for more than a single act of sexual intercourse, without the authority of a marriage, it would be sufficient to constitute the offense charged in the information.<sup>14</sup>

The court instructs the jury that if the jury believe, from the evidence, that the defendant, —— at the county of ——, in this state, at any time within —— years before finding of the indictment, did take away —— from her mother, as charged in the indictment, for the purpose of concubinage—that is, for the purpose of having sexual intercourse with her as man and woman for any length of time, even for a single night, without authority of a legal marriage—and that said —— was at the time under the age of ——, and that the mother of said —— did not consent to the taking away of said —— for said purpose of concubinage, then the jury will find the defendant guilty, and assess

<sup>12</sup> Hay v. State, 67 So. 107, 68 Fla. 458.

<sup>13</sup> State v. Tucker, 84 P. 126, 72 Kan. 481.

<sup>14</sup> State v. Adams, 78 S. W. 588, 179 Mo. 334.

his imprisonment in the penitentiary for a period of not less than \_\_\_\_\_ nor more than \_\_\_\_\_ years.<sup>15</sup>

### § 546. Use of force or persuasion

#### § 546(1). Georgia

The court instructs the jury that, if you believe from the evidence that the defendant was a married man and that he induced the girl, \_\_\_\_\_, who was not his wife, to go away with him without the consent of her parents under a false and fraudulent promise of marriage, and for the purpose of having sexual intercourse with her, you will find him guilty as charged in the indictment.<sup>16</sup>

#### § 546(2). Kansas

You are instructed that the important element of the offense is the taking away of the female from her father and Mrs. \_\_\_\_\_ without their consent for the illicit purpose, and that this may have been accomplished by the persuasion, enticement, advice, or other active influence of the defendant; and that if she was thereby removed beyond the control of her father, \_\_\_\_\_, and Mrs. \_\_\_\_\_, for such purpose, the offense is complete, and this without regard to whether or not she consented to go.<sup>17</sup>

#### § 546(3). Mississippi

The court instructs the jury that, in order to convict the defendant of the crime of abduction under the statute, you must believe from the evidence that the defendant unlawfully took the complaining witness against her will, and by force, menace, fraud, deceit, stratagem, or duress compelled or induced her to be defiled.<sup>18</sup>

#### § 546(4). Missouri

The jury are instructed that if you find from the evidence that at the county of \_\_\_\_\_ and state of \_\_\_\_\_, at any time within \_\_\_\_\_ years next before the filing of the information herein, the defendant did take away \_\_\_\_\_ from her father, \_\_\_\_\_, for the purpose of concubinage, and that the said \_\_\_\_\_ was a female under the age of \_\_\_\_\_ years, you will find him guilty, and assess his punishment at imprisonment in the penitentiary not less than \_\_\_\_\_ years nor more than \_\_\_\_\_ years. Even should you believe from the evidence that the said \_\_\_\_\_ was of easy virtue, or had previously had sexual intercourse with defendant, or had consented

<sup>15</sup> State v. Stone, 16 S. W. 890, 106 Mo. 1.

<sup>16</sup> Carter v. State, 80 S. E. 206, 14 Ga. App. 51.

<sup>17</sup> State v. Tucker. 84 P. 126, 72 Kan. 481.

<sup>18</sup> Lampton v. State, 11 So. 656.

to go away with defendant, or that she consented to have sexual intercourse with the defendant, yet none or all of these facts would constitute any defense to this prosecution.<sup>19</sup>

The jury are instructed that it is not necessary in this case for the state to prove that the taking away of ——— from her mother was by force or violence; and it is no defense that the said ——— consented to go with the defendant, or that she consented or agreed to her sexual intercourse with defendant.<sup>20</sup>

**§ 546(5). North Carolina**

The jury are instructed that if you should believe from the evidence that the girl, ———, was taken away by the defendant against her father's will and without his consent, the defendant cannot be convicted unless the jury shall further find from the evidence beyond a reasonable doubt that the girl was carried away by the force or fraud, or induced to go by the persuasion of the defendant.<sup>21</sup>

You are instructed that if you believe from the evidence that defendant by persuasion obtained the consent of the prosecuting witness, ———, to go away with him, such consent would constitute no defense to this prosecution for abducting her from her father's house.<sup>22</sup>

**§ 547. Placing in custody by defendant**

You are instructed that if you believe from the evidence that defendant persuaded the girl, ———, who was not his wife, to go to a bawdyhouse and there be a prostitute during the greater part of every night, and that he received part of her earnings, but you further believe from the evidence that no one exercised any restraint over the girl, and that she was, and had been, a prostitute for a considerable time before defendant so induced her to go to the bawdyhouse, if he did so induce her, then you will acquit the defendant.<sup>23</sup>

<sup>19</sup> State v. Adams, 78 S. W. 588, 179 Mo. 334.

<sup>20</sup> State v. Stone, 16 S. W. 890, 106 Mo. 1.

<sup>21</sup> State v. Burnett, 55 S. E. 72, 142 N. C. 577.

<sup>22</sup> State v. Chisenhall, 11 S. E. 518, 106 N. C. 676.

<sup>23</sup> People v. Drake, 121 P. 1006, 162 Cal. 248. This prosecution was under a statute providing that whoever receives any money on account of placing in custody any female for the purpose of causing her to cohabit with any man not her husband is guilty of a felony,



**§ 548. Effect of want of chastity of female****§ 548(1). Missouri**

The court instructs the jury that, even if you believe from the evidence that the prosecuting witness, ———, was of unchaste character, and prior to the alleged abduction had had sexual intercourse with the defendant, such state of facts will constitute no defense to this prosecution.<sup>24</sup>

The court instructs the jury that, although you may believe from the evidence that the general reputation of the prosecuting witness for chastity and virtue was bad at the time of the acts complained of, her want of chastity constitutes no justification to any one to take her from the custody of her father or rightful guardian for the purpose of prostitution or concubinage; but the court further instructs you that evidence of the reputation of the prosecuting witness for want of chastity is to be considered by you in weighing her testimony and is admitted for that purpose.<sup>25</sup>

**§ 548(2). Tennessee**

The jury are instructed that if you find from the evidence beyond a reasonable doubt that the prosecuting witness, ———, was living with her parents a chaste and virtuous life towards all others except defendant, and that defendant willfully took her from said parents without their consent for the purpose and with the intent of prostituting her, then he would be guilty as charged, although it may appear that prior thereto the defendant had had sexual intercourse with her.<sup>26</sup>

**§ 549. Place to which abducted female taken and length of absence**

The court instructs the jury that the defendant is being prosecuted for the violation of a statute prohibiting the enticement of an innocent female of chaste life from the home of her parents or legal guardian for the purpose of prostitution or concubinage, and that it is not necessary, to constitute the prohibited offense, that the female be taken to a place distant from the family residence, or that she be taken any particular distance therefrom, nor is it essential that the girl should be kept permanently away from such residence, or that there should be any intent to so keep her.<sup>27</sup>

<sup>24</sup> State v. Baldwin, 214 Mo. 290, 113 S. W. 1123.

<sup>25</sup> State v. Bobbst, 32 S. W. 1149, 131 Mo. 328; State v. Johnson, 22 S. W. 463, 115 Mo. 480.

<sup>26</sup> South v. State, 37 S. W. 210, 97 Tenn. 496.

<sup>27</sup> Slocum v. People, 90 Ill. 274.



The court further instructs you that it is sufficient to constitute a violation of such statute that a girl living with her parents is persuaded or enticed to go to some convenient place away from her father's house for the purpose of prostitution, although the place to which she goes is in the immediate neighborhood of such house, and she is gone only for an hour or two at a time, and she continues all the while to dwell with her parents as usual.<sup>28</sup>

**§ 550. Ignorance of age of complaining witness**

The court instructs the jury that the fact that the child, the complaining witness in this case, consented to go with defendant and to have sexual intercourse with him, if you find that she did have such intercourse and did so consent, is of no avail to the defendant, if she was under the age of consent at the time of such acts, although the defendant believed in good faith, or had good grounds for believing, that she was over the age of consent.<sup>29</sup>

**§ 551. Presumption as to chastity of prosecuting witness**

The court instructs the jury that the presumption of law is that the life and previous character of the prosecuting witness, ———, were chaste, and that the burden of proof is upon the defendant to produce sufficient evidence to overcome such presumption.<sup>30</sup>

**B. CIVIL LIABILITY**

**§ 552. Right of parent to sue**

The court instructs the jury that a father can maintain an action for the abduction of his daughter who is under twenty-one years of age. The father has such property in his infant child as will enable him to maintain an action for injury done him, by depriving him of the society of his child, and defeating the education of his child, etc. The true ground of the action, as I understand the law, is not so much the loss of the services of the child, but the outrage and deprivation, the injury the father sustains in the loss of his child, the insult offered his feelings, the agony in the destruction of his hopes concerning his child, and the irreparable loss of that comfort and society which may be the only solace of his declining years.<sup>31</sup>

<sup>28</sup> *Slocum v. People*, 90 Ill. 274.

<sup>29</sup> *People v. Dolan*, 31 P. 107, 96 Cal. 315.

<sup>30</sup> *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652. Such an instruction is

not objectionable as dealing with a presumption of fact.

<sup>31</sup> *Dobson v. Cothran*, 13 S. E. 679, 34 S. C. 518.

**§ 553. Use of force as element of cause of action**

The court instructs the jury that this action is maintainable, although the evidence does not show a forcible taking or abduction. An infant child is not able to consent, and the law therefore implies force as the taking is unlawful.<sup>33</sup>

The court instructs the jury that, if these defendants enticed and persuaded ——— to leave and remain away from her father, even after she got to the house, and to hide in the wardrobe in order to keep her from being found by the father, this would be an unlawful act, and it would be sufficient to maintain this action, and would amount to sufficient force, even if the defendants did not persuade her by promises or entice her to leave her father's house. If they did persuade her to pursue this life of shame after she went to their house of ill fame, and when her father came for her she was hid by them in the wardrobe, I think there would be sufficient force in that to maintain the action.<sup>33</sup>

**§ 554. Defense of lack of chastity**

The court instructs the jury that, if the defendants enticed or persuaded ——— to leave the home of her father, and enter upon a life of shame and disgrace, in the bawdyhouse of the defendants, the mere fact that ——— had had sexual intercourse with other men before she went would not be a defense against the action brought by the father for the injury of taking his child away, but such fact would have weight in fixing the amount of damages sustained by the father.<sup>34</sup>

<sup>33</sup> Dobson v. Cothran, 13 S. E. 679,  
34 S. C. 518.

<sup>33</sup> Dobson v. Cothran, 13 S. E. 679,  
34 S. C. 518.

<sup>34</sup> Dobson v. Cothran, 13 S. E. 679,  
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## CHAPTER XL

## ABORTION

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## § 555. Elements of offense

## § 555(1). Delaware

The Court instructs the jury that procuring a miscarriage, within the meaning and purpose of this act, is the unlawful destruction, or the bringing or causing to be brought forth prematurely the foetus or unborn offspring of a pregnant woman, at any time before birth according to the course of nature. In order to warrant the jury, in the present instance, in finding a verdict of guilty

under this statute, the burden is on the state to prove to your satisfaction, beyond a reasonable doubt, first, that the prisoner, ———, on or about the ——— day of ———, of the present year, in this county, administered or prescribed medicine; or used an instrument, as alleged in the indictment; second, that he so administered or prescribed medicine, or used the instrument, then and there, with the intent to procure the miscarriage of ———, she being then and there pregnant, or the said prisoner supposing her to be so pregnant; and, third, that said miscarriage was not then and there necessary to preserve the life of the said ———. If you find that the state has failed to prove beyond all reasonable doubt all, or any one, of these essential facts and constituent elements of this alleged felony, it will be your duty to render a verdict of not guilty.<sup>1</sup>

The court instructs the jury that, to warrant the jury in finding a verdict of guilty under this statute, the burden is on the state to prove to your satisfaction beyond a reasonable doubt (1) that the prisoner, ———, on the ——— day of ——— of the present year, in this county, used an instrument as alleged in this indictment; (2) that he so used it then and there with the intent to procure a miscarriage of ———, she being then and there pregnant, or the said prisoner supposing her to be pregnant; and (3) that said miscarriage was not then and there necessary to preserve the life of the said ———. If you are satisfied beyond a reasonable doubt that the state has proved all these facts which are essential to constitute the elements of the alleged felony, your verdict should be guilty. If you are not so satisfied, your verdict should be not guilty.<sup>2</sup>

**§ 555(2). Illinois**

The court instructs the jury that the following are material allegations of the indictment in this case: That ——— was pregnant; second, that while ——— was pregnant she aborted or miscarried; third, that said abortion or miscarriage was produced by criminal means; fourth, that said criminal means were employed by the defendant, ———. And if, upon consideration of all the evidence in this case, you find that all the foregoing propositions have not been proven beyond a reasonable doubt, then you must find the defendant, ———, not guilty.<sup>3</sup>

<sup>1</sup> State v. Brown, 85 A. 707, 3 Boyce, 499.

<sup>2</sup> State v. Massey, 82 A. 243, 2 Boyce, 501.

<sup>3</sup> People v. Patrick, 115 N. E. 300, 277 Ill. 210.

§ 555(3). **Massachusetts**

The jury are instructed that, in order to authorize a conviction, the jury must be satisfied that there was an operation performed upon ——— by the defendant, by thrusting an instrument up into her body and into her womb, with intent unlawfully thereby to procure her miscarriage, she being pregnant.<sup>4</sup>

§ 556. **Pregnant with child**

The court instructs the jury that the statute uses the term “pregnant with child,” and a woman is pregnant with child from the time of conception to the time of natural delivery. It is not essential in this state to the proof of pregnancy with child that the child should be quick; that is to say, that it should be able to move in its mother’s womb; but pregnant means in this state and under our statute as so defined, from the time of conception, and continues until the time of maternal delivery.<sup>5</sup>

§ 557. **Knowledge by defendant of pregnancy**§ 557(1). **California**

The court instructs the jury that, if you believe from the evidence that the defendant did not know whether pregnancy on the part of the woman was the reason for the cessation of her menses when he furnished her the drug, if he did furnish it, but you further believe from the evidence that he furnished it with the intention that in case she was pregnant her miscarriage should be thereby procured, and she was in fact then pregnant, he was guilty of the offense charged.<sup>6</sup>

§ 557(2). **New Jersey**

The court instructs the jury that, although there can be no violation of the statute unless the woman upon whom the alleged abortion was performed was pregnant, it is not necessary to show, in order to prove an intent to produce a miscarriage, that the defendant knew that the woman was pregnant with child. It is sufficient to show such intent that he entertained a belief in, or suspicion of, her pregnancy.<sup>7</sup>

§ 558. **Intention of defendant**

The jury are instructed that it is not necessary for the government to prove that the act complained of was performed with the

<sup>4</sup> Commonwealth v. Snow, 116 Mass. 47.

<sup>5</sup> State v. Ausplund, 167 P. 1019, 86 Or. 121.

<sup>6</sup> People v. Richardson, 120 P. 20, 161 Cal. 552.

<sup>7</sup> State v. Loomis, 97 A. 896, 89 N. J. Law, 8.

intention by the defendant to kill and murder the child; it is sufficient if it was done in the manner alleged, with intent to procure a miscarriage unlawfully.<sup>8</sup>

### § 559. Intent to procure miscarriage

The court instructs the jury that the gravamen of this offense is the intent. If you believe the woman was pregnant, or that the defendant supposed her to be, and that he used the alleged instrument, you are to decide whether he used it for the purpose, and with the intent, of procuring a miscarriage. If he did use the instrument, but you believe it was for some other purpose, or with some other intent, than to procure a miscarriage, it would not constitute the crime charged under this statute. The specific intent here is to produce the miscarriage, and the act or advice must relate to that.<sup>9</sup>

### § 560. Necessity of actually causing miscarriage

#### § 560(1). Delaware

The court instructs the jury that it is not necessary for the state to prove that the prisoner actually caused or accomplished the alleged miscarriage of ———. It will be sufficient, so far as respects this element of the offense here charged, if you are satisfied beyond a reasonable doubt, that the prisoner administered or prescribed certain alleged medicine, or used the alleged instrument with the intent to procure the miscarriage of ———, whether such intent was accomplished or not. If you are so satisfied, it will be immaterial, in your determination of this case, whether or not ——— had herself caused the alleged miscarriage by her own use of any instrument, medicine or other means, and therefore of no avail for the defense of the prisoner.<sup>10</sup>

The court instructs the jury that it is not necessary for the state to prove that the prisoner actually caused or accomplished the alleged miscarriage of ———. It would be sufficient, so far as respects this element of the offense charged, if you are satisfied that the prisoner used the alleged instrument with the intent to procure a miscarriage of ———, whether such intent was accomplished or not. Nor would the consent of ——— to the prisoner's alleged attempt to procure her miscarriage be a sufficient or lawful defense for him, in view of the positive provision of said statute, if the prisoner actually used an instrument as alleged in the indictment.<sup>11</sup>

<sup>8</sup> Commonwealth v. Snow, 116 Mass. 47.

<sup>9</sup> State v. Massey (Del.) 82 A. 243, 2 Boyce, 501.

<sup>10</sup> State v. Brown, 85 A. 797, 3 Boyce, 499.

<sup>11</sup> State v. Massey, 82 A. 243, 2 Boyce, 501.

## § 560(2). Wisconsin

You are not concerned upon that branch of the case with the question of whether he did actually produce a miscarriage or not. The question is: Did he use these instruments with the purpose and with the intent of producing a miscarriage?<sup>12</sup>

## § 561. Death of woman as ground for prosecution for murder or manslaughter

See, also, post, § 2882.

## § 561(1). Illinois

The jury are instructed that if the jury believe that ——— was a woman pregnant with child, and that the defendants, "by means of any instrument or other means whatever," caused ——— to abort or miscarry, and that the abortion was not necessary for the preservation of her life, and that she died as the result of such abortion, the defendants would be guilty of murder.<sup>13</sup>

## § 561(2). Kentucky

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that prior to the finding of the indictment herein, in the county of ———, state of ———, the defendant, ———, did willfully, feloniously, and with malice aforethought kill and murder ——— by thrusting into her body an instrument, which by said use was ordinarily dangerous to her life, with the intent to procure an abortion upon her, you should find him guilty as charged in the indictment, and in your discretion fix his punishment at death, or confinement in the penitentiary of the state during his natural life.<sup>14</sup>

The court instructs the jury that if the instrument, as used by defendant, if he used any instrument on the said ———, was not necessarily dangerous to life, yet if you believe from the evidence, beyond a reasonable doubt, that it was, by the defendant, thrust into the body of ———, with the intent to procure an abortion, and she was thereby killed, contrary to the wish and expectation of defendant, he should be acquitted of murder, but you should find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary from ——— to ——— years, in your discretion.<sup>15</sup>

<sup>12</sup> Rodermund v. State, 168 N. W. 390, 167 Wis. 577.

<sup>13</sup> People v. Hotz, 103 N. E. 1007, 261 Ill. 239.

<sup>14</sup> Clark v. Commonwealth, 63 S. W. 740, 111 Ky. 443.

<sup>15</sup> Clark v. Commonwealth, 63 S. W. 740, 111 Ky. 443.

## § 561(3). Missouri

The court instructs the jury that if, upon consideration of all the testimony in the case, in the light of the court's instructions, you believe and find from the evidence that the defendant, ———, at the city of ——— and state of ———, at any time within ——— years prior to the ——— day of ———, 19—, in and upon the body of one ———, a woman then and there being pregnant with a child, if you find that she was pregnant, did then and there unlawfully, willfully, and feloniously make an assault, and that the defendant did then and there unlawfully, willfully, and feloniously use and employ in and upon the body and womb of the said ——— an instrument known as a catheter, and that the defendant did then and there unlawfully, willfully, and feloniously insert, thrust, and force the said instrument known as a catheter into the private parts and womb of the said ———, and did thereby then and there greatly wound the said ——— in and upon the body and womb of her, the said ———, with the felonious intent thereby then and there to produce, and promote a miscarriage or abortion of the then existing pregnancy of her, the said ———, if you find that she was pregnant, and that the same was not then and there necessary to preserve the life of said pregnant woman, ———, or not being necessary to preserve the life of an unborn child then in the womb of the said ———, or that the same, namely, the use and employment of the said instrument as aforesaid, was not advised by a duly licensed physician to be necessary to preserve the life of said pregnant woman, ———, or to be necessary to preserve the life of an unborn child then in the womb of the said ———, and if the jury further believe and find from the evidence that, by the means and in consequence of the unlawful, willful and felonious use and employment of said instrument as aforesaid in and upon the body and womb of the said ———, by the defendant, if you find that such an instrument was so used by defendant with the felonious intent to destroy the foetus and child in the womb of the said ——— then and there being, and thereby produce, and promote a miscarriage or abortion of the then existing pregnancy of her, the said ———, she, the said ———, then and there became mortally wounded and diseased of her womb and body, of which mortal wound and disease she, the said ———, subsequently, on the ——— day of ———, 19—, at the city of ——— and state of ———, did die, you will find the defendant guilty of manslaughter in the second degree, as charged in the indictment, and you will assess her punishment at imprisonment



in the penitentiary for a term of not less than ——— years, nor more than ———, and, unless you find the facts so to be, you will acquit the defendant. The words “felonious” and “feloniously,” as used in these instructions, mean wickedly and against the admonition of the law. The word “willfully,” as used in these instructions, means intentionally, not accidentally.<sup>16</sup>

**§ 562. Same—Cause of miscarriage**

The jury are instructed that if the jury believes that ——— aborted from natural causes, or from any one of the several causes testified to by the medical witnesses in the case, then you should find the respondent not guilty.<sup>17</sup>

The jury are instructed that if the jury believes that ——— aborted by reason of the ordinary sickness and vomiting, augmented by the nervous, mental excitement, fatigue, lack of nourishment, and the change of climate, then you should find the respondent not guilty.<sup>18</sup>

**§ 563. Motive of procuring miscarriage**

You are instructed that, to be unlawful, acts for the purpose of procuring the miscarriage of a woman pregnant with child need not be done in a spirit of wanton cruelty or wicked revenge, but would be unlawful if done from any wicked, base, or sordid motive, offensive to good morals or injurious to society.<sup>19</sup>

**§ 564. Necessity of saving woman's life**

**§ 564(1). Massachusetts**

With respect to the lawfulness of the defendant's acts, the jury are instructed that a physician may lawfully procure the miscarriage of a woman pregnant with child, by any means appropriate and reasonable for that purpose, directly or indirectly applied, if in so doing he acts in good faith, for the preservation of the life or health of such pregnant woman.<sup>20</sup>

The court instructs the jury that the justification of a physician, charged with unlawfully producing an abortion, must depend upon his exercising his best skill and judgment, and in the honest belief that his acts, directly applied to produce a miscarriage, or applied to the treatment of a disease so as to involve a miscarriage,

<sup>16</sup> State v. Bickel, 177 S. W. 310.

<sup>17</sup> People v. Seaman, 65 N. W. 203, 107 Mich. 348, 61 Am. St. Rep. 326.

<sup>18</sup> People v. Seaman, 65 N. W. 203, 107 Mich. 348, 61 Am. St. Rep. 326.

<sup>19</sup> Commonwealth v. Brown, 121 Mass. 69.

<sup>20</sup> Commonwealth v. Brown, 121 Mass. 69.

as a not unusual incident of such treatment, are necessary to save such pregnant woman from great peril to her life or health.<sup>21</sup>

§ 564(2). Ohio

The court instructs the jury that if you find from the evidence that defendant gave chloroform to ——— with the intent to discover whether it would be necessary to operate on the fetus for the sake of the mother's health and life, but without any intent to operate unless the operation would be necessary to preserve her life, you must find that defendant did not administer chloroform with an unlawful intent. On the other hand, if you believe from the evidence that his purpose was to discover whether the fetus was dead, and then to deliver the woman and complete the abortion, even although her life was not in danger, and if that was his fixed purpose when he gave the chloroform, then the act of administering the drug was attended with the guilty intent, and, if you find that the woman died from the effect of the drug, you would be authorized to find that the defendant had committed the crime defined by the statute.<sup>22</sup>

§ 564(3). Texas

You are further instructed that if you find and believe from the evidence an abortion, if any there were, was performed upon the said ——— by the defendant, ———, for the purpose of saving the life of the mother, ———, or if you find that such abortion at said time, if any there were, was necessary, or if you have a reasonable doubt as to whether either one or both of said conditions above stated existed at said time, then it will be your duty to acquit the defendant.<sup>23</sup>

§ 565. Effect of consent of woman to operation

§ 565(1). Delaware

The court instructs the jury that neither the consent of ——— to the prisoner's attempt to procure her miscarriage, nor the prisoner's reluctance or unwillingness to perform the operation, would be a sufficient or lawful defense, in view of the positive provisions of the statute, if the prisoner subsequently prescribed the medicine or used the instrument as alleged in the indictment.<sup>24</sup>

<sup>21</sup> Commonwealth v. Brown, 121 Mass. 69.

<sup>22</sup> State v. Tipple, 105 N. E. 75, 89 Ohio St. 35.

<sup>23</sup> Link v. State, 164 S. W. 987, 73 Tex. Cr. R. 82.

<sup>24</sup> State v. Brown, 85 A. 797, 3 Boyce, 499.

§ 565(2). **Massachusetts**

You are instructed that, if you believe from the evidence that defendant procured a miscarriage of ———, and that such act was not justified by the considerations pointed out in previous instructions, such act would be none the less unjustifiable because done by the consent or upon the solicitation of the pregnant woman, whose miscarriage was attempted to be procured, or because done to screen her from exposure or disgrace, or for gain or reward.<sup>25</sup>

The jury are instructed that, if the defendant unlawfully used said instrument, as alleged, for the purpose of procuring her miscarriage, it is sufficient to authorize his conviction, under this indictment, though the jury are satisfied that the operation was performed by her procurement, and with her consent, and that the evidence showed it was with her consent.<sup>26</sup>

§ 565(3). **Missouri**

The court instructs the jury that in the event you find from the evidence that the defendant did commit the abortion, as mentioned in the instruction numbered ———, the fact, if you find it to be a fact, that the said ——— consented thereto, or requested the defendant to use such instrument known as a catheter, in the way or manner mentioned, does not constitute any defense, and should therefore not be taken into consideration by the jury in making up their verdict.<sup>27</sup>

§ 566. **Vitality of embryo**§ 566(1). **Massachusetts**

The jury are instructed that the proof on the part of the prosecution must be that, at the time of the defendant's acts upon the bodies of said ——— and said ———, they were pregnant with children which had vitality, so that in the course of nature they could mature into living children. The statute is intended to prevent and punish the destroying of embryo human life, the germs of human life before birth in the course of nature, and would not apply to acts to procure the miscarriage of a woman having a dead foetus in her womb.<sup>28</sup>

§ 566(2). **Texas**

You are further instructed that if you find and believe from the evidence in this case, beyond a reasonable doubt, that the witness

<sup>25</sup> Commonwealth v. Brown, 121 Mass. 69.

<sup>26</sup> Commonwealth v. Snow, 116 Mass. 47.

<sup>27</sup> State v. Bickel, 177 S. W. 310.

<sup>28</sup> Commonwealth v. Brown, 121 Mass. 69.

——— had been pregnant, and that an operation was performed upon her in the city of ——— on or about the date charged in the indictment, but you further find and believe from the evidence that at the time of the said operation, if any, the foetus or embryo, if any, was dead from any cause whatever, before the said ——— arrived at the office of the defendant, or before the defendant operated upon her, or at the time the defendant operated upon her, if you find that he did, or if you have a reasonable doubt as to whether such was the case, it will be your duty to acquit the defendant.<sup>29</sup>

**§ 567. Means employed to produce**

The court instructs the jury that, if it is proven beyond a reasonable doubt that both drugs and instruments were used by the defendant to commit abortion, then the allegations of the indictment are proven so far as concerns the means and instrumentalities alleged; and it is not necessary to prove beyond a reasonable doubt which was used, whether drugs or instruments, just so you are convinced beyond a reasonable doubt that one or both were used.<sup>30</sup>

**§ 568. Forcible thrusting of instrument into body**

The court instructs the jury that, as by the defendant's testimony it is confessed that he inserted into the bodies of each of the women named an instrument, which does not appear to have been known to the grand jury who found the indictment, on ——— and on ——— last, at ———, the only practical questions to be considered by the jury in relation to the ——— and ——— counts are, first, whether, at the time when this instrument was inserted into their bodies by defendant, the women were pregnant with child, and, second, whether this instrument was thus inserted into the bodies of these women unlawfully, that is to say, without justification in law. As to these two questions, the jury are instructed that the allegations of the indictment, that an instrument was forced and thrust into the bodies of these women, are substantially and sufficiently proved by evidence that such instrument was inserted into their bodies by any degree of mechanical force.<sup>31</sup>

<sup>29</sup> Link v. State, 164 S. W. 987, 73 Tex. Cr. R. 82.

<sup>30</sup> Thomas v. State, 47 So. 257, 156 Ala. 166.

<sup>31</sup> Commonwealth v. Brown, 121 Mass. 69.

**§ 569. Use of drugs**

The court instructs the jury that, if you believe from the evidence that the prisoner administered or caused to be taken by ———, named in the indictment, any noxious or destructive substance or liquid with intent to procure a miscarriage of said ———, then the jury should find the said defendant guilty. It must appear, however, in order to such conviction, not only that the prisoner gave such drug, or substance, or liquid, but that it was actually taken into the person of said ———. It will suffice, however, that prisoner procured and gave the drug or substance to said ——— with the intent named, and that she afterward took and swallowed such drug or substance, or some portion of it. And it is not necessary, in order to be noxious and destructive, within the meaning of the statute, that such drug should be poisonous, as the term is commonly understood, or should be capable of actually producing the miscarriage. It will be sufficient if, upon the consideration of all the testimony, it shall appear to the jury that such drug, so administered (if any), is unwholesome and might probably occasion injury or derangement of the system to a woman pregnant with child.<sup>32</sup>

**§ 570. Pleading and proof—Proof of averments as to time**

In relation to the allegation as to the day, the court instructs the jury, that it is not necessary that it should be proved that the acts complained of were on the day alleged, that the exact day is not material, and if the jury are satisfied that the defendant performed the operation on any day in the month of ———, it is sufficient, as far as the day is material; that if the jury are satisfied that the witnesses for the government were in error as to the date stated by them, this is a proper matter to be considered upon the question of the degree of credit they are entitled to as to other matters; and if this, either alone or in connection with other evidence, causes the jury so far to doubt as to their truth and the reliability of their testimony in other matters, that they are not satisfied beyond doubt that the defendant did perform the operation as alleged, then they should acquit defendant.<sup>33</sup>

**§ 571. Evidence—Possession of instruments adapted to produce abortion**

The court instructs the jury that the possession by a physician of surgical instruments adapted to use in procuring the miscarriage

<sup>32</sup> Doughterty v. People, 1 Colo. 514.

<sup>33</sup> Commonwealth v. Snow, 116 Mass. 47.

of pregnant women would be explained, consistently with that physician's innocence of any intention to use them for unlawfully procuring miscarriages, if they were instruments also adapted equally to other and legitimate uses in surgery or midwifery, unless their extraordinary number and variety was in more than ordinary proportion to the whole number and variety of surgical instruments possessed by him, or the exigencies of his practice furnished him occasions for using; but the significance, as evidence, of the possession of any number or variety of surgical instruments adapted especially to procuring miscarriage of pregnant women, would more or less depend upon circumstances, usual or unusual, ordinary or extraordinary, attending the mode of their possession and keeping, and the exigencies of such physician's practice.<sup>34</sup>

#### § 572. Evidence of intent

The court instructs the jury that the intent to procure the miscarriage may be shown by direct evidence, that is, by the express confession or declaration of the accused; or such intent may be proved by the acts and conduct of the prisoner, and other circumstances from which you may naturally and reasonably infer the intent charged.<sup>35</sup>

#### § 573. Evidence of other similar operations

In connection with the proof of the intent to procure the miscarriage we call your attention to the testimony of the witness ——— respecting an operation alleged to have been performed on his wife similar to the one charged in this indictment. We say to you that such testimony cannot be considered by you at all in determining whether the defendant committed the acts charged in the indictment, that is, administered or prescribed the medicine or used the instrument alleged. Such testimony offered by the state to show that the defendant performed an operation on the wife of said witness similar to the one charged in the indictment can be considered only when the jury are satisfied from other evidence in the case that the defendant did commit the acts charged, and even then the testimony given by said witness can be considered only for the purpose of determining whether the defendant committed those acts with the unlawful intent to procure a miscarriage.<sup>36</sup>

<sup>34</sup> Commonwealth v. Brown, 121 Mass. 69.

<sup>35</sup> State v. Brown (Del.) 85 A. 797, 3 Boyce, 499.

<sup>36</sup> State v. Brown (Del.) 85 A. 797, 3 Boyce, 499.

**§ 574. Sufficiency of evidence of intent**

You are further instructed that the intent with which an act is committed may be proved by direct and positive testimony, or such intent may be inferred from all the facts and circumstances surrounding and attending the act, as shown by the evidence in the case, and the intent with which the defendant used an instrument or instruments upon the private parts or womb of said ———, if you find that he did use it, or them, must be determined by you from the evidence given in this case.<sup>87</sup>

**§ 575. Credibility as witness of woman operated upon**

The court instructs the jury that, inasmuch as ——— and ———, by their solicitation of or consent to the acts of defendant, alleged to be unlawful, were severally implicated in these acts, and their unlawful and criminal character, that fact may justly be considered by the jury as affecting their credibility as witnesses and the force and weight of their testimony.<sup>88</sup>

<sup>87</sup> State v. De Groat, 168 S. W. 702, 259 Mo. 364.

<sup>88</sup> Commonwealth v. Brown, 121 Mass. 69.

## CHAPTER XLI

## ABSTRACTS OF TITLE

§ 576. Liability of abstractor for negligence in examining title.

§ 576. Liability of abstractor for negligence in examining title

I charge you that, in order for the plaintiff to recover in this case, he must establish to your satisfaction that a contract relation existed between plaintiff, ———, and the defendant, the ——— Company, under which and by reason of which the plaintiff had certain rights, and the defendant certain obligations to perform with reference to the plaintiff. In other words, this contract relation which the plaintiff claims must have been such that he, the plaintiff, had a right to rely upon this alleged contract, and the defendant had certain duties with reference to the plaintiff, and those duties he must have performed in the manner as I shall hereafter more in detail instruct you.<sup>1</sup>

<sup>1</sup> Beckovsky v. Burton Abstract & Title Co., 175 N. W. 235, 208 Mich. 224.



## CHAPTER XLII

## ABUSE OF PROCESS

- § 577. Elements of cause of action.
- 578. Malice and want of probable cause.
- 579. What constitutes probable cause.
- 580. Attempt to enforce process against exempt property.
- 581. Damages.

## § 577. Elements of cause of action

The court instructs the jury that this is an action as alleged for malicious abuse of legal process, and the plaintiff, in order to recover, must prove by a preponderance of the evidence that a criminal process was issued against her substantially as alleged in her complaint, and that after it was issued the defendant caused said process to be used, not for the purpose of vindicating the criminal law, but for the purpose of evicting the plaintiff and her husband from certain premises where they were living at the time.<sup>1</sup>

The court instructs the jury that, to entitle the plaintiff to recover, it is not only necessary to prove that the defendant had an ulterior motive other than a purpose to vindicate the criminal law, to wit, the design of evicting the plaintiff and her husband from the premises, but she is also required to prove some act on the part of the defendant, or at his instance or request, in the use of such criminal proceedings, other than such as would be proper in the regular prosecution of the charge, and that the defendant cannot be held responsible for merely setting the criminal law in motion and causing the arrest of the plaintiff and holding her in custody, even though such acts were done with the ulterior motive of evicting her from the premises of the defendant, but in order to recover the plaintiff must further show some distinct act or omission, as set forth in the complaint, accomplished at the instance or request of the defendant, which amounted to a misuse or abuse of the process after it had been issued.<sup>2</sup>

The court instructs the jury that, while one arrested on a criminal complaint has the right to be taken before a magistrate without unnecessary delay, and an opportunity given to give bail, and though the jury may find that the plaintiff was unnecessarily arrested in the nighttime, and unnecessarily confined without an

<sup>1</sup> Kool v. Lee, 134 P. 906, 43 Utah, 394.

<sup>2</sup> Kool v. Lee, 134 P. 906, 43 Utah, 394.

opportunity to give bail, yet the defendant will not be liable for that, unless caused at his instance and request, and done with the design to evict the plaintiff and her husband, and not to vindicate the criminal law.<sup>3</sup>

**§ 578. Malice and want of probable cause**

The court instructs the jury that, in order for the plaintiff to recover for abuse of process it is not essential for her to prove that the defendant acted maliciously or without probable cause, that is, so far as sustaining the right to recover is concerned; but the proofs, if any, tending to show malice and want of probable cause, are to be considered in case you find she is entitled to recover, when you consider the question of the amount of damages, if any, you find in her favor.<sup>4</sup>

**§ 579. What constitutes probable cause.**

You are instructed that, if the plaintiff willfully disturbed the peace and quiet of the defendant at his store by loud and unusual noise, by offensive conduct, or by threatening the defendant, such conduct constituted probable cause, and gave the defendant the right to prosecute the plaintiff for such disturbance of the peace, and that the element of probable cause for the prosecution must be found in favor of the defendant. In other words, such conduct of the plaintiff would make her guilty of disturbing the peace, and there would be no question of the defendant having probable cause or, of his right to cause her to be prosecuted therefor.<sup>5</sup>

**§ 580. Attempt to enforce process against exempt property**

You are instructed that, if the jury shall believe and find from the evidence that defendant caused and directed the ——— Railroad Company to be summoned as garnishee of the plaintiff at the time of the several garnishments in evidence on the original execution in evidence, and that at the time of the service of said garnishments the plaintiff was an employé of the said railroad company, working for wages, and that he resided in ——— county, state of ———, and was the head of a family, as explained in instruction No. ———, and that at the time of the service of said garnishments the said railroad company did not have in its possession or under its control any property, money, or effects of the plaintiff, and did not owe plaintiff any money except such as

<sup>3</sup> Kool v. Lee, 134 P. 906, 43 Utah, 394.

<sup>4</sup> Kool v. Lee, 134 P. 906, 43 Utah, 394.

<sup>5</sup> Kool v. Lee, 134 P. 906, 43 Utah, 394.

was exempt from seizure or garnishment as explained in instruction No. ———, or such as was subject to be selected and held by plaintiff as exempt as explained in instruction No. ———, and if the jury shall believe and find from the evidence that the defendant at the time of causing or directing such garnishment to be served had no reasonable or probable cause for believing that said railroad company had in its possession or under its control property, money, or effects of plaintiff, or owed plaintiff money which might be lawfully held on such garnishments and taken in satisfaction of said execution, yet, nevertheless, that defendant caused and directed said railroad company to be so summoned as garnishee of plaintiff maliciously, and for the purpose of compelling payment of his judgment out of plaintiff's wages, at the same time knowing plaintiff's rights of exemption herein, or that defendant caused or directed said garnishments to be served on said railroad company maliciously and for the purpose of harassing and annoying said company and causing it to discharge plaintiff from his employment unless he paid defendant's judgment, then it will be the duty of the jury to find their verdict for the plaintiff on the first count of the petition in this cause.<sup>6</sup>

#### § 581. Damages

You are instructed that, if the jury find for the plaintiff on the first count of the petition, they should allow and assess in his favor, first, such actual damages, not exceeding ——— dollars, as under the evidence they may believe he has sustained, and which will reasonably compensate him for any reasonable expenses, if any, incurred by him, directly occasioned by and resulting from the defendant's acts and conduct as shown by the evidence; and, second, and in addition thereto, the jury may also allow and assess against the defendant such further sum by way of exemplary or punitive damages, not exceeding ——— dollars, as will, in their opinion, sufficiently punish the defendant for the wrong and injury done the plaintiff. If the jury allow exemplary damages, the amount thereof must be separately stated in their verdict.<sup>7</sup>

<sup>6</sup> Cooper v. Scyoc, 79 S. W. 751, 104 Mo. App. 414.

<sup>7</sup> Cooper v. Scyoc, 79 S. W. 751, 104 Mo. App. 414.

## CHAPTER XLIII

## ABUTTING OWNERS

## A. RIGHTS IN STREET

- § 582. Right to have street remain unobstructed.
- 583. Recovery for injury to means of ingress and egress.
- 584. Right of owner of fee to trees standing in right of way.
- 585. Rights as to shade trees.
- 586. Damages for obstruction.

## B. LIABILITY FOR INJURIES TO PERSONS IN STREET

- 587. Injuries from sagging telephone wire.
- 588. Negligence with respect to leaving manhole or coal hole uncovered.
  - 588(1). Massachusetts.
  - 588(2). Missouri.
- 589. Right temporarily to obstruct street.
  - 589(1). Alabama.
  - 589(2). Indiana.
- 590. Liability for acts of independent contractor.
- 591. Contributory negligence of traveler.
  - 591(1). Alabama.
  - 591(2). Indiana.
- 592. Presumptions—*Res ipsa loquitur*.

## A. RIGHTS IN STREET

## § 582. Right to have street remain unobstructed

Right to cut down telegraph pole in highway, see post, § 3548.  
 Telephone pole in street as nuisance, see post, § 4108.

The court instructs the jury that an abutting owner is not necessarily entitled to have the thoroughfare on which his lot abuts maintained as a continuously opened thoroughfare, provided his private right of access to and from his property is left by some reasonably convenient route or way. The law does not guarantee the continuance of the way as it was dedicated, but only that the owner shall not be prevented from getting into and out of his property by some reasonably convenient way.<sup>1</sup>

The court instructs the jury that the law does not guarantee that the plaintiff's way to and from his property along ——— avenue should remain the same, without change or diminution. Alterations may be made or obstructions created in that avenue under legal authority, and plaintiff could not complain, provided a reasonable means of getting to and from his property is left to him.<sup>2</sup>

<sup>1</sup> *Meighan v. Birmingham Terminal Co.*, 51 So. 775, 165 Ala. 591.

<sup>2</sup> *Meighan v. Birmingham Terminal Co.*, 51 So. 775, 165 Ala. 591.

**§ 583. Recovery for injury to means of ingress and egress**

In passing upon the question as to whether or not the excavation along ——— avenue was made by the receivers, ——— and ———, in the line of their duty as such receivers and in their official capacity as such, you are instructed that said receivers had a right to construct the line of railroad across such avenue in the town of ———, but that it was the duty of said receivers to restore the said avenue thus crossed over to such state as not to unnecessarily impair its usefulness as a street, and if you believe from the testimony that the method adopted by the receivers in making this excavation was necessary in order to restore said street to its original condition, then you are instructed that if any injury resulted to the plaintiff by reason of the construction of said excavation that the defendant railway company is liable for the injury sustained.<sup>3</sup>

**§ 584. Right of owner of fee to trees standing in right of way**

You are instructed that, whenever a public road is laid out under an order of court, the public acquires in the highway only such rights as the public easement therein requires. The owner of the fee is not divested of his title, and he does not part with the incidents of the soil not needed for the improvement or repair of the road, or of the system of which it forms a part. Subject to this right, trees standing within the limits of the right of way, and necessary to be removed, for the proper enjoyment of the right of way, belong, when removed, to the owner of the fee, and cannot be taken for private use; and if so taken, the owner of the fee can maintain an action of trespass to recover damages therefor.<sup>4</sup>

**§ 585. Rights as to shade trees**

Liability of tree warden for injuring tree, see post, § 8549.

We may say to you that the trimming or cutting of shade trees along the public highway, without the knowledge or consent of the abutting owner of the fee in such highway, or without having obtained a right of way from such abutting owner, constitutes an unlawful act for which damages may be allowed the party aggrieved.<sup>5</sup>

You are instructed that it is not denied by the company that the plaintiff, being owner of the fee, had a right to the trees grow-

<sup>3</sup> Kansas City, M. & O. Ry. Co. of Texas v. Weaver (Tex. Civ. App.) 217 S. W. 740.

<sup>4</sup> Cowgill v. Hurley (Del.) 86 A. 731, 4 Boyce, 151.

<sup>5</sup> Jordan v. Delaware & A. Telegraph & Telephone Co. (Del.) 75 A. 1014, 1 Boyce, 107.

ing on the land upon her side of the road or highway, for all purposes not incompatible with the proper and lawful use of the highway. But if the owner of such fee, by an agreement made or assented to by such owner, or made by some one else acting under the authority of such owner, gives a telephone company the right to construct a telephone line upon or across, his lands, such company has the right to cut or trim trees standing upon the land over which the right of way is given, so far, and to such extent, as may be reasonably necessary for the proper construction and operation of such line.<sup>6</sup>

**§ 586. Damages for obstruction**

The court instructs the jury that, if you believe from the evidence that the plaintiff's property has been improved more than it has been damaged by the defendant's work complained of, when considered in connection with the whole improvement, you should find for the defendant.<sup>7</sup>

**B. LIABILITY FOR INJURIES TO PERSONS IN STREET**

**§ 587. Injuries from sagging telephone wire**

The court instructs the jury that if they believe from the evidence that the wire which injured the plaintiff sagged from the K. property adjoining the street by virtue of the fact that it was detached from the house and insecurely wrapped around a tree near the house on that side after the K. property passed to the defendant company, and that the sagging which caused the wire to injure the plaintiff did not come from the other side of the street, and that for three or four months before the injury the wire had been gradually sagging from the K. side so that it was a danger and menace to the traveling public, and that during all this time the defendant company had full control and dominion over the said K. property and wire, and knew of its sagging condition, or could have ascertained the same by ordinary diligence, it thereupon became the duty of defendant to use due care to either remove said wire from across the public road, or to so fasten and secure it that it would not be a danger or menace to the traveling public, and if they further believe the defendant company failed to perform this duty, and as a direct and proximate result of such failure plaintiff was injured without negligence on the part of

<sup>6</sup> *Jordan v. Delaware & A. Telegraph & Telephone Co.* (Del.) 75 A. 1014, 1 Boyce, 107.

<sup>7</sup> *Meighan v. Birmingham Terminal Co.*, 51 So. 775, 165 Ala. 591.

herself or the driver of the buggy, their verdict should be for the plaintiff.<sup>8</sup>

**§ 588. Negligence with respect to leaving manhole or coal hole uncovered**

**§ 588(1). Massachusetts**

The court instructs the jury that the defendant is not the insurer of the safety of the coal hole. He is only held to ordinary care and diligence about it. Was ordinary care exercised about that coal hole? The defendant himself knew nothing about it, but he must be held responsible for the acts of those to whom he delegated the care of it. On that you will see among other things where the coal hole was. It was in a highway. See how much the highway was traveled; in what part of the sidewalk it is; whether on that part over which people were likely to travel or not. See further what would be likely to be the consequences arising from having it out of order, because the consequences of an accident may properly be taken into consideration by the jury in considering what care should be taken to avoid it. The defendant had the right to use that part of his premises under the sidewalk providing he exercised due care with reference to people passing over it. The fact that it was a part of the street would not prevent him from using his land under the street providing he takes proper care for the persons who are going over it. He is not to be held responsible because the coal hole was there, nor from the fact that there was an excavation under the sidewalk, but, the coal hole and the excavation being there, he is held responsible for such care as ought to be exercised under the circumstances. On that you will see what was the original construction of the coal hole. Was there a sound coal cover, or not? Did he have any reason to believe that it was out of order? Was any complaint ever made to him or to his agents? If complaint was made to his agents, and the care was delegated to them, their care is the care of the defendant; their eyes are his eyes; their ears are his; and their hands are his, so far as to them is delegated the care of the coal hole. Of course you will look and see, among other things, whether the hole as originally constructed was such as would be likely to get out of order. You will see what care was exercised by the janitor or others. You will consider how many persons had the right to put coal through the hole, and whether that would increase or decrease the care required about it. It is in dispute as

<sup>8</sup> Shenandoah Valley Loan & Trust Co. v. Murray, 91 S. E. 740, 120 Va. 563.



to what was the original condition of the coal cover and hole. See whether, under all the circumstances at the time of this accident, that coal cover was in a dangerous condition by reason of such a lack of care as ought to have been exercised with reference to it because you must hold the defendant for such care as properly ought to have been exercised about it.<sup>9</sup>

**§ 588(2). Missouri**

You are instructed that if the jury find and believe from the evidence that the sidewalk mentioned in the evidence was a public thoroughfare and in common and general use by pedestrians, and that plaintiff did not know that the covering had been removed from the manhole or opening in said sidewalk, then the plaintiff had the right to act upon the assumption that the said sidewalk was in a reasonably safe condition; plaintiff being required, however, in going or walking along or upon said sidewalk, to exercise reasonable care for his own safety.<sup>10</sup>

**§ 589. Right temporarily to obstruct street**

**§ 589(1). Alabama**

The jury is charged that the owner of a storehouse or a storing room abutting on a sidewalk in a town or city is, under the law, entitled to the temporary use of the sidewalk in front of his store, provided he consume no more than reasonable time in the moving of such merchandise across the sidewalk into such storehouse.<sup>11</sup>

The court instructs the jury that if the jury believe from the evidence that the defendant's storing room abutted the sidewalk, and that there was no other way of transporting goods from the drays into the warehouse, and if the jury believe from the evidence that the defendant was conducting said storage room and storing goods in it for mercantile purposes, then the jury is charged that the defendant had a right to truck the cotton seed meal from his dray over said sidewalk into his storage room, if not more than a reasonable time was consumed in trucking said meal across said sidewalk, and if the trucking was done in a reasonably prudent way.<sup>12</sup>

**§ 589(2). Indiana**

You are instructed that the owner or tenant occupying property abutting upon a sidewalk has, as incident to such ownership or oc-

<sup>9</sup> *Stevenson v. Joy*, 25 N. E. 78, 152 Mass. 45.

<sup>10</sup> *Bentley v. Rothschild Bros. Hat Co.*, 129 S. W. 249, 144 Mo. App. 612.

<sup>11</sup> *Walker v. John Smith, T.*, 74 So. 451, 199 Ala. 514.

<sup>12</sup> *Walker v. John Smith, T.*, 74 So. 451, 199 Ala. 514.



cupancy, rights and duties beyond those allowed or owing by the ordinary traveler on such sidewalk. Among such rights is that of repairing the sidewalk, and if necessary he may to that end temporarily obstruct or close a part of such sidewalk by placing thereon material or other things suitable for that purpose, but in so doing he must exercise care for the safety of those using such sidewalk commensurate with the requirements of the location and surroundings. And if you believe from a preponderance of the evidence in this case that the platform over which plaintiff's decedent stumbled, if you find that he did stumble, was placed there by the defendant as a method of temporarily guarding certain defects in the sidewalk in front of the premises occupied by it, and that it was a reasonably safe method of temporarily guarding such defects, and that the platform was not maintained on said sidewalk an unnecessary or unreasonable length of time, then that act would not in itself constitute negligence. And if you find that the portion of the sidewalk where said platform was placed was so well lighted that one using the sidewalk could by the exercise of ordinary care have seen the platform in time to have avoided injury from it, that fact, if you find it to be a fact, would excuse the defendant from giving other warning of the presence of the platform and the obstruction of the sidewalk thereby.<sup>13</sup>

**§ 590. Liability for acts of independent contractor**

You are instructed that if the jury find from the evidence that the defendants had let the work of constructing the building and area in question to contractors, who were to do all the work and furnish all the materials on their own credit, with their own means, and that the defendants, while the work was in progress, had no possession or occupancy of the premises, and had no control of the mode or manner in which said contractors should do the work, other than to accept or reject the work as being in compliance or noncompliance with the contract, then the defendants are not responsible for any injury resulting to the plaintiff in consequence of the negligence of said contractors or any of their employes in not guarding the said area with proper protections or coverings.<sup>14</sup>

<sup>13</sup> *Bailey v. Columbia Grocery Co.*, (App.) 124 N. E. 784.

<sup>14</sup> *Hawver v. Whalen*, 29 N. E. 1049,

49 Ohio St. 69, 14 L. R. A. 828. The above instruction was abstract in this case.

**§ 591. Contributory negligence of traveler****§ 591(1). Alabama**

The jury is charged that whilst a pedestrian has a right to the entire width of the sidewalk to walk upon, yet if the jury find from the evidence that a part of the sidewalk in this instance was wet and slippery, and this condition was open and obvious to the plaintiff, and if a greater part of it, about ——— feet in width of the sidewalk and running the full front of the building, was dry and safe for pedestrians, it was the duty of the plaintiff to select the dry and safe portion of said sidewalk to walk upon, and if she negligently selected the wet and slippery part to walk on, and such selection and walking upon said slippery part proximately contributed to the injury of the plaintiff, then the plaintiff cannot recover in this suit.<sup>15</sup>

**§ 591(2). Indiana**

You are instructed that if you believe from the evidence that the platform over which the plaintiff's decedent stumbled was in plain view, where it could be seen by any one exercising ordinary care with reference to his surroundings, but that plaintiff's decedent failed to observe its location and use ordinary care to avoid it, then he was guilty of such contributory negligence that your verdict in this case should be for the defendant.<sup>16</sup>

**§ 592. Presumptions—Res ipsa loquitur**

I instruct you that you are not at liberty to conclude that the walk in question at the time and place of the accident, was in a dangerous condition simply because of the accident which happened to plaintiff. But you must consider all the facts and circumstances with relation to the condition of the walk at the time of the accident, and from all of the facts and circumstances in the case, as shown by the evidence and under the instructions I give you as to the law, determine in your own mind whether the place where plaintiff was injured was in a dangerous condition to persons traveling in the ordinary way, using ordinary care, because of the negligence of defendant.<sup>17</sup>

<sup>15</sup> Walker v. John Smith, T., 74 So. 451, 199 Ala. 514.

<sup>16</sup> Bailey v. Columbia Grocery Co. (App.) 124 N. E. 784.

<sup>17</sup> Jensen v. Schlenz, 154 P. 159, 89 Wash. 268.

## CHAPTER XLIV

## ACCIDENT INSURANCE

- § 593. Whether injury sustained by insured.  
594. What is an accident.  
595. Right of recovery as dependent on whether injuries caused by external, violent, and accidental means.  
    595(1). United States.  
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596. Right of recovery as dependent on extent of injuries—What constitutes total disability within policy.  
597. Right of recovery as dependent on whether accident sole cause of death.  
    597(1). Iowa.  
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602. Necessity of external and visible sign of injury.  
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    607(1). Illinois.  
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608. Same—Distinguished from negligence.  
609. Exception of accidents occurring in consequence of riding on a locomotive.  
610. Exception of injuries sustained while riding on the platform or steps of any railway car.  
611. Exception of injuries received while leaving moving conveyance using steam as a motive power.  
612. Exception of death by suicide.  
613. Right to increased recovery or double indemnity in certain cases—Injuries received while in passenger elevator.  
614. Same—Injuries received while in or on street car.  
615. Notice of injury and proofs of death—Authority of agent to waive conditions of policy.  
616. Presumption and burden of proof as to cause of death.  
    616(1). Maryland.  
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**§ 617. Presumption against suicide.**

617(1). California.

617(2). Illinois.

618. Matters considered on issue of cause of death.

619. Sufficiency of evidence as to cause of death.

**§ 593. Whether injury sustained by insured**

You are instructed that the first question (viz., was the deceased, ———, injured by jumping from the platform?) is so entirely a question of fact, to be determined upon the testimony, that the court must submit it, without discussion, to your determination. In passing upon the question you will consider all the circumstances of the occurrence as laid before you in the testimony; the apparent previous physical condition of ———; the subsequent occurrences and circumstances tending to show the change in his condition; the relation in time which the first developments of any trouble bore to the time when he jumped from the platform; the nature of his last sickness; and the symptoms disclosed in its progress and termination. Further, you will inquire: What evidence, if any, did the post mortem examination, and any and all subsequent examinations, of the parts alleged to have been the seat of the supposed injury furnish of an actual physical injury? What connection, if any, does there or does there not appear to be between the act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of the post mortem investigations? The question is before you in the light of all proven facts, for determination. The court cannot indicate any opinion upon it without invading your exclusive province; and by your ascertainment of the facts the parties must be bound. There is presented in the case a train of circumstances. Do they or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus you may properly pursue the inquiry, guided by and keeping within the limits of the testimony.<sup>1</sup>

**§ 594. What is an accident**

The court instructs the jury that, an accident is any event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and unexpected to the person to whom it happened. The happening

<sup>1</sup> United States Mut. Acc. Ass'n v. Barry, 9 S. Ct. 755, 131 U. S. 100, 33 L. Ed. 60.

of an event without the concurrence of the will of the person by whose agency it was caused, or the happening of an event without any human agency. And you are instructed that if such an accident occurred to the said ———, and if you find that such accident was the moving or producing cause of his death without which his death would not have occurred, and that his death resulted from said accidental cause independent of all other causes, including diseased condition of his body, then your verdict should be for the plaintiff. But if you fail to so find, your verdict should be for the defendant.<sup>2</sup>

**§ 595. Right of recovery as dependent on whether injuries caused by external, violent, and accidental means**

**§ 595(1). United States**

You are instructed that, if you find that injury was sustained, then the next question is: Was it effected through external, violent, and accidental means? This is a pivotal point in the case, and therefore vitally important. The means must have been external, violent, and accidental. Did an accident incur in the means through which the alleged bodily injury was effected? The jumping off the platform was the means by which the injury, if any was sustained, was caused. Now, was there anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground? The term "accidental" is here used in its ordinary, popular sense, and in that sense it means "happening by chance; unexpectedly taking place; not according to the usual course of things;" or not as expected. In other words, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted from the accident, or through accidental means. We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or

<sup>2</sup> Hanley v. Fidelity & Casualty Co., 161 N. W. 114, 180 Iowa, 805.

unforeseen or involuntary movement of the body, from the time ——— left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control, in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand. And I instruct you that if ——— jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected, or would naturally expect, such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect, under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means. Of course it is to be presumed that he expected to reach the ground safely and without injury. Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance, or not as expected, happen, in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means.<sup>3</sup>

§ 595(2). Missouri

The court instructs the jury that if they find from the evidence that ——— died in ———, on ———, and that such death resulted from bodily injuries sustained through external, violent, and accidental means, and that the cause of said ———'s death was the

<sup>3</sup> United States Mut. Acc. Ass'n v. Barry, 9 S. Ct. 755, 131 U. S. 100, 33 L. Ed. 60.

accidental rupture of his right kidney by an accidental strain, jar, or fall while endeavoring to raise a window in his office in the ——— Building in ———, on the ——— day of ———, that their verdict will be for the plaintiffs on both counts of the petition.<sup>4</sup>

**§ 596. Right of recovery as dependent on extent of injuries—  
What constitutes total disability within policy**

You are instructed that this paragraph sets out as an exhibit a copy of the policy, and in said policy it is provided that no claim shall ever accrue unless it arises from physical, bodily injury, through external, violent, and accidental means, and then only when the injury shall, independently of all other causes, immediately and wholly disable the insured from performing any and every kind of business pertaining to his occupation as manager of the ——— Company. I instruct you that, as a matter of law, the meaning of this provision of the policy, is not that the plaintiff must have been disabled so as to prevent him from doing anything whatsoever pertaining to his said occupation, but that he must have been disabled only to the extent that he could not do any and every kind of business pertaining to his said occupation. He might be able to do a part, and not be able to do all, and, because he was not able to do all, be deemed to be wholly disabled from doing any and every kind, provided, of course, that he was so disabled as to be prevented from doing substantially all the necessary and material things in said occupation requiring his own exertions in substantially his customary and usual manner of so doing. He might be able to do personally minor and trivial things, not requiring much time or physical labor, and through others, acting under his direction, to do the heavier things requiring physical exertion, which in the ordinary and proper performance of his duties he had heretofore done personally, and yet, because of inability to do these heavier things and more material things personally, be said to be wholly disabled, within the terms of his policy, provided, further, that the things he was unable to personally do constitute substantially all of his said occupation.<sup>5</sup>

<sup>4</sup> *Fetter v. Fidelity & Casualty Co.*  
of New York, 73 S. W. 592, 174 Mo.  
256, 61 L. R. A. 459, 97 Am. St. Rep.  
560.

<sup>5</sup> *Commercial Travelers' Mut. Acc.*  
*Ass'n v. Springsteen*, 55 N. E. 973, 23  
Ind. App. 657.



**§ 597. Right of recovery as dependent on whether accident sole cause of death**

**§ 597(1). Iowa**

You are instructed that it is provided in the by-laws of the defendant association, which is a part of the contract sued on, that no benefits shall be paid for death caused wholly by disease, nor in any case except when the accidental injury was the proximate and sole cause of the death. Under the terms of this contract, the defendant is only liable in the event that death resulted solely, and independently of all other causes, from the alleged accident, and this the plaintiff must prove by a preponderance of the evidence. This provision of the by-laws of the defendant association entered into became and was at the time of the death of the said ———, a part of the contract between him and the defendant association, and is binding upon the plaintiff and the defendant association in this case.<sup>6</sup>

**§ 597(2). Missouri**

The court instructs the jury that, before they can find the issues for the plaintiffs, they must find that the alleged accident was the sole and only direct cause of the death of the insured.<sup>7</sup>

**§ 598. Effect of disease at time of accident**

**§ 598(1). California**

The court instructs the jury that, if the plaintiff in this case has established by a preponderance of the evidence not only the fact of the accidental injury, but the sufficiency thereof to cause death, independently of other causes, and the testimony in reference to pre-existing disease fails to establish such disease as an indirect or contributory cause of death, then the plaintiff can recover.<sup>8</sup>

The court instructs the jury that under the terms of this policy plaintiff cannot recover for the death of ———, unless that death was caused by accidental means, and solely and exclusively by such

<sup>6</sup> *Vernon v. Iowa State Traveling Men's Ass'n*, 138 N. W. 696, 158 Iowa, 597. It was objected to this instruction that the jury were not told that there could be no recovery unless plaintiff showed that death resulted from injuries received through external violent and accidental means, independent of all other causes, and that the jury were not informed that,

if death resulted partly from medical treatment, there could be no recovery.

<sup>7</sup> *Fetter v. Fidelity & Casualty Co. of New York*, 73 S. W. 592, 174 Mo. 256, 61 L. R. A. 459, 97 Am. St. Rep. 560.

<sup>8</sup> *Kellner v. Travelers' Ins. Co.*, Hartford, Conn., 181 P. 61, 180 Cal. 326.



means, independently of other causes. If you shall find that the death was caused in part by the heart disease, and that this heart disease was not in fact caused by this accident, your verdict must be for the defendant. If you shall be in doubt whether this accident caused either appendicitis or the heart disease, your verdict must be for the defendant.<sup>9</sup>

**§ 598(2). Missouri**

The jury is instructed that if they believe from the evidence that the death of ——— was directly caused by the accidental rupture of his right kidney, then their verdict should be for plaintiffs on both counts of their petition—on the first count in the sum of ——— dollars, and on the second count in the sum of ——— dollars, with interest on both said sums at ——— per cent. per annum from ———, notwithstanding that the jury further believes from the evidence that said kidney at the time of the rupture was diseased, provided, that the jury further find that said ——— would not have died at the time, under the circumstances, and in the manner he did die, had it not been for the accidental rupture of his kidney.<sup>10</sup>

The jury are instructed that they are the judges of the question of fact as to what was the cause of ———'s death. If they find from the evidence that the cause of said death was accidental rupture of the right kidney on or about ———, under the circumstances as detailed in evidence, they will find for the plaintiffs, even though they believe from the evidence that said right kidney, when so ruptured, was diseased.<sup>11</sup>

**§ 598(3). Vermont**

The jury are instructed that the plaintiff cannot recover even if you believe from the evidence that the death of ——— was caused by accident, if you also find that disease or bodily infirmity contributed directly or indirectly to such death.<sup>12</sup>

**§ 599. Disease as constituting accidental injury**

You are instructed that the plaintiff having brought this action into court, the burden of proving the case rests upon her, and she is obliged to satisfy you by a fair preponderance of the testimony that she has suffered the loss of an eye by accident. The

<sup>9</sup> Clarke v. New Amsterdam Casualty Co., 179 P. 195, 180 Cal. 76.

<sup>10</sup> Fetter v. Fidelity & Casualty Co. of New York, 73 S. W. 592, 174 Mo. 256, 61 L. R. A. 459, 97 Am. St. Rep. 560.

<sup>11</sup> Fetter v. Fidelity & Casualty Co. of New York, 73 S. W. 592, 174 Mo. 256, 61 L. R. A. 459, 97 Am. St. Rep. 560.

<sup>12</sup> Clark v. Employers' Liab. Assur. Co., 48 A. 639, 72 Vt. 458.

particular allegation on which the plaintiff rests is that she became afflicted with a disease through an accident which happened at the time that she was doing washing in her own house. Now, the plaintiff must prove by a preponderance of the evidence the fact alleged, that the plaintiff contracted a gonorrheal infection of the right eye while doing the family washing on the date alleged. Unless you believe from the evidence that the plaintiff contracted the gonorrheal infection of the eye by the splashing of the water from the washtub in the eye, you should find for the defendant.<sup>13</sup>

You are instructed that, if you believe the probabilities are as great that the plaintiff received the gonorrheal infection in the eye, as her hand came out of the water in a wet condition, and that she rubbed her eye in the wet condition, then you should find for the defendant. If you believe from the evidence that she contracted the infection by having the germs transmitted to her by an outside agency, such as being transmitted through the air, or coming from any other person infected with such disease, then you should find for the defendant. The question is solely for you, gentlemen, to determine that one question from a fair consideration of this testimony. If you are convinced that the water splashed in the eye, and the infection was received in that way, taking into consideration the circumstances which immediately followed, and the development of the disease as testified to by the plaintiff, you would be justified in finding a verdict for her. If she has not sustained that by a fair preponderance of the evidence, find for the defendant.<sup>14</sup>

**§ 600. Disease or bodily infirmity resulting from accidental injury**  
**§ 600(1). Illinois**

The jury are instructed that, though the jury believe from the evidence that the death of ——— was caused in part by bodily infirmity or disease, yet if you believe from the evidence that said ——— received accidental injuries and that such bodily infirmity or disease was caused by or was a natural, direct, proximate, and necessary result of such accidental injuries, and that such accidental injuries were the direct cause of his death, then the fact that such bodily infirmities or disease contributed to cause the death of the deceased would not constitute a defense to this action.<sup>15</sup>

<sup>13</sup> *Sullivan v. Modern Brotherhood of America*, 133 N. W. 486, 167 Mich. 524, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116.

<sup>14</sup> *Sullivan v. Modern Brotherhood*

*of America*, 133 N. W. 486, 167 Mich. 524, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116.

<sup>15</sup> *Coulter v. Travelers' Protective Ass'n*, 144 Ill. App. 255.

§ 600(2). **Nebraska**

You are instructed that if, on the other hand, you find from the evidence that the said ——— received a bodily injury through external, violent, and accidental means, and that a disease commonly known as Bright's disease, or blood poisoning, resulted, and was brought about by the injury, and that said disease so resulting from the injury, if you find it did so result, contributed to or hastened the death of said ———, that would not be such a disease or bodily infirmity as would prevent recovery of the plaintiff in this case, as defined in these instructions.<sup>16</sup>

§ 601. **Blood poisoning from wounds suffered by insured in professional operations**

You are instructed that, by the terms of the plaintiff's policy of insurance, it is made to cover blood poisoning sustained by a physician or surgeon resulting from septic matter introduced into the system through wounds suffered in professional operations; but you are also instructed that there is no evidence of the plaintiff having received any wound, and he must recover, if at all, upon other provisions of the policy.<sup>17</sup>

§ 602. **Necessity of external and visible sign of injury**

You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in ——— a mortal injury. Taking it all into consideration, and applying to the facts the instruction of the court, you will determine whether, if any injury was sustained, it was effected through external, violent, and accidental means. The defendant claims that, if ——— did sustain injury, it was one of which there was no external and visible sign, within the meaning of the certificate of insurance, and, therefore, that the plaintiff is not entitled to recover. Counsel are understood to contend that no recovery could be had under a certificate of insurance in the form and terms of this one, if the injury was wholly internal. In that view the court cannot concur. It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow, and convert the contract itself into a snare—an instrument for the destruction of valuable rights. Visi-

<sup>16</sup> Rathjen v. Woodmen Accident Ass'n, 141 N. W. 815, 93 Neb. 629.

<sup>17</sup> Fidelity & Casualty Co. of New

York v. Thompson (C. C. A. Colo.) 154 F. 484, 83 C. C. A. 324, 11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181.

ble signs of injury, within the meaning of this certificate, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see; but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels; if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury—then those are external and visible signs, provided they are the direct results of the injury; and with this understanding of the meaning of the certificate of insurance, and upon the evidence, you will say whether, if ——— was injured as claimed, there were or were not external and visible signs of the injury; and the determination of this point will involve the consideration of the question whether what are claimed here to have been external and visible signs were, in fact, produced by—were the result of—the injury, if any was sustained.<sup>18</sup>

**§ 603. Exemption from liability for death caused wholly by disease**

You are instructed that if you find by a preponderance of the evidence that an accident happened to the deceased, ———, by an abrasion of the skin of his left leg by the use of a brush by an attendant administering said bath, and that from such abrasion blood poison or septicæmia set in, and you further find that by virtue of this injury and the resulting blood poison, if you find there was such injury and blood poison, death resulted as the sole result thereof, then and in that event the plaintiff will be entitled to recover in this case, and you should so find by your verdict. If, however, you find that the death of the said ——— resulted directly or indirectly from or in consequence of disease, then there can be no recovery in this case, and your verdict in that case should be for the defendant.<sup>19</sup>

**§ 604. Exemption from liability for accidents caused by particular diseases**

The court instructs the jury that if the fall of ——— was caused by disease, plaintiff cannot recover; but the question naturally

<sup>18</sup> United States Mut. Acc. Ass'n v. Barry, 9 S. Ct. 755, 131 U. S. 100, 33 L. Ed. 60.

<sup>19</sup> Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696, 158 Iowa, 597.

What is a "disease" within the meaning of the contract in suit? The ordinary definition of the word is: "Any derangement of the functions or alteration of the structure of the animal organs." This, as you will see, would include the slightest and most temporary ailment. But this is not its meaning as used in this policy. The policy or contract in suit singles out some particular diseases, as vertigo or fits, and exempts the company from liability for accidents caused thereby; and in such cases, as I have told you in the last instruction, the company will be relieved from liability, even if the attack was sudden, unusual, and of a transient nature; but if you do not find either of these two specially mentioned maladies to have been the cause of such accident, but are required to see whether such cause existed under the general head of "disease," then you must accept this word as meaning some ailment or disorder of somewhat established or settled character, some physical disturbance to which ——— was subject, and of which the attack that caused his fall was in some measure a recurrence. A mere temporary disorder, that was new or unusual with him, arising from some sudden and unexpected derangement of the system, though it produced or caused unconsciousness, would not be a "disease," within the meaning of this contract, and would not exempt the defendant company from liability in this action. Here, again, you are limited to circumstantial evidence upon which you are to base your finding.<sup>20</sup>

The court instructs the jury that under the contract or policies sued upon, if said ———'s fall was caused by vertigo or fits, or by reason of disease or bodily infirmity, the defendant cannot be held liable in this action. And, under the facts in this case, the words "disease" and "bodily infirmity" must be considered as having the same meaning.<sup>21</sup>

**§ 605. Exception from policy of injuries intentionally inflicted by some other person**

**§ 605(1). Kentucky.**

The court instructs the jury that if you believe from the evidence that the wound which caused his death was inflicted intentionally by another, without the consent or procurement of the insured, and not in an assault committed by such other person, if any, for the purpose of burglary or robbery, then the law is for

<sup>20</sup> Meyer v. Fidelity & Casualty Co. of New York, 65 N. W. 328, 96 Iowa, 378, 59 Am. St. Rep. 374.

<sup>21</sup> Meyer v. Fidelity & Casualty Co. of New York, 65 N. W. 328, 96 Iowa, 378, 59 Am. St. Rep. 374.

the plaintiff as against the defendant, the ——— Insurance Company, and the jury should award the plaintiff the sum of \$———, with interest thereon at the rate of ——— per cent. per annum from ———.<sup>22</sup>

**§ 605(2). Oklahoma**

The jury are instructed that the intent on the part of the said ———, with which he inflicted the injuries upon the said insured from which said injuries the said insured died, is to be gathered from all the facts and circumstances proved in the case and the facts and circumstances surrounding the killing at the time. And in this case if you should believe that the said ——— shot at the said insured believing at the time that the said insured was some other person, and that the said ——— would not have shot and killed the said insured had he known that the person at whom he was shooting was insured, then in that event you are instructed that the injuries inflicted upon the said insured would not be intentional within the meaning of the policy, and in the event of such finding your verdict should be for the plaintiff.<sup>23</sup>

**§ 606. Injuries received from one while attempting to commit burglary or robbery**

The court instructs the jury that if you believe from the evidence that the wound which caused the death of the insured was inflicted accidentally, either by himself or by another, or that it was inflicted intentionally by another, without the consent or procurement of the insured, in an assault committed by such other person, if any, for the purpose of burglary or robbery, then the law is for the plaintiff as against the ——— Insurance Company, and the jury should award the plaintiff the sum of \$———, with interest at the rate of ——— per cent. per annum from ———.<sup>24</sup>

The court instructs the jury that "burglary," as used in these instructions, means the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. "Robbery" means the taking with intent to steal of personal property, in possession of another, from his person, or in his presence, by violence or by putting him in fear.<sup>25</sup>

<sup>22</sup> *Ætna Life Ins. Co. v. Rustin*, 151 S. W. 366, 151 Ky. 103. In this case, under the conditions named in the instruction, the policy limited the recovery to one-tenth of the amount otherwise payable.

<sup>23</sup> *General Accident, Fire & Life*

*Assurance Corporation v. Hymes*, 185 P. 1085, 77 Okl. 20, 8 A. L. R. 318.

<sup>24</sup> *Ætna Life Ins. Co. v. Rustin*, 151 S. W. 366, 151 Ky. 103.

<sup>25</sup> *Ætna Life Ins. Co. v. Rustin*, 151 S. W. 366, 151 Ky. 103.

**§ 607. Voluntary exposure to unnecessary danger****§ 607(1). Illinois**

The court instructs the jury that, if they believe from the evidence in this case that the plaintiff suffered the injury in question through violent, external and accidental means, which were not the result of any unnecessary exposure to dangers on his part, then you will find the issues for the plaintiff; but if you should believe from the evidence that said injury was the result of an unnecessary exposure of himself to danger (not in any attempt to save human life), then your verdict should be for the defendant.<sup>26</sup>

**§ 607(2). Missouri**

The jury are instructed that standing on the side of, or hanging to, a car in a moving train in a railroad yard at night, where there are other cars standing on another track so close to the track upon which said train was moving as not to permit the body of a person so riding to clear said stationary cars [with knowledge of these facts], is a voluntary exposure to unnecessary danger or obvious risk of injury, which prevents a recovery in this case except as to one-tenth of the amount of the policy.<sup>27</sup>

**§ 607(3). Texas**

You are instructed that, before you can find for the defendant on the ground that the deceased received his accident as a result of his voluntary exposure to unnecessary danger, you must find, by a preponderance of the evidence, that the deceased, at the time of the accident, voluntarily exposed himself to unnecessary danger, and that his injury and death resulted therefrom, and, if you fail to so find, you will not find for the defendant on this issue. And in this connection you are further instructed that it is not sufficient for the defendant to show that the deceased was guilty of a want of ordinary care or a lack of prudence, but it is necessary to show that the deceased went into the danger and received his injury as a result thereof, and that while going into the danger, if any, the deceased had knowledge of the particular danger and cause to apprehend it, and that he went into the danger, if any, with the intention to expose himself to it, and that he received his injury as a result thereof, and on a failure to so show by a preponderance of the evidence defendant would not be entitled to a verdict on this issue.<sup>28</sup>

<sup>26</sup> Travelers' Preferred Accident Ass'n v. Stone, 50 Ill. App. 222.

<sup>27</sup> Dillon v. Continental Casualty Co., 109 S. W. 89, 130 Mo. App. 502.

<sup>28</sup> Travelers' Ins. Co. v. Harris (Civ. App.) 178 S. W. 816.



**§ 608. Same—Distinguished from negligence**

The jury are instructed that the question of whether the circumstances of a particular accident bring it within one of the exceptions by which the company has guarded itself against an accident resulting from voluntary exposure to unnecessary danger is not a question whether the person insured has exercised reasonable care or caution, nor whether he has been guilty of negligence or of unlawful acts, but it is a question whether or not the insurance company has shown—the burden being upon it to do so—that the insured voluntarily exposed himself to unnecessary danger, and that the death resulted in consequence thereof.<sup>29</sup>

**§ 609. Exception of accidents occurring in consequence of riding on a locomotive**

You are instructed that the policy insured ——— as a contractor and builder, in the office and-traveling, and it is claimed on the part of the plaintiff, that he was traveling at the time he was injured, traveling as a contractor and builder engaged in railroad work, and that he was using a usual and ordinary means of travel in that occupation. Now, if that is so, the exception I have spoken of would not save the company, because if they having insured him as a contractor and builder, knowing through their agent that he was engaged, and had been for years, as a contractor and builder in railroad work as well as other work, and insured him while he was in his office and traveling, it is to be taken that that was insuring him while he was traveling in the usual and ordinary way of a contractor and builder engaged in railroad work. So that is a question of fact for you to consider: Was he at the time this accident occurred traveling as a contractor and builder engaged in railroad work in the usual and ordinary way of travel for one in that occupation, or in a usual and ordinary way? If you find that to be so by a fair balance of testimony, and if you find that at the time of the accident the insured was engaged in the occupation in which he was insured as a contractor and builder, and was traveling on that business, then the plaintiff is entitled to recover, notwithstanding this provision that relieves the company from liability where the accident occurs in consequence of the assured riding on a locomotive.<sup>30</sup>

<sup>29</sup> De Greayer v. Fidelity & Casualty Co., 58 P. 390, 126 Cal. xvii.

<sup>30</sup> Trow v. Preferred Accident Ins. Co., 67 A. 821, 80 Vt. 321.



**§ 610. Exception of injuries sustained while riding on the platform or steps of any railway car**

What is meant by the phrase "while riding on the platform or steps of any railway car"? The very literalism of the words would cover every possible injury or death which did not take place wholly inside the car, and away from any platform or steps, while the car is in motion. It seems to be conceded, however, by the defendant's counsel, that it was not intended to have this rigid meaning, when they admitted in argument that it permitted a passenger to pass across a platform from one car to another. He may not occupy the platforms or steps for the purposes of "riding" on the train as one would occupy a seat, or as one might occupy by standing in the aisles on the inside of the car for riding on the train; but for any necessary purpose, certainly, and for any reasonably convenient purpose, probably, which only required a momentary or temporary or transitory "being" or "standing" or "riding" on the platform or steps, the traveler may be on the platform without violating this condition in the policy. For example, if one standing on a platform, waiting to enter the door while the crowd before him were entering and being seated, as might be the case in a rush for the dining car—to use a suggestion made by one of the jurors to counsel in progress of the argument—should be injured or killed, it could hardly be said that this condition of the policy was violated, because he was literally riding on the platform. Or, if one, having to look out for himself, should momentarily step to the platform to see if he had reached his station, could it be said that he was riding on the platform? These would be necessary purposes, in any fair sense of the words "riding on the platform." It would be mere literalism to hold such a temporary occupation to be "riding on the platform," although it is not impossible that such a situation might be covered by a prohibition from "standing" or "being" on a platform, as in the Minnesota case it was held that a waiting on the platform until the train should stop was within the broader phrase. I am not willing to say to you that any temporary occupation of the platform for the simple convenience of the traveler would be permitted by the condition of this policy, or that the liability of the company would exist where the injury or death took place during such convenient occupation of the platform; but without the least hesitation, the court may say to you that any necessary occupation of the platform which is temporary in its character, and does not amount to that more permanent occupation which might just as well be had inside the car as on the platform, so far as the traveler's convenience is con-

cerned, would not be within the prohibition. The rule of law is that such an ambiguous expression as "riding on the platform" or "steps" will be construed most liberally for the holder of the ticket, and against the insurance company. Wherefore the word "riding" must be limited to its ordinary sense of a more permanent occupation than merely standing or being on the platform for a temporary, but a necessary, purpose. And here it is worth observation that, in the immediately succeeding prohibition about the right of way, the word "being" is used in the phraseology as above quoted, thus, "while walking or being in the right of way," etc. This shows that the company, while drafting the conditions, was careful of its phraseology; and inasmuch as the familiar expression in similar policies theretofore existing used the language "standing, being, or riding," there is some significance in the omission of the words "standing or being," in favor of the interpretation the court is now giving to the word "riding." I conclude the subject of the interpretation of the conditions about riding on the platform by saying to you: If you believe from all the testimony in this case that immediately before and at the moment \_\_\_\_\_'s body, designedly or undesignedly, left the train, he was occupying the platform, in the sense of "riding" on it, as above defined, his administrator cannot recover; but if you believe from all the evidence that at that moment he was upon the platform temporarily only, and for any necessary purpose, and not sufficiently prolonged in the occupancy to amount to "riding" on it, such temporary occupancy would not be within the prohibition of the policy.<sup>81</sup>

**§ 611. Exception of injuries received while leaving moving conveyance using steam as a motive power**

You are instructed that one of the defenses relied on by the defendant in this case is that the cause of death of the deceased, \_\_\_\_\_, was his leaving or trying to leave a moving conveyance, using steam as a motive power, in violation of the terms and conditions of the policy in suit. Upon this question you are instructed that, in order to sustain its defense, the burden is upon the defendant to show by a fair preponderance of the credible evidence before you that the deceased, at the time of receiving the injury resulting in his death, was purposely leaving or trying to leave the car upon which he was riding, and did not accidentally slip or fall from the steps upon which he was standing immediately

<sup>81</sup> Standard Life & Accident Ins. Co. v. Thornton (C. C. A. Tenn.) 100 F. 582, 40 C. C. A. 564, 49 L. R. A. 116.

prior to said accident. The fact that deceased was standing upon the platform and steps of the car immediately prior to said accident would not constitute a defense, under this clause of the contract, unless he was at such time purposely leaving or trying to leave such car and steps, and to alight therefrom.<sup>32</sup>

**§ 612. Exception of death by suicide**

The court instructs the jury that if the jury believe from the evidence that the insured committed suicide, sane or insane, or that the wound which caused his death was inflicted intentionally by another with the consent or procurement of the insured, then the law is for the defendant, the ——— Insurance Company, and the jury should so find.<sup>33</sup>

**§ 613. Right to increased recovery or double indemnity in certain cases—Injuries received while in passenger elevator**

The court instructs the jury in this case that a passenger elevator, within the meaning of the terms of the policy of the insured, is one in which passengers are ordinarily carried. If you find from the evidence that the elevator referred to in the evidence was one in which passengers were, on and prior to ———, carried up and down at various times, it was a passenger elevator within the meaning of the policy, at the time of the injuries received by ———, although it may have been used for purposes of carrying freight.<sup>34</sup>

The court instructs you that a passenger elevator need not be of any particular form, or made in any particular way, or with any particular contrivance or device. It does not mean that it must be used exclusively for the carriage of passengers. If it is customarily used for the carriage of passengers, this is sufficient to constitute it a passenger elevator within the meaning of the policy. If the jury believe that a large number of persons have been carried at various times in this elevator, as passengers, and that it has been used daily for the carriage of persons, it then is a passenger elevator.<sup>35</sup>

The court instructs the jury that a passenger elevator need not be of any particular form or size or have any particular kind of gate or safety contrivance. If an elevator is customarily used for

<sup>32</sup> Smith v. Aetna Life Ins. Co., 88 N. W. 368, 115 Iowa, 217, 56 L. R. A. 271, 91 Am. St. Rep. 153.

<sup>33</sup> Aetna Life Ins. Co. v. Rustin, 151 S. W. 366, 151 Ky. 103.

<sup>34</sup> Wilmarth v. Pacific Mut. Life

Ins. Co. of California, 143 P. 780, 168 Cal. 536, Ann. Cas. 1915B, 1120.

<sup>35</sup> Wilmarth v. Pacific Mut. Life Ins. Co. of California, 143 P. 780, 168 Cal. 536, Ann. Cas. 1915B, 1120.

the purposes of carrying human beings as passengers from one floor of a building to another floor in the same building, it is to be considered a passenger elevator.<sup>36</sup>

**§ 614. Same—Injuries received while in or on street car**

The court instructs the jury that if the jury believe and find from the evidence that on ———, the ——— Elevated Railway Company was a carrier of passengers for hire and used the railroad and car mentioned in the evidence for such purpose, and if you further find and believe from the evidence that on said day the employés of said ——— Elevated Railway Company in charge thereof stopped said car at or near a point where the tracks of said railway company cross the state line between the states of ——— and ——— for the purpose of receiving passengers, and, if you further find that F., with the intention in good faith to become a passenger (if you so find), had gone up the steps and through the station at said state line and before the doors of said car were closed, and before said car had started, he was in the act of stepping upon the steps of said car to become a passenger thereon, then the court instructs you that said F. was a passenger on said car. And, if you further find and believe from the evidence that said F. was a passenger as above defined and had actually gotten onto the steps of said car and was standing thereon when he was caused to fall therefrom and to be killed by falling from the said steps of said car at said point to the street below (if you so find), then said F. was a passenger on said car within the meaning of the terms of said insurance policy and the additional benefit indorsement extending the benefits under said policy, and which are in evidence in this case.<sup>37</sup>

**§ 615. Notice of injury and proofs of death—Authority of agent to waive conditions of policy**

The jury are instructed that the denial of the right of the assured to claim a waiver "by reason of any act or acts of any agent, unless such waiver be specially authorized in writing over the signature of the president or secretary of the company," is confined to those provisions and conditions of the policy which enter into and form a part of the contract of insurance, and are essen-

<sup>36</sup> *Wilmarth v. Pacific Mut. Life Ins. Co. of California*, 143 P. 780, 168 Cal. 536, Ann. Cas. 1915B, 1120.

<sup>37</sup> *Fay v. Aetna Life Ins. Co.*, 187 S. W. 861, 268 Mo. 373. The policy gave

a right to double indemnity in case of an accident to the insured while "in or on" a public conveyance. The court held that there was no reversible error in the above instruction.

tial to make it a binding contract; and does not extend to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing proofs of deaths.<sup>38</sup>

### § 616. Presumption and burden of proof as to cause of death

#### § 616(1). Maryland

The court instructs the jury that there is no presumption that the death of ——— resulted from the accident which he is alleged to have sustained on or about the ——— day of ——— (if the jury find he sustained such accident), and the burden of proof rests upon the plaintiff to establish by a preponderance of testimony that the said accident directly and independently of all other causes produced the death of the said ——— on the ——— day of ———, and if the jury find that certain organs or other physical parts of the body of the said ——— were in a diseased or infirm condition at the time when he met with said alleged accident, and that condition contributed to his unfortunate death, then their verdict must be for the defendant.<sup>39</sup>

#### § 616(2). Missouri

The court instructs the jury that, the defendant in this case having pleaded an exception in the terms of the insurance policies sued on, and having alleged in their answer that the death of ——— was caused by disease, and not by accident, the burden of proving that said ———'s death was caused by disease is upon the defendant, and, unless they believe from the preponderance of the evidence that said death was caused by disease, they will find for the plaintiffs.<sup>40</sup>

### § 617. Presumption against suicide

#### § 617(1). California

The court instructs the jury that, where the insured is found dead under such circumstances that death may have been due to suicide or to accident, the presumption is against suicide and in favor of accident.<sup>41</sup>

<sup>38</sup> Travelers' Ins. Co. v. Harvey, 5 S. E. 553, 82 Va. 949.

<sup>39</sup> Standard Accident & Life Ins. Co. of Detroit, Mich., v. Wood, 82 A. 702, 116 Md. 575.

<sup>40</sup> Fetter v. Fidelity & Casualty Co.

of New York, 73 S. W. 592, 174 Mo. 256, 61 L. R. A. 459, 97 Am. St. Rep. 560.

<sup>41</sup> Wilkinson v. Standard Accident Ins. Co. of Detroit, Mich., 180 P. 607, 180 Cal. 252.

**§ 617(2). Illinois**

The court instructs the jury that, where a man suffers injuries which might have been caused by accident or might have been intentionally inflicted upon himself, and there is no preponderance of evidence as to the cause of such injuries, the presumption is that they occurred by accident.<sup>42</sup>

**§ 618. Matters considered on issue of cause of death**

The jury are instructed that the issue between the parties is whether the death of ——— was caused solely by the injury which he received, or partly or wholly by endocarditis, and that this issue is for the jury to determine from all of the facts and circumstances disclosed in the evidence, including the testimony of the physicians as to his condition after the injury and before his death, and also his condition as disclosed by the post-mortem examination. The jury are further instructed that they may also consider the condition of ———'s health before the injury, the manner and nature of the injury, and his complaints as to pain therefrom up to the time of his death.<sup>43</sup>

**§ 619. Sufficiency of evidence as to cause of death**

The jury are instructed that if the jury believe from the evidence that ——— was a passenger on the train of cars of the ——— Railroad Company, leaving ——— about ——— p. m. on the ——— day of ———, and scheduled in the regular time-table of the company to arrive at ——— about ——— a. m. of ———, and that the train traveled on time, and that his dead body was found next morning, about ———, lying upon the cross-ties, with his head to the east and his feet to the west, between the rails of the same railroad, upon or near the west end of a trestle constructed in part of sawed square cross-ties, with sharp edges, extending over a common road about three and one-half or four miles west from ———; that the night was cold, and frost had settled around the body when discovered; that when found he was lying upon his face; that there was a cut or fracture in the rear part of his head or skull, sufficient of itself to produce death; that when found both arms and several ribs were broken; that there was a pool of blood on the ground under or near where the body was found, and the mark or evidence of hair and blood on the sharp edge of one of the cross-ties of the trestle corresponding

<sup>42</sup> *Wilkinson v. Aetna Life Ins. Co.*, 88 N. E. 550, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269.

<sup>43</sup> *Morrow v. National Masonic Acc. Ass'n*, 101 N. W. 468, 125 Iowa, 633.

to the wound on the head—then these facts, if proven, in the absence of proof to the contrary sufficient to overcome them, authorize the jury to find that the said ———, within the twenty-four hours covered by the contract contained in the ticket of insurance sued on, came to his death by external, violent, and accidental means, within the contract, and authorize a verdict for the plaintiff on that issue.<sup>44</sup>

<sup>44</sup> Standard Life & Accident Ins. Co. v. Thornton (O. O. A. Tenn.) 100 F. 582, 40 C. C. A. 564, 49 L. R. A. 116.

## CHAPTER XLV

## ACCORD AND SATISFACTION

- § 620. Effect of payment of part of undisputed claim.
- 621. Effect of acceptance of part payment of disputed claim.
  - 621(1). Indiana.
  - 621(2). Missouri.
  - 621(3). Oklahoma.
- 622. Acceptance of sum tendered as binding creditor to conditions accompanying offer.
  - 622(1). Arkansas.
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- 623. Same—Sending check in full settlement.
  - 623(1). Georgia.
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- 624. Same—Intent of creditor.
- 625. Duty of creditor to accept or reject, as a whole, offer of settlement.
- 626. Necessity that offer should be so framed that other party must either refuse it or accept it upon the conditions named.
  - 626(1). Iowa.
  - 626(2). Kansas.
- 627. Assent of debtor to refusal of creditor to accept terms of offer.
- 628. Necessity of performance of agreement to pay.

See, also, Compromise and Settlement; Payment; Release and Discharge.

### § 620. Effect of payment of part of undisputed claim

You are instructed that, if the jury finds from the evidence that at the time of the \$—— payment there was a larger sum actually due, and that there was no controversy between the parties as to the amount, or that they or either of them was mistaken as to the amount then due, then a release and satisfaction of the whole debt, based upon such mistake, or in the absence of any dispute as to a larger sum being due, would not be a release or satisfaction of the unpaid portion of the debt.<sup>1</sup>

### § 621. Effect of acceptance of part payment of disputed claim

#### § 621(1). Indiana

The jury are instructed that a person cannot pay and satisfy a debt by the payment of a sum less than the debt; but if you believe from the evidence that the plaintiff, in order to avoid a suit, of the result of which he was doubtful, agreed to receive any sum in full satisfaction of the amount he claimed to be due on said account, and upon such agreement the defendant paid the sum agreed upon,

<sup>1</sup> Byrnes v. Byrnes, 99 N. W. 426, 92 Minn. 73.



then such agreement and payment would completely discharge the defendant from all liability.<sup>2</sup>

§ 621(2). Missouri

You are instructed that if you find and believe from the evidence that on and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the plaintiffs were asserting a claim against the defendant for an amount alleged to be due them under the contracts referred to in the evidence in excess of the amount of \$\_\_\_\_\_, and that the defendant in good faith was disputing said claim, and that on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, the defendant tendered plaintiffs the sum of \$\_\_\_\_\_, with the understanding and on the condition that plaintiffs accept said sum in full settlement and satisfaction of all claims against said defendant, growing out of the contracts mentioned in the evidence, and that the plaintiffs, under such condition and with such understanding, did accept said sum, and execute a receipt in full of all their claims, contractual or otherwise, including all their claims for work done under said contracts, then your verdict must be for the defendant on the \_\_\_\_\_ and \_\_\_\_\_ counts of plaintiffs' petition, unless you further find and believe from the evidence that the defendant knowingly, and with intent to deceive and coerce the plaintiffs into accepting said settlement, made false and fraudulent representations to plaintiffs concerning the ability of the plaintiffs to collect any judgment they might secure against defendant for a larger amount, as set out in other instructions, and that the plaintiffs had a right to, and did, believe and rely upon said representations and entered into said settlement in reliance thereon.<sup>3</sup>

§ 621(3). Oklahoma

You are instructed that the fact, if you should find the same to be a fact, that the plaintiff accepted a sum of money in part payment of his claim would not bar him from a recovery of the balance, if any was due him. The fact that the agent of the defendant, if you should find the same to be a fact, may have written him that he had adjusted the difference and named the condition upon which the adjustment had been made, the further fact that the plaintiff accepted a sum of money thus sent to him, would not bar his right of recovery, unless the amount was accepted by the plaintiff in full settlement and discharge of the disputed claim.<sup>4</sup>

You are instructed that one who accepts a payment of money

<sup>2</sup> Ogborn v. Hoffman, 52 Ind. 439.

<sup>3</sup> Scott v. Parkview Realty & Improvement Co., 164 S. W. 532, 255 Mo. 76.

<sup>4</sup> Deming Inv. Co. v. McLaughlin, 118 P. 380, 30 Okl. 20.

upon a disputed claim is not estopped in law to assert his right to the balance, unless he accepts the same thus tendered in full settlement and discharge of said claim. You are therefore instructed that if you find and believe from the evidence that the defendant company, through plaintiff as its duly authorized agent, had procured the application of ——— for a loan, and that the loan was subsequently consummated, and thereafter arose a dispute as to the division of the commission, and you further find and believe from a preponderance of the evidence that the defendant knew this was a disputed claim at the time defendant sent said check, the fact that the plaintiff accepted the check would not bar his right of recovery, and the defendant would be liable for the amount, unless you further find that the plaintiff accepted said check in full settlement and discharge of the liability of the defendant to him, in which event your verdict should be for defendant.<sup>5</sup>

**§ 622. Acceptance of sum tendered as binding creditor to conditions accompanying offer**

**§ 622(1). Arkansas**

The jury are instructed that where a sum of money is paid in satisfaction of a disputed claim, and the tender is accompanied by such acts and declarations as amount to a condition that, if the amount is accepted, it is accepted in full satisfaction, or is such that the party is bound to understand therefrom that, if he takes it, he takes it subject to such conditions, the acceptance constitutes an accord and satisfaction, although the creditor protests at the time that it is not all that is due him, or that he does not accept it in full satisfaction of his claim.<sup>6</sup>

**§ 622(2). Maryland**

You are instructed that, if you believe from the evidence that the defendant paid the plaintiff on the ——— of ———, 19—, the sum of \$——, in full for his services, and for all claims of the plaintiff upon the defendant, and that the plaintiff accepted said sum, such settlement operated as an accord and satisfaction of plaintiff's claim, and that he is not entitled to recover.<sup>7</sup>

**§ 622(3). Nebraska**

You are instructed that if you find from the evidence that there was a dispute in good faith between the board of county commissioners of defendant county and the plaintiffs as to the amount

<sup>5</sup> Deming Inv. Co. v. McLaughlin, 118 P. 380, 30 Okl. 20.

<sup>6</sup> Barham v. Bank of Delight, 126 S. W. 394, 94 Ark. 158, 27 L. R. A. (N. S.) 439.

<sup>7</sup> Lister's Agricultural Chemical Works v. Pender, 21 A. 686, 74 Md. 15.

justly due them under said contract, and that said dispute was settled by such county board agreeing to allow and pay, and the said plaintiffs to accept and receive, \$—— in full settlement and satisfaction of said claim, and that in pursuance of said claim, and that in pursuance of such settlement and agreement, such sum of money was allowed by such board, and paid to, and received by, said plaintiffs, then said plaintiffs cannot recover in this action, and your verdict should be for defendant.<sup>8</sup>

You are further instructed that if you find from the evidence that there was a disagreement in good faith between the plaintiffs and said board of county commissioners with respect of the amount due and owing said plaintiffs under said contract, and that said board proposed to allow and pay to them the sum of \$—— in full satisfaction and settlement of said claim, that then it was optional with said plaintiffs to accept said sum or to refuse the same. But, if you further find that said plaintiffs exercised such option by accepting such allowance and receiving such sum, then they would be bound by the condition that such allowance and payment was in full satisfaction and settlement of said claim, to the same extent that they would have been bound had they expressly agreed to such condition; and this would be true even as against any secret or expressed intentions to the contrary, or any protests then or subsequently made.<sup>9</sup>

**§ 623. Same—Sending check in full settlement**

**§ 623(1). Georgia**

The court instructs the jury that, where a debtor sends to his creditor a check which contains a statement to the effect that it is to be applied in full settlement of all accounts and notes due by the debtor (and as to the amount of which indebtedness the parties are in dispute), the creditor's acceptance and collection of the check will operate as a full settlement and satisfaction of all accounts and notes owing the creditor by the debtor previous to that date.<sup>10</sup>

**§ 623(2). Texas**

You are instructed that if you believe from the evidence that P., plaintiff's assignor, performed work for the defendant, and that there was a dispute as to the amount due therefor, and that P. accepted a check from the defendant containing the stipulation that it was in full satisfaction for all work done, then, in the absence of any mutual mistake of the parties, the check would be conclusive

<sup>8</sup> Green v. Lancaster County, 85 N. W. 439, 61 Neb. 473.

<sup>9</sup> Green v. Lancaster County, 85 N. W. 439, 61 Neb. 473.

<sup>10</sup> Elrod v. M. C. Kiser & Co., 79 S. E. 375, 13 Ga. App. 471.

and binding upon both of them, and would preclude plaintiff from a recovery against defendant for any part of such work, and you must find for the defendant.<sup>11</sup>

**§ 624. Same—Intent of creditor**

The court instructs the jury, on this question of accord and satisfaction, that if you find from the evidence that the claim on which the plaintiff sues was unliquidated, and that a check tendered by the defendant to the plaintiff on account of such claim, and having the words "In full settlement of account to date" written upon it, was accepted and cashed by the plaintiff, the legal effect of such act of the plaintiff was to satisfy his demand, and that it does not matter what the intent of plaintiff was when he cashed the check, or whether he understood the legal effect of his act or not.<sup>12</sup>

**§ 625. Duty of creditor to accept or reject, as a whole, offer of settlement**

The jury are instructed that if the check for \$—— and three notes introduced in evidence were sent to the plaintiffs by the defendants at the same time and as a part of one transaction, as a full settlement of an honestly disputed claim between the plaintiffs and the defendants, then the plaintiffs, as a matter of law, were not entitled to receive and appropriate the check, and collect the amount thereof, and return the notes; that a tender of such a kind must be accepted as a whole or not at all; and if the return of the notes was not acquiesced in by the defendants, but they have been tendered back by the defendants to the plaintiffs, and are now ready to be delivered by the defendants to the plaintiffs, then the plaintiffs cannot recover in this action.<sup>13</sup>

You are instructed that, if the jury believe from the evidence that prior to the bringing of this suit by the plaintiffs against the defendants there was an honest dispute between the plaintiffs and the defendants as to the amount due from the defendants to the plaintiffs, and whether the same was due, and on or about the —— of ——, 19——, in order to adjust and settle the controversy and the account, the defendants delivered to the plaintiffs a check for \$——, and three notes, one for \$——, payable four months after date, one for \$——, payable five months after date, and one for \$——, payable six months after date, said check and notes aggregating the sum of \$——, and that said check and notes were delivered to the plaintiffs with the statement and understanding

<sup>11</sup> Olson v. Burton (Civ. App.) 141 S. W. 549.

<sup>12</sup> Schumacher v. Moffitt, 71 Or. 79, 142 P. 353.

<sup>13</sup> Lapp v. Smith, 55 N. E. 717, 183 Ill. 179.

that they were given, and should be received, in full settlement and payment of said claim of the plaintiffs against the defendants; and the plaintiffs received said check, and collected and kept the amount thereof, but refused to accept the notes, and returned the same to the defendants, and that the defendants demanded back said \$—— unless the plaintiffs should receive the check and notes in full settlement of the account, and the defendants now have said notes in their possession, and have tendered the same to the plaintiffs on the trial of this case, then the court instructs you, as a matter of law, that the plaintiffs cannot recover in this action.<sup>14</sup>

**§ 626. Necessity that offer should be so framed that other party must either refuse it or accept it upon the conditions named**

**§ 626(1). Iowa**

You are instructed that to constitute an accord and satisfaction, where there is a bona fide dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to the condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions. A party to whom an offer is thus made has no alternative but to refuse it or to accept it upon such conditions, and if he takes it his claim is canceled.<sup>15</sup>

**§ 626(2). Kansas.**

The court instructs the jury if you find from the evidence that defendant offered plaintiff \$—— in satisfaction of a disputed claim arising out of transaction relative to the sale of lands in ——, and that the offer of money was accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction, and such that the plaintiff is bound to understand, if he takes it, he takes it subject to such conditions, then your verdict should be for the defendant. But if you find from the evidence that the payment of \$—— was not offered in satisfaction of such disputed claim, and not accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction and such that the plaintiff is not bound to understand that, if he takes it, he takes it subject to such conditions, then I instruct you that such matters do not constitute an accord and satisfaction, and that the plaintiff would not be thereby

<sup>14</sup> Lapp v. Smith, 55 N. E. 717, 183 Ill. 179.

<sup>15</sup> Beaver v. Porter, 105 N. W. 346, 129 Iowa, 41.

barred from recovering the amount you may find due the plaintiff, if any amount you find is due.<sup>16</sup>

**§ 627. Assent of debtor to refusal of creditor to accept terms of offer**

You are instructed if you find, from a preponderance of the evidence, that the plaintiff assented to, and accepted the money in question under the terms and conditions of said tender, as made, and in full settlement and satisfaction of his claims and demands against the defendants as aforesaid, then the plaintiff will not be entitled to recover in this action in any sum whatever; and, if you so find, you should determine the issue of accord and satisfaction in favor of the defendants, and return your verdict in their favor. If you do not so find, or if you believe from the evidence that the plaintiff, at the time said tender was made, expressly refused to accept the terms and conditions thereof, and to receive the money in full payment and satisfaction of his claims as aforesaid, but accepted and received the same only upon the conditions and with the understanding between himself and the defendant, that the same should be accepted as part payment only, and not in full satisfaction of his claims against the defendants, then the same would not constitute an accord and satisfaction between the parties.<sup>17</sup>

**§ 628. Necessity of performance of agreement to pay**

You are instructed that if plaintiff signed a paper, lacking sufficient mental capacity to understand it and her lack of mental capacity had been created by the negligence of the defendant company, then the paper would not be binding upon her unless the amount agreed to be paid in satisfaction was actually paid, unless it was understood between her and the company that the promise to pay was accepted as a release of their obligation to her by reason of the injury. An accord and satisfaction is treated by the courts as an extinguishment of the original claim, but there must be not only an agreement between the parties as to what shall be done and how much shall be paid, but there must be actual performance of that, unless the agreement is itself accepted as an extinguishment of the claim, in which case the parties would substitute a new cause of action for the original and the claimant would have to proceed upon the defendant's promise to recover such sum or to secure performance of such duty as they had agreed to perform. That is the rule in regard to accord and satisfaction.<sup>18</sup>

<sup>16</sup> *Baugh v. Flst*, 115 P. 551, 84 Kan. 740.

<sup>17</sup> *Perin v. Cathcart*, 89 N. W. 12, 115 Iowa, 553.

<sup>18</sup> *Clark v. New York, N. H. & H. R. Co.*, 87 A. 206, 35 R. I. 479.

## CHAPTER XLVI

## ACCOUNT, ACTION ON

- § 629. What constitutes open account.  
630. Burden of proof.  
631. Sufficiency of evidence.  
632. Effect of admission by defendant.

## § 629. What constitutes open account

The jury are instructed that, if you shall find that the various deliveries of coal to the steamer ———, as charged upon the books of ———, were entered upon the books as parts and items of running and continuous dealings between ——— and the defendant, and that the account was kept unclosed prior to the date of the last entry on ———, with the anticipation of further transactions on the part of ——— and the defendant, then I instruct you that the book account which contains these charges is an open book account.<sup>1</sup>

## § 630. Burden of proof

You are charged, at the request of the defendant, that the burden of proof devolves upon the plaintiff to make out its case on the account sued on by a preponderance of evidence, and as to those items, if any, upon which there has been a failure, if any, to make proof, you will disallow them to plaintiff, and as to such items, if any, you will find in favor of defendant.<sup>2</sup>

## § 631. Sufficiency of evidence

The court instructs the jury that the plaintiff is required to establish each and every item of his account that is denied by the defendants, by a preponderance of the evidence; that the burden of the proof is upon the plaintiff.<sup>3</sup>

You are instructed that if, upon the whole case, the jury are in doubt from the evidence as to whether the defendants are indebted to the plaintiffs, or if the evidence leaves the question evenly balanced as to whether the defendants are indebted to the plaintiffs, then your verdict should be for the defendants.<sup>4</sup>

<sup>1</sup> Mercantile Trust Co. of San Francisco v. Doe, 146 P. 697, 26 Cal. A. 246.

<sup>2</sup> Keating Implement & Machine Co. v. Erie City Iron Works (Tex. Civ. App.) 63 S. W. 546.

<sup>3</sup> Allen-West Commission Co. v. Hudgins & Bro., 86 S. W. 289, 74 Ark. 468.

<sup>4</sup> Allen-West Commission Co. v. Hudgins & Bro., 86 S. W. 289, 74 Ark. 468.

**§ 632. Effect of admission by defendant**

The jury are instructed that plaintiff is entitled to recover the full amount charged in the bill of particulars for all items which have been admitted by defendant to be correct.<sup>5</sup>

<sup>5</sup> *Mitchell v. Joyce* (Iowa) 28 N. W. 473.



## CHAPTER XLVII

## ACCOUNT STATED

§ ~~633~~ **Requisites.**

633(1). Illinois.

633(2). Nebraska.

§ ~~634~~ **Effect of failure to object to account rendered.**

634(1). Alabama.

634(2). California.

634(3). Illinois.

634(4). Iowa.

634(5). Minnesota.

634(6). Oklahoma.

634(7). Oregon.

634(8). West Virginia.

§ 635. **Effect of promise to pay amount stated in account rendered.**

635(1). Alabama.

635(2). Illinois.

§ 636. **Effect of part payment as showing acquiescence in account rendered.**§ 637. **Effect and conclusiveness of account stated.**

637(1). Alabama.

637(2). Florida.

637(3). Illinois.

637(4). Missouri.

§ 633. **Requisites**§ 633(1). **Illinois**

The court instructs the jury that a settlement between two parties is a mutual accounting between them, done with the full assent and knowledge of both parties, by which the parties shall arrive at some definite result as to the amount due from one to the other, and in which result both parties agree as to such amount due; and if the jury believe, from the evidence, that the pretended settlement, claimed by the plaintiff to have taken place in ———, was not an accounting in which both parties brought forward their accounts for settlement, and did not arrive at any conclusion to which both parties agreed, or if there was committed any error in such settlement, accidental or otherwise, on the part of the plaintiff, then such accounting and pretended settlement is not binding upon the defendant.<sup>1</sup>

§ 633(2). **Nebraska**

The jury are instructed that no particular form of words is necessary to constitute a settlement in law, nor is it essential for the

<sup>1</sup> Eddie v. Eddie, 61 Ill. 134.

plaintiff to prove a promise to pay the balance found to be due, provided a balance is found in his favor.<sup>3</sup>

**§ 634. Effect of failure to object to account rendered**

**§ 634(1). Alabama**

The court charges the jury that plaintiff's failure to object to any charges made against him by the ——— can only be considered as a circumstance against him, and not as conclusive proof that he admitted them to be correct, or that they were correct.<sup>3</sup>

**§ 634(2). California**

The court instructs the jury that if you find from the evidence that a statement of account was rendered to defendant on ———, and that the items thereof were explained to her, and that more than three months elapsed after said date without any objection being made by the defendant, the account became an account stated, the items of which were no longer open to inquiry, in the absence of allegation and proof of fraud or mistake.<sup>4</sup>

**§ 634(3). Illinois**

The jury are instructed that if the jury believe, from the evidence in the case, that the plaintiffs, on or about the ———, sent to the defendants an account, showing the purchase of the high wines by the plaintiffs for the defendants, the amount paid for the same, the interest on the amount so paid, the credits to the defendants for the \$——— paid by them, the sum for which the high wines were sold, and the interest on these amounts, showing a balance in favor of the plaintiffs of \$———, and the defendants held said account, and retained possession of the same from the date of such delivery up to the time when this suit was commenced, without making objections to the correctness of such account, this is a circumstance to be taken into account by the jury in determining whether or not the defendants have admitted the correctness of said account.<sup>5</sup>

**§ 634(4). Iowa**

The court instructs the jury that what will amount to a stated account from the presumed acquiescence of the plaintiff, arising from lapse of time and his failure to object to the same within a reasonable time, depends upon the circumstances and nature of the transaction and habits of business, and it is for you to deter-

<sup>3</sup> *Brewer v. Wright*, 41 N. W. 159, 25 Neb. 305.

<sup>4</sup> *Hodges v. Kyle*, 63 So. 761, 9 Ala. App. 449.

<sup>4</sup> *Cusick v. Boyne*, 82 P. 985, 1 Cal. App. 643.

<sup>5</sup> *Miller v. Bruns*, 41 Ill. 293.

mine, from all the circumstances of the case, whether plaintiff acquiesced in the statement rendered by the defendant by lapse of time.<sup>6</sup>

§ 634(5). Minnesota

You are instructed that it is uncontradicted that there was some conversation between the president of the defendant and the manager of plaintiff in ———, about the ———, with reference to furnishing this so-called advertising in a number of papers all over the country, and the copy of the advertisement was furnished plaintiff; and it is claimed by plaintiff that it did according to this agreement publish or furnish the advertisement in these papers. You have heard the testimony in that regard as to the regular way in which plaintiff is doing business, and further than that there is no evidence that these advertisements were run in those papers, unless you should find it from the subsequent correspondence between the defendant and plaintiff. There is no evidence as to the agreed price in this case, although it is testified to by both the manager of the plaintiff and the defendant that there was an agreed price; but what that price is there is no evidence, unless it be in the account furnished by the plaintiff to the defendant, the account of the work. Now, gentlemen of the jury, the law is this: That if there is an account between parties, a transaction between them, and the one furnishes the other with a statement as to his claim, and the other party to whom the statement is furnished does not within a reasonable time make any objection, it may be a presumption that he agrees to the correctness of the account. And it is for you to say whether, upon this controversy here, what passed between the parties subsequent to ——— (that is, the sending of an account to the defendant and its retention by it) establishes the fact that the advertisement was furnished as contracted for, and whether or not that was the agreed price between the parties. Now, when a statement is furnished, and there are certain objections within a reasonable time; then, of course, the evidence as to acquiescing in the account furnished by silence is out of the case. Now, if upon this evidence and these instructions you come to the conclusion that the fair preponderance of the testimony shows that plaintiff furnished the advertisement as it had agreed upon to the defendant, and that the agreed price was that claimed in the complaint, \$———, then your verdict should be for plaintiff for that sum and interest.<sup>7</sup>

<sup>6</sup> Millard v. Bennett, 139 N. W. 914, 161 Iowa, 242.

<sup>7</sup> Western Newspaper Union v. Segerstrom Plano Mfg. Co., 136 N. W. 752, 118 Minn. 230.

## § 634(6). Oklahoma

The court instructs the jury that, when one party sends out a statement of account to another with whom he has dealings, which is received by the other party, but not replied to or objected to within a reasonable time, the acquiescence of the party is taken as an admission that the account is correctly stated; and what is a reasonable time in this connection is a question for the jury to determine, under all the circumstances of the case, considering the nature of the business, the distance of the parties from each other, and the means of communication between them.<sup>8</sup>

## § 634(7). Oregon

You are instructed that it is alleged by plaintiffs that on the \_\_\_\_\_ day of \_\_\_\_\_, they rendered and presented their account to the defendants, showing the amount due them thereon, which was assented to by defendants as being correct, which allegation is denied by the answer of the defendants; and this is the only issue of fact to be tried and determined by the jury.<sup>9</sup>

You are instructed that, if the debtor fails for several posts, when the dealings are between parties living in the same state, to object to said statement, he is presumed to have assented thereto.<sup>10</sup>

You are instructed that if you find that plaintiffs rendered and delivered, either in person or by mail, a statement of their account to defendants, on or about the \_\_\_\_\_ day of \_\_\_\_\_, and that defendants received the same, and made no objections thereto until \_\_\_\_\_; the account became a stated account, and you will find a verdict for the plaintiffs and against the defendants in the amount asked for in the complaint, less the sum of \$\_\_\_\_\_, which plaintiffs admit as having received on said account sued on.<sup>11</sup>

You are instructed that in this case it is admitted that on \_\_\_\_\_, the plaintiffs sent their statement to defendants, showing the balance claimed by them from defendants, and that the defendants received it in due course of mail, and within a very few days after it was written; that \_\_\_\_\_, was the first time they objected thereto; that there is, and was in the year \_\_\_\_\_, daily mail connection between \_\_\_\_\_ and \_\_\_\_\_; and that there was in \_\_\_\_\_ mail connection twice a week between \_\_\_\_\_ and \_\_\_\_\_, distant therefrom about \_\_\_\_\_ miles. The court therefore charges you, under the circumstances in this case, that the account rendered

<sup>8</sup> Lamont Mercantile Co. v. Piburn, 152 P. 112, 51 Okl. 618.

<sup>9</sup> Fleischner v. Kubli, 25 P. 1086, 20 Or. 328.

<sup>10</sup> Fleischner v. Kubli, 25 P. 1086, 20 Or. 328.

<sup>11</sup> Fleischner v. Kubli, 25 P. 1086, 20 Or. 328.

became a stated account, and under the pleadings in this case you must find for the plaintiffs and against the defendants in the amount claimed in the complaint, less the sum of \$——, admitted to have been paid on said account.<sup>12</sup>

**§ 634(8). West Virginia**

The jury are further instructed that if you believe from the evidence in this case that the plaintiff received, from time to time, from the defendant, statements of his account with the defendant, and was thereby afforded the opportunity to see the items in his bill of particulars mentioned, charged against him, and remained silent, and did not object to the charge of such items against him within a reasonable time after each of such statements were so rendered, then the defendant had the right to infer acquiescence of the plaintiff in the correctness of such charges, and the plaintiff is now estopped to deny the correctness of all such items to which he did not object in proper time; and, as to all such items of the plaintiff's account, you must find for the defendant.<sup>13</sup>

**§ 635. Effect of promise to pay amount stated in account rendered**

**§ 635(1). Alabama**

The court charges the jury that, if they believe from the evidence that the sale of cement was completed prior to the receipt by defendant of the statement of account accompanying the letter of ——, general manager, dated ——, and that after receipt of said statement the defendant promised to pay the amount stated in said statement or account, they should find for the plaintiff under the second count of the complaint.<sup>14</sup>

**§ 635(2). Illinois**

The jury are instructed that, if they find, from the evidence in the case, that the defendant admitted the account sued on in this case to be correct and unpaid, and promised to pay the same, such admissions are sufficient evidence to entitle the plaintiffs to recover the amount of said account, unless they further find from the evidence that defendant, when he made the admission, was as a fact mistaken in the facts in regard to said account.<sup>15</sup>

<sup>12</sup> *Fleischner v. Kubli*, 25 P. 1086, 20 Or. 328.

<sup>13</sup> *Shrewsbury v. Tufts*, 23 S. E. 692, 41 W. Va. 212.

<sup>14</sup> *Cook & Laurie Contracting Co. v. Bell*, 59 So. 273, 177 Ala. 618.

<sup>15</sup> *Warren v. Dickson*, 27 Ill. 115.

**§ 636. Effect of part payment as showing acquiescence in account rendered**

You are instructed that part payment of an account presented for payment is not conclusive evidence that the whole account is a valid or just account, but it may be evidence and is prima facie evidence that a part of the account thus paid was just and valid, and may, in the absence of evidence showing that the balance of the account was objected to, go to show that the justice of the whole account was acquiesced in by the debtor.<sup>16</sup>

**§ 637. Effect and conclusiveness of account stated****§ 637(1). Alabama**

The jury are instructed that, if you believe from the evidence that there was a stated account between plaintiff and defendant, this fact would not preclude defendant from showing that the said account was either incorrect or void for want of consideration.<sup>17</sup>

**§ 637(2). Florida**

You are instructed that a stated account establishes prima facie the correctness of the items of the account, and, unless this presumption is overcome by proof of fraud, mistake, or error, it becomes conclusive.<sup>18</sup>

**§ 637(3). Illinois**

The jury are instructed that if you believe from the evidence that some time about ——— a statement of account was made by the plaintiff or its agent, and submitted to defendant or its agent, and that the latter acquiesced in its correctness, then the law regards this as a stated account, by which both parties will be bound, unless it can be shown that some error or mistake has been made, or some fraud practiced, and the burden of proving mistake or fraud is on the party alleging it.<sup>19</sup>

The jury are instructed as a matter of law that if you believe, from a consideration of all the evidence, that the defendant arrived at a settlement with plaintiff as to the balance due the latter, then the defendant is bound by that settlement, and is liable to plaintiff for the balance, if any, so found, unless it shall appear

<sup>16</sup> Withers v. Sandlin, 32 So. 829, 44 Fla. 253.

<sup>17</sup> Ivy Coal & Coke Co. v. Long, 36 So. 722, 139 Ala. 535.

<sup>18</sup> Withers v. Sandlin, 32 So. 829, 44 Fla. 253.

<sup>19</sup> Concord Apartment House Co. v. Alaska Refrigerator Co., 78 Ill. App. 682.

that the settlement was made through fraud of the plaintiff or through the mistake of both parties.<sup>20</sup>

§ 637(4). Missouri

The court instructs the jury that if you find and believe from the evidence that the plaintiff and the wife of the defendant, as his agent, agreed upon \$———<sup>1</sup> being the amount due her, then in that event such an amount agreed upon as aforesaid is the only amount you can take into consideration in determining the indebtedness of defendant, and you will deduct from said sum such amounts, if any, paid by defendant, in determining whether he owes her anything.<sup>21</sup>

<sup>20</sup> Neagle v. Herbert, 73 Ill. App. 17.

<sup>21</sup> Yount v. Spain (App.) 180 S. W. 17.

## CHAPTER XLVIII

## ACKNOWLEDGMENT

- § 638. Sufficiency of acknowledgment of married woman.
- 639. Effect of certificate of acknowledgment.
- 640. Effect of acknowledgment as equivalent to signature.

**§ 638. Sufficiency of acknowledgment of married woman**

You are instructed that a married woman's deed to her homestead, where she joins her husband in the execution of the same, is void, under our law, unless executed by herself and husband in strict conformity with the requirements of our law regulating such conveyances, and, to make such an acknowledgment legal and valid as those attached to the said deed, the three following propositions must be established by the evidence: (1) The wife must be examined by the notary public who takes her acknowledgment privily and apart from her husband; that is, the wife must be examined by the notary public out of the presence and the hearing of her husband. (2) The notary public must fully explain to the wife out of the presence and the hearing of her husband all of the contents of the deed, and all other material facts known to him at that time that might affect the wife's interest in the property conveyed or in the consideration received for the same. (3) The wife, after having the same thus explained to her by the notary public, must acknowledge to him such instrument to be her act and deed, and she must state to him that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it. If you believe from the evidence that either one of the above propositions was not complied with when ———'s acknowledgment was taken to the two deeds signed by her and her husband, or if you believe from the evidence that at the time ———'s acknowledgment was taken to said deed that she did not understand the English language sufficiently well to fairly understand the meaning of the words and phrases used by the notary public in explaining said deed, and in taking her acknowledgment to the same, then you are instructed that both of said deeds would be absolutely void, and convey no title to ——— thereunder, if both of said lots described in the said two deeds were at that time the homestead of plaintiffs, or a part thereof, and, in either event, you should find for the plaintiffs and against all par-



who had notice of said defective acknowledgment, and that the same was defective.<sup>1</sup>

The court instructs the jury, on the other hand, that if you believe from the evidence that said acknowledgment of ——— to the said deeds was taken as required by law, and as above explained, and that at the time it was so taken she understood the English language sufficiently well to fairly understand the explanation, the words and phrases used by the notary public to her of the contents of said deeds and of the acknowledgments, then you will find for all of the defendants, unless you find for the plaintiffs under some of the issues hereinafter submitted to you.<sup>2</sup>

### § 639. Effect of certificate of acknowledgment

I charge you that the certificate of ———, justice of the peace, that plaintiff acknowledged before him that she executed a deed in question in this case voluntarily, raises a presumption in favor of the validity of said deed, which can only be rebutted by clear proof of fraud, duress, or imposition, practiced on plaintiff, in which ——— and ——— participated.<sup>3</sup>

The court instructs the jury that if you believe from the evidence that ———, the plaintiff in this action of ejectment, could not read or write on ———, and that defendant requested her to go to ———'s office to have her will completed or changed or corrected, and she went there pursuant to that request, and she did not know and was not informed that the paper she is said to have signed and acknowledged was a deed and not her will, then even though she made her mark, and acknowledged that she knew the contents of the paper, and executed it voluntarily, you must find for plaintiff.<sup>4</sup>

### § 640. Effect of acknowledgment as equivalent to signature

The court charges the jury that under the laws of ——— it is not necessary, in order for husband and wife to make a valid mortgage, that they, or either of them, should actually sign their names with their own hands; but if they appear before a proper officer, and acknowledge the execution as the law provides, and the officer attaches his certificate as the law provides, then this is sufficient, so far as the signing of the names to a mortgage is concerned.<sup>5</sup>

<sup>1</sup> *Evart v. Dalrymple* (Tex. Civ. App.) 131 S. W. 223.

<sup>2</sup> *Evart v. Dalrymple* (Tex. Civ. App.) 131 S. W. 223.

<sup>3</sup> *Butler v. Hill*, 67 So. 260, 190 Ala. 576.

<sup>4</sup> *Butler v. Hill*, 67 So. 260, 190 Ala. 576.

<sup>5</sup> *McClendon v. Doe ex dem*, 25 So. 30, 122 Ala. 384.

## CHAPTER XLIX

## ADJOINING LANDOWNERS

- § 641. Liability for injuries caused by blasting operations.
  - 641(1). Maine.
  - 641(2). Missouri.
- 642. Rights and liabilities as to trees on boundary line.
- 643. Duty as to rainwater falling on roof.
- 644. Respective rights of adjoining owners to lateral support and to excavate.
  - 644(1). Delaware.
  - 644(2). Kentucky.
  - 644(3). Utah.
- 645. Causing subsidence of soil by withdrawal of percolating or subterranean waters.
- 646. Degree of care required in excavating to avoid injury to adjacent building.
- 647. Duty to give notice of excavation.
- 648. Duty of one owner undertaking to alter foundation walls of adjoining owner.
- 649. Effect of failure of owner to take precautions to protect his building.
  - 649(1). Delaware.
  - 649(2). Utah.
- 650. Excavation as proximate cause of injury.
- 651. Defense, in action for injuries to building, that building erected in violation of ordinance.
- 652. Effect of defects in construction of building as precluding recovery for negligent excavation.
- 653. Presumption as to negligence.
- 654. Presumption of negligence from collapse of building.
- 655. Evidence considered on question of negligence in excavating.
- 656. Measure of damages for removal of lateral support.

See, also, Boundaries; Fences.

Respective rights of owner of surface and of minerals underneath, see post, § 3857.

### § 641. Liability for injuries caused by blasting operations

#### § 641(1). Maine

The court instructs the jury that the plaintiff can "maintain the action, providing he proves damages, although he sold the land to the predecessor in title of the defendant with the understanding that it was to be used as a slate quarry," and that it is not necessary for the plaintiff to prove negligence or carelessness on the part of the defendant.<sup>1</sup>

<sup>1</sup> Wilkins v. Monson Consol. Slate Co., 52 A. 755, 96 Me. 385.

§ 641(2). *Missouri*

The jury are instructed that if they believe from the evidence in the case the plaintiff was the owner of a certain house on ——— avenue in ———, and that during the year ———, and since, the defendant was engaged in building a railroad in the immediate vicinity of her said property, and that in building said railroad it shot off numerous blasts of powder and dynamite which shook and damaged her said house, if it did so shake and damage the same, then the jury will allow her such damages as they shall believe from the evidence was directly caused by said blasts of powder and dynamite, not to exceed the sum of \$———.²

§ 642. *Rights and liabilities as to trees on boundary line*

You are instructed that it is a principle of law that if a tree stands directly upon the line between the lands of adjoining owners, so that the line passes through it, it is the common property of both, whether it be marked as a boundary or not, and if you believe that the defendant entered upon the plaintiff's property, or, without being thereon, aided or abetted any one in the trespass complained of, or ordered, incited, advised, or directed the person or persons who committed the trespass to cut the line trees and otherwise do the acts alleged, then he, the defendant, is as liable as though he committed the act with his own hands, and your verdict should be for the plaintiff.³

§ 643. *Duty as to rainwater falling on roof*

The jury are instructed that the plaintiff complains in his declaration that the defendant is the owner of a livery barn adjoining the premises occupied by plaintiff, having a large roof surface, from which water falling on said roof was negligently permitted to flow off and upon the premises of the plaintiff in great quantities; and further alleges that on ——— the water thus negligently permitted by defendant to flow from the roof of his barn on the premises occupied by plaintiff caused the damage complained of. If you believe from the preponderance of the evidence that the plaintiff has proven these allegations of the declaration and that plaintiff was thereby injured, your verdict should be for the plaintiff.⁴

The jury are instructed that, before the plaintiffs can recover, they must show that the damage caused to their property, as

² *Johnson v. Kansas City Terminal Ry. Co.*, 170 S. W. 456, 182 Mo. App. 349.

³ *Phillips v. Brittingham* (Del.) 77 A. 964, 2 Boyce, 173.

⁴ *Miller v. Wilson*, 104 Ill. App. 556.

claimed in the declaration, was caused by reason of the negligence of and failure of the appellee to provide his barn with such gutter and down-spout as would ordinarily and usually carry away all water that might fall upon the roof thereof by all ordinary and expectant rains; and that if the jury believe from the evidence that the appellee did furnish such gutter and down-spout, and used reasonable care to keep the same in reasonably good condition, and that the damage to appellants was by reason of extraordinarily heavy floods, and not by reason of any negligence on the part of the defendant, then and in that case they should find him not guilty.<sup>5</sup>

The jury are instructed that the law does not require the owner of a building to keep and maintain a gutter that will always under all circumstances carry off the water from his roof.<sup>6</sup>

The jury are instructed that, if the jury believe from the evidence that the gutter on the building of defendant was sufficient to carry off the water that would fall on the roof of such building in the usual and ordinary rainstorms, then this would be a discharge of his duty to prevent damage to the plaintiff from rain so falling.<sup>7</sup>

**§ 644. Respective rights of adjoining owners to lateral support and to excavate**

**§ 644(1). Delaware**

The court instructs the jury that an owner of land adjoining land upon which there is a building or other structure may lawfully excavate on his own land, and to the line of his land, although he endangers such structure. This general right to excavate, however, does not relieve an owner of the excavated land from taking reasonable precautions against injuring the adjoining building, and it is his duty to proceed with the excavation in an ordinarily skillful and careful manner, but he is bound to use only reasonable and ordinary care to prevent injuring the building. What is ordinary care and skill in the excavating and attendant work, in each case, depends upon the circumstances of that particular case. This obligation on the person excavating to use ordinary care and skill about his work, is not affected or relieved, by the fact, that the adjoining building was poorly constructed or that it encroached upon the excavator's land.<sup>8</sup>

<sup>5</sup> *Miller v. Wilson*, 104 Ill. App. 556.

<sup>6</sup> *Meister v. Lang*, 28 Ill. App. 624.

<sup>7</sup> *Meister v. Lang*, 28 Ill. App. 624.

<sup>8</sup> *Moore v. Anderson*, 94 A. 771, 5 Boyce, 477.

**Kentucky**

The court instructs the jury that plaintiff, having built a two-story brick house on the line between him and the defendant, had no right to any lateral support from the property of defendant, and that defendant had a right to excavate and build to the division line; that it is admitted in the pleadings that the defendant served a notice on the plaintiff as to his intentions to excavate; and that said notice was served in time to enable plaintiff to shore up and protect his property; and that, under said state of case, it was the duty of plaintiff to shore up and protect his property, and it is admitted by the pleadings that he failed to do so. Now, if the jury believe from the evidence that the defendant made the excavations and did the striking and hammering on plaintiff's foundation complained of, with reasonable and ordinary care, and that the same was necessary for the building of defendant's house, they must find for defendant.<sup>9</sup>

**§ 644(3). Utah**

You are instructed that the owner of land can lawfully excavate up to the line thereof, although such excavation may endanger a building situated upon the adjoining land; but it is the duty of the owner before making such excavation to give to the owner of the adjoining land notice of his intention to make such excavation a sufficient time before commencing to enable such person to take such precautions for the protection of his building as may be reasonably necessary, and it is also the duty of the person making such excavation to use ordinary care, skill, and caution to prevent injury to the building upon the adjoining land; and if the owner making such excavation gives such due and timely notice to the owner of the adjoining land, and exercises ordinary care, skill, and prudence in making such excavation, he is not liable for any damages resulting therefrom to the building upon the adjoining premises; but, if he should fail to give such notice, or should fail to exercise ordinary care, skill, and prudence in making such excavation, and such failure is the proximate cause of injury and damage to the adjoining buildings, then he would be liable for such damage.<sup>10</sup>

<sup>9</sup> Lapp v. Guttenkunst, 44 S. W. 964, 19 Ky. Law Rep. 1950.

<sup>10</sup> Murray Meat & Live Stock Co. v. Newhouse Realty Co., 155 P. 442, 47 Utah, 622.

**§ 645. Causing subsidence of soil by withdrawal of percolating or subterranean waters**

I charge you that, if you find from the evidence in this case that the cause of the injuries to plaintiffs' property, if you find the same was injured, was the tapping of an underground stream or stratum by the boring of the tunnel into the earth, and that such underground stream or stratum so tapped ran out, causing a subsidence of the soil on which plaintiffs' buildings stand, then the defendants would be under no liability for the damages so caused, and plaintiffs would have no right to recover therefor; and, if you do so find, your verdict must be for the defendants. However, for this instruction to apply, you must believe that the percolating or subterranean waters withdrawn were upon the defendant railway company's own property. It would not apply if such water was withdrawn from underneath or below or in a public street or in property which was not the property of said railway company.<sup>11</sup>

**§ 646. Degree of care required in excavating to avoid injury to adjacent building**

The court instructs the jury that this action is based upon the negligence of the defendants; that is, their failure to use that degree of care and skill in the prosecution of their work of excavating, that, under all the circumstances of this case, you find would be used by an ordinarily prudent and careful person to prevent injuries to the adjoining property.<sup>12</sup>

The court instructs the jury that the defendants were not obliged to take such precautions in prosecuting their work as to prevent the possibility of injury, under all circumstances, to plaintiff's building, but were obliged to use such care and skill in their work as an ordinarily careful and prudent person would use under all the circumstances of this case.<sup>13</sup>

**§ 647. Duty to give notice of excavation**

The court instructs the jury that the duty of a landowner, who intends to excavate on his own land, to proceed with due care and caution, ordinarily requires that he should notify the adjoining landowner of his intention, and thus afford the latter an opportu-

<sup>11</sup> *Farnandis v. Great Northern Ry. Co.*, 84 P. 18, 41 Wash. 486, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027. No prejudicial error in this instruction as against the defendant and appellant railroad company.

<sup>12</sup> *Moore v. Anderson* (Del.) 94 A. 771, 5 Boyce, 477.

<sup>13</sup> *Moore v. Anderson* (Del.) 94 A. 771, 5 Boyce, 477.

nity of protecting his buildings and structures from apprehended injury. However, whether the excavator's failure to give notice to the adjoining landowner of his intention to excavate, would be the want of ordinary care and prudence in and about his work of excavating, is for the jury to determine, from all the facts and circumstances of each particular case.<sup>14</sup>

**§ 648. Duty of one owner undertaking to alter foundation walls of adjoining owner**

The court instructs the jury that if they believe from the evidence that the defendant undertook, for compensation by the plaintiff, to remove the rock projecting over his line in the foundation wall of plaintiff, then the law made it defendant's duty to exercise such care and skill in doing such work, to protect plaintiff's wall and foundation from injury and damage, as persons of ordinary care, skill, and prudence would have done under the same circumstances; and, if the jury believe from the evidence that the defendant failed to exercise such care, skill, and prudence, then the law is for the plaintiff, and the jury will so find.<sup>15</sup>

**§ 649. Effect of failure of owner to take precautions to protect his building**

**§ 649(1). Delaware**

The court instructs the jury that the notice of excavation should be sufficient to bring to the adjoining owner full knowledge of the intended excavation in time, and at a time, to enable him to protect his property. If after such notice, the owner of the adjoining land neglects to take proper precaution for the protection of his building, the owner who has given the notice, is nevertheless bound to prosecute the excavation and attendant work in a reasonably careful and skillful manner, and if he does so, he is not liable for damages to the adjacent building; but he is so liable, notwithstanding such notice, if he thereafter conducts the excavating and attendant work in a careless and unskillful manner.<sup>16</sup>

**§ 649(2). Utah**

You are instructed that where one about to make an excavation notifies the adjoining landowner of such intention, and the adjoining landowner refuses or neglects to take the necessary steps to

<sup>14</sup> Moore v. Anderson (Del.) 94 A. 771, 5 Boyce, 477.

<sup>15</sup> Lapp v. Guttenkunst, 44 S. W. 964, 19 Ky. Law Rep. 1950.

<sup>16</sup> Moore v. Anderson, 94 A. 771, 5 Boyce, 477.



protect his building, such refusal and neglect does not excuse nor relieve the person making the excavation from the duty of exercising ordinary care, skill, and prudence in making the same; but, notwithstanding such neglect on the part of the adjoining owner, the person making the excavation would be liable for any and all damages which proximately resulted from any acts of negligence in making such excavations.<sup>17</sup>

**§ 650. Excavation as proximate cause of injury**

The court instructs the jury that, in considering this case, you should first determine whether the injuries to the building complained of by the plaintiff, were caused by the excavation on the land of ———, one of the defendants, as alleged in plaintiff's declaration, or by some other cause. If you should not be satisfied from the preponderance or greater weight of the evidence that the injuries to the building complained of were caused by said excavation, but by some other means, then your verdict should be for the defendants, and your consideration of the case would end there. If, on the other hand, you should be satisfied from the preponderance or greater weight of the evidence, that the injuries complained of were caused by the excavation on ———'s land, and are also satisfied that the excavating was not done by the defendants in an ordinarily careful and skillful manner, under the circumstances as proven in this case, then they would be guilty of negligence, and your verdict should be for the plaintiff.<sup>18</sup>

**§ 651. Defense, in action for injuries to building, that building erected in violation of ordinance**

The jury are instructed that the fact, if shown by the evidence, that ——— was erecting a building on his property in violation of a city ordinance, is no defense to this action, and, if true, will not prevent the owner from recovering for his injuries if otherwise entitled thereto.<sup>19</sup>

**§ 652. Effect of defects in construction of building as precluding recovery for negligent excavation**

The court instructs the jury that, if you should believe plaintiff's building was constructed of inferior materials and by poor workmanship, but also believe that defendants did not do the ex-

<sup>17</sup> *Murray Meat. & Live Stock Co. v. Newhouse Realty Co.*, 155 P. 442, 47 Utah, 622. This instruction was not complained of.

<sup>18</sup> *Moore v. Anderson* (Del.) 94 A. 771, 5 Boyce, 477.

<sup>19</sup> *Hall v. Gage*, 172 S. W. 833, 116 Ark. 50, L. R. A. 1915C, 704.



cavating and attendant work in an ordinarily careful and skillful manner, under the circumstances of this case, as you find them from the evidence, and thereby caused the injuries complained of, your verdict should be for the plaintiff.<sup>20</sup>

**§ 653. Presumption as to negligence**

The court instructs the jury that negligence is never presumed, but must be proven, and the burden of proving it rests upon the plaintiff. So in this case negligence cannot be presumed because the wall cracked or slid.<sup>21</sup>

**§ 654. Presumption of negligence from collapse of building**

The court instructs the jury that the collapse of a building or falling of a wall is prima facie evidence of negligence, and imposes a burden upon the owner to show that the accident happened without his negligence.<sup>22</sup>

The jury are instructed that it is the duty of an owner of a building to take reasonable care that it shall not fall and injure others; and therefore the mere fact of the fall of a building, whereby a person lawfully on adjoining premises is injured, raises a presumption that the owner of the building has been negligent.<sup>23</sup>

**§ 655. Evidence considered on question of negligence in excavating**

The court instructs the jury that if you are satisfied from the evidence that the plaintiff was not notified of the intended excavating in time, and at a time, for him to take proper precautions to protect his building from apprehended injury, you may take that into consideration, with all the other facts and circumstances of the case, in determining whether they did prosecute the work with due care and caution.<sup>24</sup>

**§ 656. Measure of damages for removal of lateral support**

The jury are instructed that there is incident to land, in its natural condition, a right to support from the adjoining land; and if land not subject to artificial pressure sinks or falls away, in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measurement

<sup>20</sup> Moore v. Anderson (Del.) 94 A. 771, 5 Boyce, 477.

<sup>21</sup> Moore v. Anderson (Del.) 94 A. 771, 5 Boyce, 477.

<sup>22</sup> Hall v. Gage, 172 S. W. 833, 116 Ark. 50, L. R. A. 1915C, 704.

<sup>23</sup> Hall v. Gage, 172 S. W. 833, 116 Ark. 50, L. R. A. 1915C, 704.

<sup>24</sup> Moore v. Anderson (Del.) 94 A. 771, 5 Boyce, 477.

of damages in such case is not the cost of restoring the land to its former condition or situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the acts of the party removing the support.<sup>25</sup>

The jury are instructed that, if you find from the evidence that the defendant in this case removed land adjoining plaintiff's in the manner charged in the complaint, then the measure of damages would be the diminution in value of plaintiff's land.<sup>26</sup>

<sup>25</sup> *Moellering v. Evans*, 22 N. E. 989, 121 Ind. 195, 6 L. R. A. 449.

<sup>26</sup> *Moellering v. Evans*, 22 N. E. 989, 121 Ind. 195, 6 L. R. A. 449.

**CHAPTER L****ADULTERY**

- § 657. Elements of offense—Proof of marriage of defendant.**
- 658. Prosecution for living in adultery.**
  - 658(1). Alabama.**
  - 658(2). Missouri.**
- 659. Necessity of showing consent of woman.**
- 660. Who may institute prosecution.**
- 661. Pleading and proof—Proof of averments as to time.**
  - 661(1). Oregon.**
  - 661(2). Utah.**
- 662. Same—Offense committed after filing complaint.**
- 663. Burden of proof.**
- 664. Evidence considered in determining issues—Evidence of opportunity for adultery.**
  - 664(1). New Mexico.**
  - 664(2). Oregon.**
- 665. Proof of adulterous disposition.**
- 666. Proof of other acts than that charged in information.**
- 667. Sufficiency of evidence.**
  - 667(1). Iowa.**
  - 667(2). Michigan.**
- 668. Sufficiency of evidence of marriage of defendant.**
- 669. Necessity of corroboration of prosecuting witness.**

**§ 657. Elements of offense—Proof of marriage of defendant**

You are instructed that one of the matters for you to consider would be whether or not this defendant was a married man on ———; it being the theory of the state that he was a married man, and that the girl, ———, was not. The state having offered evidence here in relation to a ceremony that was performed, and as to the fact that this defendant and the person known as ——— have resided together, and if you believe from all of this evidence, either testimony offered on the part of the state or testimony that may be given by witnesses on the part of the defendant, or from any or all of this testimony you believe and are satisfied beyond reasonable doubt that this defendant was a married man, married to this ——— at the time it is claimed that this adultery occurred, then that element of the offense is established, and as far as that question is concerned, you need give it no more consideration.<sup>1</sup>

**§ 658. Prosecution for living in adultery****§ 658(1). Alabama**

The court charges the jury, that if they believe from the evidence that defendant ——— lived with his mother, near the col-

<sup>1</sup> State v. Walsh, 25 S. D. 30, 125 N. W. 295.

lege, and that ——— lived with her mother, in ———, and that they did not live together in adultery or fornication, they should acquit the defendant; and that before the defendants, or either of them, could be convicted, the evidence must satisfy the minds of the jury beyond a reasonable doubt, that the defendants did more than occasional acts of illicit or criminal intimacy.<sup>3</sup>

**§ 658(2). Missouri**

The jury are instructed that if you shall find from the evidence that the defendants were not living together in a state of open and notorious adultery, but were simply, at the time charged in the information, stopping together in the same room occasionally, and were only guilty of occasional acts of illicit intercourse, then you should find the defendants not guilty.<sup>3</sup>

**§ 659. Necessity of showing consent of woman**

You are instructed that to constitute the crime of adultery as against the man, the consent of the woman to the carnal intercourse is not indispensable, but the offense may, as against him, exist, though the connection was effected by force and against her will.<sup>4</sup>

**§ 660. Who may institute prosecution**

The court charges the jury that no prosecution for adultery can be commenced, but on the complaint of the wronged husband or wife, and if, in this case, the wife of defendant appeared before the grand jury in response to a subpoena and testified before them in the case, but not intending to prefer the charge of adultery against the defendant, but gave her testimony, supposing she was required to do so, this would not be a complaint by her against her husband, within the meaning of the law.<sup>5</sup>

**§ 661. Pleading and proof—Proof of averments as to time**

**§ 661(1). Oregon**

The jury are instructed that, although the crime charged in the information is alleged to have been committed on ———, it is not necessary that the jury should find that this was the exact date of the offense, if one was committed, in order to convict; but if you are satisfied from the evidence that it was perpetrated within a ——— or more from the date stated, and before the filing of the

<sup>3</sup> *McAlpine v. State*, 23 So. 130, 117 Ala. 93.

<sup>5</sup> *State v. Crowner*, 56 Mo. 147.

<sup>4</sup> *State v. Donovan*, 16 N. W. 130, 61 Iowa, 278.

<sup>5</sup> *State v. Donovan*, 16 N. W. 130, 61 Iowa, 278.

information, you will be justified in bringing in a verdict of guilty, if you are satisfied beyond a reasonable doubt that when the alleged intercourse took place, if it did take place, the defendant was a married man and the husband of \_\_\_\_\_.<sup>6</sup>

**§ 661(2). Utah**

The jury are instructed that the state is not required to prove the date of the commission of the crime charged exactly as alleged in the information. The time of the offense, if one was committed, is sufficiently established under the law if you believe from the evidence beyond a reasonable doubt that the unlawful act charged was committed within \_\_\_\_\_ years prior to the filing of the information, which information was so filed on \_\_\_\_\_.<sup>7</sup>

**§ 662. Same—Offense committed after filing complaint**

The jury are instructed that you cannot convict the defendant for living in adultery with the said \_\_\_\_\_ for any period of time after the filing of the complaint against defendant.<sup>8</sup>

**§ 663. Burden of proof**

You are instructed that the burden is on the state to show that the indictment was found on the complaint of the wife, and failing to do so the jury should acquit.<sup>9</sup>

**§ 664. Evidence considered in determining issues—Evidence of opportunity for adultery**

**§ 664(1). New Mexico**

You are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendants, within \_\_\_\_\_ years next previous to the date of the returning of the indictment into court (giving the proper date of such return), occupied the sleeping apartment alone as a sleeping room, that circumstance may be considered by you in arriving at your verdict.<sup>10</sup>

**§ 664(2). Oregon**

You are instructed that you may also take into consideration any evidence tending to show an opportunity upon the part of these parties to commit this crime. Evidence of an adulterous disposition or inclination, together with evidence of an opportunity to commit the crime, would be sufficient to justify you in bringing in

<sup>6</sup> State v. Eggleston, 77 P. 738, 45 Or. 346.

<sup>7</sup> State v. Green, 115 P. 181, 38 Utah, 389.

<sup>8</sup> Proctor v. State, 35 S. W. 172, 37 Tex. Cr. R. 366.

<sup>9</sup> State v. Donovan, 16 N. W. 130, 61 Iowa, 278.

<sup>10</sup> United States v. Griego, 75 P. 30, 12 N. M. 84.

a verdict of guilty against this defendant, if this evidence satisfies you beyond a reasonable doubt that the crime was committed.<sup>11</sup>

**§ 665. Proof of adulterous disposition**

The court instructs the jury that it is not sufficient, in considering a charge of this character, from the standpoint of circumstances or circumstantial evidence, that an opportunity to commit the crime may be shown or inferred from the circumstances. In addition to the evidence of such opportunity, there must be evidence satisfactory to you of the adulterous disposition, if any, of the accused, or the disposition to commit the crime charged if the opportunity is offered. The same rule holds with reference to that, however, as I have already charged you with reference to the flagrant act. It is not necessary that the adulterous disposition be proven by direct and positive testimony to that particular point; but this may be inferred from the conduct of the party, from the associations and relations which you find from the evidence to have existed between the parties.<sup>12</sup>

You are instructed that you can take into consideration evidence tending to show an adulterous or amorous disposition on the part of the accused, and also on the part of the person with whom it is alleged that he committed this crime—any adulterous or amorous disposition, or evidence tending to show an inclination on the part of these parties to commit adultery. You can take into consideration any evidence tending to show such a disposition or inclination, either before or after the time when this crime is alleged to have been committed; and you may take into consideration any evidence tending to show that this act was committed at other times and places, although it may show distinct and separate crimes. because such evidence would tend to show an adulterous disposition or inclination on the part of the parties.<sup>13</sup>

**§ 666. Proof of other acts than that charged in information**

Gentlemen of the jury, you have been instructed that the state is not required to prove the exact date of the alleged crime, but the state is required to prove the exact offense charged in the information and cannot establish the commission of the act charged by the mere proof of other and similar acts; and evidence of the commission of other and similar acts is only to be considered for the purpose of showing the probability of the commission of the

<sup>11</sup> State v. Eggleston, 77 P. 738, 45 Or. 346.

<sup>12</sup> State v. LaMore, 99 P. 417, 53 Or. 261.

<sup>13</sup> State v. Eggleston, 77 P. 738, 45 Or. 346.

act charged, and if there is no evidence of the commission of the act charged, the guilt of the defendant cannot be established by proof or offered proof of other offenses than the one charged in the information.<sup>14</sup>

**§ 667. Sufficiency of evidence**

**§ 667(1). Massachusetts**

You are instructed that if a married man is found with a woman not his wife, in a room with a bed in it, and stays through the night with her there, that is sufficient to warrant a finding of adultery against him.<sup>15</sup>

**§ 667(2). Michigan**

The jury are instructed that sexual intercourse must be proved.<sup>16</sup>

**§ 668. Sufficiency of evidence of marriage of defendant**

You are instructed that the marriage may be proved in different ways. Evidence of eyewitnesses who saw the marriage performed is sufficient (that is, it is sufficient if you believe the evidence to be true); and if you are satisfied from the evidence in this case that at the time this act is alleged to have been committed the defendant, ———, was married to ———, that would be sufficient evidence upon that part of the case. I will further say that if you are satisfied that the marriage was performed, that the defendant and ——— were married at some time prior to the time this offense is alleged to have been committed, it would not be necessary for the state to go on and show that they continued to be husband and wife, but it would be presumed they have continued to be husband and wife, in the absence of any evidence to the contrary.<sup>17</sup>

**§ 669. Necessity of corroboration of prosecuting witness**

You are charged as a part of the law of this case, at the request of the defendant, that, before you would be authorized to find the defendant guilty, you must not only believe the testimony of the prosecutrix, ———, to be true, but you must further find from the evidence that said ——— has been corroborated by other testimony showing both the commission of the offense charged as well as connecting defendant therewith. The corroborating testimony necessary under the law must be upon material facts connecting the defendant with the commission of the offense charged.<sup>18</sup>

<sup>14</sup> State v. Moss, 131 P. 1132, 73 Wash. 430.

<sup>15</sup> Commonwealth v. Clifford, 13 N. E. 345, 145 Mass. 97.

<sup>16</sup> People v. Payment, 67 N. W. 689, 109 Mich. 553.

<sup>17</sup> State v. Eggleston, 77 P. 738, 45 Or. 346.

<sup>18</sup> Jackson v. State, 101 S. W. 807, 51 Tex. Cr. R. 220.

## CHAPTER LI

## ADVERSE POSSESSION

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**A. WHAT CONSTITUTES**

**§ 670. Definitions and elements in general**

**§ 670(1). Connecticut**

You are instructed that the question, in this part of the case, gentlemen, for you, is whether the defendants, and those under whom they claim, have for a period of ——— years had actual, open, and exclusive adverse occupancy and possession of the land claimed to be owned by the plaintiff; such adverse possession being known and acquiesced in by the real owner, or so far notorious as to be presumptively within his knowledge.<sup>1</sup>

**§ 670(2). Delaware**

You are instructed that, to acquire title by adverse possession, the possession must be exclusive, notorious, adverse to the rights of all others, and continued uninterrupted for a period of at least ——— years.<sup>2</sup>

**§ 670(3). Georgia.**

The court instructs the jury that possession, to be the foundation of a prescription, must be in the right of the possessor, and

<sup>1</sup> Merwin v. Morris, 42 A. 855, 71 Conn. 555.

<sup>2</sup> State v. Willoughby, 102 A. 983, 7 Boyce, 83.

not of another, must not have originated in fraud, must be public, continuous, exclusive, uninterrupted, and peaceable, and be accompanied by a claim of right.<sup>3</sup>

**§ 670(4). Illinois**

The court instructs the jury that, to constitute an adverse possession sufficient to defeat the party who has the legal title, the possession must be hostile in its inception and so continue without interruption for the period of ——— years. It must be an actual, visible, open, notorious, hostile, and exclusive possession, acquired and retained under claim of title inconsistent with that of the true owner.<sup>4</sup>

**§ 670(5). Iowa**

The jury are instructed that, to constitute a bar to plaintiff's right to recover in this action, defendants herein must show an actual occupancy of the premises in suit, clear, definite, notorious and hostile, and such occupancy must be continuous, adverse and exclusive during the whole period prescribed by the statute.<sup>5</sup>

**§ 670(6). Kentucky**

The court instructs the jury that if they should believe from the evidence that the plaintiff, ———, had the actual adverse possession of the tract of land sued for continuously and uninterruptedly for ——— years or more before ———, claiming the same openly and notoriously as her own, adversely to all others, then and in that event the jury should find for the plaintiff the lot of ground sued for.<sup>6</sup>

The court instructs the jury that if they believe from the evidence that N. conveyed the entire boundary of land described in plaintiffs' petition to P., on the ——— of ———, 18—, and that said P., on the ——— of ———, 18—, sold and conveyed the same property to the female plaintiff, ———, and further believe from the testimony that in pursuance of such conveyances, and under color thereof, the said P. and the plaintiffs entered into the actual possession of the lands so conveyed, claiming title thereto to the full extent of the boundary and title so conveyed, and that such possession of said land continued for a period of ——— years previous to the defendant's entry sued for, and during such period their possession was actual, visible, and notorious, then such pos-

<sup>3</sup> Walker v. Steffes, 77 S. E. 580, 139 Ga. 520.

<sup>4</sup> Illinois Cent. R. Co. v. Noyes, 96 N. E. 830, 252 Ill. 178.

<sup>5</sup> Davenport v. Sebring, 3 N. W. 403, 52 Iowa, 364.

<sup>6</sup> Louisville & N. R. Co. v. Rayl, 107 S. W. 298, 32 Ky. Law Rep. 870.

session is adverse, and the jury should find for the plaintiffs, and determine their damages as indicated in instruction No. \_\_\_\_\_.<sup>7</sup>

§ 670(7). *Michigan*

It is the defendant's claim that he received the property by deed in \_\_\_\_\_, but that no fence was built around the premises until \_\_\_\_\_. It is the claim of the plaintiff that the defendant never actually occupied the land and never claimed to own the disputed strip in question until on or about the time he put the fence around the disputed land, which was in \_\_\_\_\_. Now in order for the defendant to avail himself of title by adverse possession, by means of the fence he built in \_\_\_\_\_, such possession under the statute must be open, notorious, continuous, exclusive, visible, and distinct, as well as adverse, and such possession must have been for a period of \_\_\_\_\_ years prior to the starting of this suit.<sup>8</sup>

You are instructed that if you find, in the spring of \_\_\_\_\_ or summer of that year, \_\_\_\_\_, after getting his deed, began the exercise of such acts of ownership and control as are usual by owners of timber lots when used to supply a farm in the neighborhood with timber, and his acts were of such an adverse, open, notorious, and hostile nature as to clearly indicate that he asserted exclusive control over it, and that he continued to do so up to the time of his sale to \_\_\_\_\_, and that afterwards \_\_\_\_\_ continued with like acts, you would be justified in finding that defendants had been in such possession as to bar any claim of title upon the part of the plaintiff, and your verdict should be for the defendants.<sup>9</sup>

§ 670(8). *Missouri*

The jury are instructed that if the jury believe from the evidence that the defendant had the exclusive, visible, notorious, continued, and actual adverse possession of the premises in controversy prior to the death of \_\_\_\_\_, and that the defendant, after the death of \_\_\_\_\_, continued in such possession, and had and held the visible, exclusive, notorious, continued, and actual adverse possession of the premises in controversy for a period of \_\_\_\_\_ years next before the commencement of this suit, they will find for the defendant.<sup>10</sup>

You are instructed that if you find from the evidence in the case that plaintiff purchased lot \_\_\_\_\_ and obtained a deed thereto in \_\_\_\_\_ and that in person and by tenants he used and occupied

<sup>7</sup> *Maysville & B. S. R. Co. v. Holton*, 39 S. W. 27, 100 Ky. 665, 19 Ky. Law Rep. 1.

<sup>8</sup> *Wilcox v. Jenison*, 164 N. W. 484, 198 Mich. 182.

<sup>9</sup> *Murray v. Hudson*, 32 N. W. 889, 65 Mich. 670.

<sup>10</sup> *Coshov v. Otey (Mo.)* 222 S. W. 804.

any part of said lot, under claim of ownership of the whole thereof, under said deed, for ——— years thereafter, and before this suit was begun, and that during the whole of said ——— years such claim and such use and occupation under said deed was open, notorious, continuous, exclusive, and adverse to all others, you are instructed that he thereby obtained a good title thereto.<sup>11</sup>

You are instructed that adverse possession is possession by one person which is inconsistent with possession or right of possession by another. In theory it is a possession founded in trespass originally, but available after the lapse of years by reason of an open, notorious, and hostile occupation. To constitute adverse possession, it is necessary that the possession be actual, continuous, notorious, and hostile, but all of these may appear from the nature and circumstances of the possession. "Actual," in this sense, means real, visible. "Continuous" means without interruption. "Notorious" means open, undisguised, generally known, and "hostile" means opposed and antagonistic to the claims of all others. "Undisputed" means not called in question.<sup>12</sup>

The jury are instructed that, in order to divest the title to the land mentioned in the petition of the plaintiff out of the plaintiff and vest it in the defendant by reason of the adverse possession of the latter, that possession must be actual, visible, notorious, hostile, continuous, and uninterrupted, under a claim of title, for a period of ——— years next preceding the commencement of this suit.<sup>13</sup>

**§ 670(9). Nebraska**

You are instructed that adverse possession sufficient to defeat a legal title must be hostile in its inception and continue uninterruptedly for ——— years. It must also be open, notorious, adverse, and exclusive, and must be held during all such time under a claim of ownership by the occupant; and all of these facts must be proved by a preponderance of the evidence.<sup>14</sup>

You are instructed that if you believe from the evidence that the defendant, ———, not less than ——— years prior to the commencement of this suit, entered into possession of the lands in controversy, and cultivated said lands or fenced the same, or erected improvements of any kind thereon, or did other acts of such a character as to clearly show that he was occupying said lands and

<sup>11</sup> *Dee v. Nachbar*, 106 S. W. 35, 207 Mo. 680.

<sup>12</sup> *Bradbury Marble Co. v. Laclede Gaslight Co.*, 106 S. W. 594, 128 Mo. App. 96.

<sup>13</sup> *Dalby v. Snuffer*, 57 Mo. 294.

<sup>14</sup> *Hoffine v. Ewing*, 84 N. W. 93, 60 Neb. 729.

claiming the same as his own, and during all of said \_\_\_\_\_ years continued to so occupy said lands, claiming during all of said time to be the owner of the same, and never during any of said period of \_\_\_\_\_ years abandoning said lands, but during all of said time continued openly, notoriously, adversely, and exclusively to occupy and claim the same as his lands, then you are instructed that said acts on the part of said defendant, \_\_\_\_\_, would constitute adverse possession, within the meaning of the law, and would entitle the defendant to a verdict at your hands. But if the defendant, \_\_\_\_\_, has failed to establish any of said acts by a preponderance of the evidence, your verdict should be for the plaintiff.<sup>15</sup>

§ 670(10). North Carolina

You are instructed that the plaintiffs in their complaint claim title to a large tract of land, about \_\_\_\_\_ acres; but they have not introduced any testimony tending to show title to any land except that embraced in the calls of the \_\_\_\_\_ grant of \_\_\_\_\_. The plaintiffs must recover, if at all, upon the strength of their own title. For the purpose of showing title out of the state, they introduced a grant dated \_\_\_\_\_, to \_\_\_\_\_, and then a deed from \_\_\_\_\_ to \_\_\_\_\_, father of plaintiff, dated \_\_\_\_\_, containing the same metes and bounds as those of the \_\_\_\_\_ grant, and they claim that under said deed they or their ancestor entered into possession of said land, and since then (he and they) have been in the open and notorious possession of said land by known and visible metes and bounds adversely to all the world. Before plaintiffs can recover, they must satisfy you by the greater weight of the evidence of the following facts: (1) That they have located the \_\_\_\_\_ grant, and that it is included in the lands described in the complaint. (2) That they and those under whom they claim have been in the open, notorious, adverse possession of the land embraced in the said grant for more than \_\_\_\_\_ years next preceding the commencement of this action under the deed from \_\_\_\_\_ to \_\_\_\_\_. The possession of a part of the land embraced in the \_\_\_\_\_ deed would extend to the whole, in the absence of evidence tending to show that some one else possessed any part of said land adversely to the plaintiffs or their ancestor \_\_\_\_\_.<sup>16</sup>

§ 670(11). Oregon

The court instructs the jury that there are five essential elements necessary to constitute an effective adverse possession: First,

<sup>15</sup> *Hoffne v. Ewing*, 84 N. W. 93, 60 Neb. 729.

<sup>16</sup> *McNeely v. Laxton*, 63 S. W. 278, 149 N. C. 327.

the possession must be hostile and under a claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and, fifth, it must be continuous. If any of these constituents is wanting, the possession will not effect a bar of the legal title.<sup>17</sup>

§ 670(12). Texas

The court instructs the jury that by adverse possession is meant an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another.<sup>18</sup>

The jury are instructed that if you believe from a preponderance of the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession (as those terms have been defined) of the land described in the defendants' answer, claiming, cultivating, using, or enjoying the same, by defined metes and bounds, continuously for ——— years before the filing of this suit on the ———, you will find for defendants.<sup>19</sup>

You are instructed that peaceable and adverse possession is one that is "actual, continuous, visible, notorious, distinct, hostile—that is, adverse—fair, and open and of such a character as to indicate clearly a claim of ownership in the occupant."<sup>20</sup>

§ 670(13). Virginia

The court instructs the jury that there are five characteristics of adverse possession of land, which must exist before title to land is acquired by such adverse possession, as follows: First, it must be hostile to, or adverse to, the true title holder; second, it must be an actual possession; third, it must be a visible, notorious, and exclusive possession; fourth, it must be a continuous possession; fifth, it must be a possession under color of title.<sup>21</sup>

§ 670(14). West Virginia

The jury are instructed that the party who relies on adverse possession of land, under color or claim of title, to defeat the legal owner of the land, must show: (1) His color or claim of title, and that it covers the land, or a part of the land, in controversy; (2) that he entered under said claim or color of title upon said land in controversy, or some part thereof; (3) that his entry was hostile and adverse to the party having the legal title, and was actual, visi-

<sup>17</sup> Talbot v. Cook, 112 P. 709, 57 Or. 535.

<sup>18</sup> Brown v. Fisher (Civ. App.) 193 S. W. 357.

<sup>19</sup> Texas & N. O. Ry. Co. v. A. G.

& J. C. Broom, 114 S. W. 655, 53 Tex. Civ. App. 78.

<sup>20</sup> Hunter v. Malone, 108 S. W. 709, 49 Tex. Civ. App. 116.

<sup>21</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.



ble, and exclusive; and (4) must have so continued hostile, actual, visible, and exclusive, unbroken, under said color or claim of title, for 10 years before the commencement of the action to dispossess him.<sup>22</sup>

§ 670(15). Wisconsin

You are instructed that if you find from the evidence that the defendant entered into occupation and possession of the premises in question claiming title thereto exclusive of and hostile to any other right, and that such claim of title was made in good faith, the defendant, believing that he had a good title to such land as the owner thereof, and further find that such occupation and possession was actual, and continued uninterrupted and notorious and hostile to any other right or title to said land for a period of \_\_\_\_\_ years prior to the commencement of this action, and that during all that time the defendant so claimed title to said land, that would constitute adverse possession, and would bar plaintiff's right to recover in this action, and your verdict in such case would be for the defendant.<sup>23</sup>

B. ACTUAL POSSESSION

Effect of actual possession as notice, see post, § 684.

§ 671. Necessity in general

§ 671(1). Alabama

The court instructs the jury that the mere claim of a right or title to land not accompanied by actual possession of the same, no matter how long continued such claim of right and title may be, and no matter how loudly and vociferously or noisily and publicly the mere claim of right or title may have been made, it is not sufficient to cut off the right of entry in the true owner, and if the land be vacant, he may enter thereon without wrong, in safe defiance of any such mere claim of rights or title; nor is the right of recovery cut off by said claim of right or title; and if the person who makes such claim has not been in possession of the land actually for a sufficient time to cut off the title of the owner under the statutes of \_\_\_\_\_, the latter may maintain an action for recovery of the land, no matter how long the claimant has asserted his mere claim of right and title, and regardless of the publicity which may have been given to such mere claim of right and title.<sup>24</sup>

<sup>22</sup> Maxwell v. Cunningham, 40 S. E. 499, 50 W. Va. 298.

<sup>23</sup> Bartlett v. Secor, 14 N. W. 714, 56 Wis. 520.

<sup>24</sup> Veitch v. Hard, 75 So. 405, 200 Ala. 77.

I charge you, gentlemen, that the mere recording of a deed to a tract of land is not adverse possession of said land, and that the law does not require the owner of land to take notice of any deed purporting to convey his title which another may have recorded.<sup>25</sup>

§ 671(20). **Kentucky**

The court instructs the jury that adverse possession, within the meaning of instruction No. ———, is an actual adverse possession manifested by some act or fact sufficient to indicate to others that defendant had in fact the possession, and that the ousted claimant had been dispossessed.<sup>26</sup>

§ 672. **What constitutes**

§ 672(1). **Alabama**

The court charges the jury that to constitute an actual possession of land it is only necessary to put it to such use or exercise such dominion over it as in its present state it is reasonably adapted to.<sup>27</sup>

§ 672(2). **Kentucky**

The court instructs the jury that if they should believe from the evidence that the plaintiff had said lot under inclosure, and claimed said land as her own, then she was in the actual adverse possession of said lot in the meaning of the instructions.<sup>28</sup>

§ 673. **Necessity of acts effecting change in condition of land**

The court instructs the jury that while lands remain uncleared or in a state of nature, they are not susceptible of adverse possession against an older patentee, or one holding under such older patentee, except by acts of ownership effecting a change in their condition, which, from their nature, indicate a notorious claim of title, and to constitute such adverse possession there must be occupancy, cultivation, improvement, or other open, notorious, and habitual acts of ownership.<sup>29</sup>

§ 674. **Effect of occasional acts of trespass or of occupancy**

§ 674(1). **Connecticut**

You are instructed that an occasional use of the land, such as the occasional cutting of grass or firewood, will not be sufficient to establish adverse possession.<sup>30</sup>

<sup>25</sup> *Velch v. Hard*, 75 So. 405, 200 Ala. 77.

<sup>26</sup> *Le Moyne v. Neal*, 164 S. W. 964, 158 Ky. 316.

<sup>27</sup> *Alabama State Land Co. v. Matthews*, 53 So. 174, 168 Ala. 200.

<sup>28</sup> *Louisville & N. R. Co. v. Rayl*, 107 S. W. 298, 32 Ky. Law Rep. 870.

<sup>29</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

<sup>30</sup> *Merwin v. Morris*, 42 A. 855, 71 Conn. 555.

## § 674(2). Kentucky

The jury are instructed that occasional cutting of timber, or occasional occupancy of the land, is not adverse possession within the meaning of instruction No. \_\_\_\_.<sup>81</sup>

## § 674(3). Maine

The jury are instructed that if plaintiff cut the grass upon a natural fresh meadow, and carried the hay away and converted it to his own use, annually for any period of time, however long, without any other possession of the land on which it grew, or any claim of title to the land, such acts alone would not constitute an adverse possession against the true owner of the soil.<sup>82</sup>

## § 674(4). Virginia

The court instructs the jury that occasional acts of trespass on forest land uninclosed, annually entering on said land to range cattle in the woods, or salt cattle or ranging sheep or hogs, and other like acts, amounting to mere trespasses, are not sufficient to establish actual possession.<sup>83</sup>

## § 675. Use of property as stone yard

The jury are instructed that if the jury find from the evidence that \_\_\_\_\_, the ancestor of the defendants, bought at a tax sale held by the late corporation of \_\_\_\_\_, so called, the property in controversy in this case, and paid the price bid by him at such sale, and received from the corporation of \_\_\_\_\_ a deed to said property, which was by him duly filed for record and recorded in the land records of the \_\_\_\_\_ more than \_\_\_\_\_ years prior to the commencement of this suit; that thereupon the said property was assessed to the said \_\_\_\_\_ on the tax books of the city of \_\_\_\_\_, and the taxes thereon from that time until the beginning of this suit paid by the said \_\_\_\_\_ or his successors in title, the defendants in this case; that at a period of time more than \_\_\_\_\_ years before the commencement of this suit the said property was rented in behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stoneyard, paying rent therefor from the date of making such arrangement with the defendants; that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business; and that

<sup>81</sup> Ward v. Middleton, 124 S. W. 823.

<sup>82</sup> Gardner v. Gooch, 48 Me. 487.

<sup>83</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

such use and possession of the said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely, and uninterruptedly for a period of ——— years next before the commencement of this suit—then the jury is instructed that the defendants are entitled to recover.<sup>34</sup>

### § 676. Necessity of inclosure or improvements

#### § 676(1). Kansas

The court instructs the jury that, to constitute adverse possession of land, it is not absolutely necessary that there should be inclosure, buildings, or cultivation, but the acts done must be such as to give unequivocal notice of the claim to the land adverse to the claim of all others, and must be of such a character and so openly done that the real owner will be presumed to know that a possession adverse to his title has been taken.<sup>35</sup>

#### § 676(2). Maine

The jury are instructed that, if the plaintiff's possession of the premises in dispute was open, notorious, exclusive, and adverse, comporting with the usual management of a farm by its owner, though a portion was woodland and uncultivated, and though not wholly surrounded by fences, or rendered inaccessible by other obstructions, it would constitute a disseizin of the true owner, and be affected by other facts.<sup>36</sup>

#### § 676(3). Michigan

You are instructed that, to constitute possession, it is not necessary that the land should be inclosed with a fence, or that the land should be cultivated or resided upon, or that buildings should be erected thereon. It is sufficient if the acts of ownership are of a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in question.<sup>37</sup>

#### § 676(4). Missouri

You are instructed that, if you believe from the evidence in the case that the land in controversy, or any considerable part thereof, was susceptible of a definite occupation or possession—that is, that said land, or any part thereof, was fit for pasture or cultivation without clearing or cutting away the timber thereon—then, in order to constitute the possession of plaintiff, or that of those un-

<sup>34</sup> *Holtzman v. Douglas*, 18 S. Ct. 65, 168 U. S. 278, 42 L. Ed. 466.

<sup>35</sup> *Trager v. Elliot*, 187 P. 875, 106 Kan. 228.

<sup>36</sup> *Gardner v. Gooch*, 48 Me. 487.

<sup>37</sup> *Murray v. Hudson*, 32 N. W. 889, 65 Mich. 670.

der whom he claims, adverse as required in the foregoing instruction, the jury must find from the evidence in the cause that the plaintiff or his grantor, ———, either in person or by their tenants, built permanent structures on said land, or actually inclosed or cultivated said land, or some part thereof, for the period of ——— years prior to the institution of this suit, and that it is not sufficient in such a case that plaintiff and his grantor, ———, paid the taxes on said land, kept off trespassers, cut timber, erected temporary structures, and pastured hogs thereon under a claim of ownership.<sup>38</sup>

**§ 676(5). Virginia**

The court instructs the jury that the exercise by the defendants, or their father under whom they claim, of visible, open, notorious, and habitual acts of ownership, over the land in controversy is sufficient evidence of possession, and it is not necessary to such possession that the land should be inclosed, or built upon, or actually cultivated or cleared.<sup>39</sup>

**§ 676(6). Wisconsin**

You are instructed that for the purpose of constituting an adverse possession by a person claiming title not founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: (1) When it has been protected by a substantial inclosure; (2) when it has been usually cultivated and improved.<sup>40</sup>

**§ 677. Sufficiency of inclosure by fence**

The court instructs the jury that an inclosure by a fence would not alone show exclusive and adverse possession, unless such fence was sufficiently substantial to afford reasonable protection against the cattle of the neighborhood, but that an occasional breaking of the fence by cattle, or the cutting of the wire by others, by reason of which the cattle of the neighborhood entered upon the land, would not constitute a break in the possession, unless the fence was left in such condition as that the land was open to the cattle of the public for such a length of time as to justify the belief that the defendant did not intend to continue the exclusive appropriation of the same.<sup>41</sup>

<sup>38</sup> Cook v. Farrah, 16 S. W. 692, 105 Mo. 492.

<sup>39</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>40</sup> Bartlett v. Secor, 14 N. W. 714, 56 Wis. 520.

<sup>41</sup> Sharrock v. Ritter (Tex. Civ. App.) 45 S. W. 156.

**§ 678. Effect of gaps in fence**

The court instructs the jury that a substantial inclosure is that which substantially accomplishes the purpose of inclosing the land. It depends, to some extent, on the character of the land, and the use to which it is to be put. There might be a difference as to what a substantial inclosure was in different parts of the country and different kinds of land. I can conceive of an inclosure which would be regarded as a substantial inclosure for timber land or grazing land, which would not be considered a substantial inclosure for a garden plat. As I say, there is probably a difference depending upon the character of the land and the part of the country where the inclosing is done; but the inclosure must be substantial in the sense of running all the way around. You cannot say that an inclosure is substantial when there are breaks in it; that would defeat the whole object of the fence. I might have a 10-acre field and have it beautifully fenced, and if I left 50 feet of it down, the effect and purpose of the fencing would be destroyed, for the object in having a fence is to have all of the land fenced. That, however, is a matter to be reasonably applied—or a principle to be reasonably applied. One who fences in property is not chargeable with every break that may occur in his fence by the act of other people who may cut gaps or tear down the fence or pull up his posts from time to time. It is sufficient for him to reasonably look out for his fence, and when he finds there are defects to repair them from time to time, and when he does that he has kept his fence up substantially, although there may be from time to time gaps left in it, made by other people, or breaks made by the wind or by cattle, or in any other way that might occur; but so far as the owner is concerned, he must place around the entire premises a substantial fence, and he must maintain it for the statutory period.<sup>42</sup>

**§ 679. Character of improvements**

The court instructs the jury in this case that the section of our Code under which the defendant, ———, claims title to the land in controversy is numbered ———, and it reads as follows:

“For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only: 1. \* \* \* 2. Where it has been usually cultivated or improved. \* \* \*” You are further instructed that the defendant claims title on the ground that it has

<sup>42</sup> Baugher v. Boley, 58 So. 980, 63 Fla. 75, 87.

improved the said land in a manner, degree, and to an extent as is usual in this county wherein is situate like and similar property devoted to the same or similar uses. The term 'improvement' is one of indeterminate and varying significance, dependent upon the thing to which it is applied. Generally speaking, it means a physical addition to and betterment of such land so as to make it the better to subserve human wants and economic requirements. Whether or not a thing added and done to land constitutes an improvement depends upon the location of the land, the purposes to which it is devoted, and whether or not, by the work done and the addition made to the land, the adaptability of the thing attached to the land or whether the land so altered or changed is bettered and improved in condition to the extent and in the way that is usual in like lands used in like situations in like communities. Each case rests and depends upon its own particular facts, circumstances, and conditions. Now in this case, if you believe from a preponderance of the evidence that the defendant, ———, entered into the possession of the lands in controversy; that at said time the stream in question extended over a territory, now in part covered by the public road; that it built the said road over and across said lands or a part thereof or adjacent thereto; that it put a pipe line through said lands or a part thereof; that it cribbed up the said stream on either side or both sides and confined the waters thereof to a smaller channel; that it bridged the new channel; that it hauled and filled the land with earth or tailings between the said channel as so made, if any, and the road as so built, if any, to a depth of several feet, and likewise filled said land on the opposite side; that it kept constant possession thereof, stored lumber and machinery thereon, and used the said land as a necessary adjunct to its mining operations; and that it did these things and each and all of them for more than ——— years immediately prior to the commencement of this action—then you are further instructed that such work or use, additions, and alterations, if such there were, made and constituted an "improvement," as that term is used in our Code.<sup>48</sup>

#### § 680. Wild lands

The jury are instructed that, if you are reasonably satisfied from the evidence that plaintiff and those under whom he claims had such an adverse possession of the land as from its wild nature it was susceptible of for ——— years prior to the time that defend-

<sup>48</sup> Trask v. Success Mining Co., 155 P. 288, 28 Idaho, 483.



ant entered into possession, then your verdict must be for the plaintiff.<sup>44</sup>

**§ 681. Property not capable of permanent useful improvement**

You are instructed that neither physical occupation, cultivation, nor residence is necessary to constitute actual adverse possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the property has been evidenced by open, visible, continuous acts of ownership, known to and acquiesced in by the real owner, or so far notorious as to be presumed to be within his knowledge.<sup>45</sup>

**C. OPENNESS, NOTORIETY, AND EXCLUSIVENESS OF POSSESSION**

**§ 682. Necessity of notoriety of possession**

**§ 682(1). Alabama**

The court charges the jury that the burden of proving adverse possession is upon the defendant; and, if the evidence fails to reasonably satisfy the jury that a sufficient portion of the lands in suit was within defendant's inclosure, that would attract the attention of a reasonably prudent owner that the inclosure included a portion of the land in suit, then such inclosure would not be sufficiently notorious to extend the possession to the lands outside the inclosure.<sup>46</sup>

The court charges the jury that the possession of land which the law protects is open and notorious possession, and not a secret or furtive possession.<sup>47</sup>

**§ 682(2). Michigan**

You are instructed that the owner need not move to retake possession till he learns or ought to know that his lands are taken possession of.<sup>48</sup>

You are instructed that, in order to constitute such a possession as would bar the plaintiff's title, or establish a title in ——— by prescription, the use must have been of so open, visible, and notorious a character as to be equivalent to notice to the persons living in the immediate neighborhood, or the owner, if residing in that locality, that ——— was in possession, claiming to own the

<sup>44</sup> *Owen v. Moxon*, 52 So. 527, 167 Ala. 615.

<sup>45</sup> *Merwin v. Morris*, 42 A. 855, 71 Conn. 555.

<sup>46</sup> *Lawrence v. Doe ex dem. Ala-*

*bama State Land Co.*, 41 So. 612, 144 Ala. 524.

<sup>47</sup> *Edmondson v. Anniston City Land Co.*, 29 So. 596, 128 Ala. 589.

<sup>48</sup> *Hockmoth v. Des Grands Champ*, 39 N. W. 737, 71 Mich. 520.



land and controlling it as his own. Such possession must be actual, continued, visible, notorious, adverse, and hostile for the period of time required by the statute; and if ———'s possession was not so actual, continued, visible, notorious, adverse, and hostile as to indicate to persons residing in the neighborhood that he had the exclusive control and management of the land, the limitation provided for by the statute would not afford the defendants any benefit.<sup>49</sup>

### § 683. Facts showing notorious possession

Effect of slight encroachment on land of another, see post, § 697.

#### § 683(1). Alabama

The court charges the jury that openness and notoriety and exclusiveness of possession are shown by such acts in respect of the land in its condition at the time as comport with ownership—such acts as would ordinarily be performed by the true owners in appropriating the land or its avails to his own use, and in preventing others from the use of it as far as reasonably practicable.<sup>50</sup>

#### § 683(2). Nebraska

You are instructed that adverse possession may be evidenced by such use of the lots in question by defendant or his privies as would indicate to a passer-by, and to the owner if he went to them, that they were used and claimed by some one.<sup>51</sup>

You are instructed that no particular act or series of acts were necessary to be done on the land by defendant in order to make his possession actual and available to him in this case as a defense. Any visible or notorious acts which the jury may find from the evidence clearly show an intention on his part to claim ownership and possession will be sufficient to establish his claim of adverse possession; and such acts are equally available to him, whether they were done either personally, or by his lessees or other privies or agents.<sup>52</sup>

### § 684. Effect of actual possession as notice

#### § 684(1). Alabama

The court charges the jury that if they find from the evidence that J. B. bought the lands in the fall of ——— from ———, and went into actual adverse possession of the lands by himself and by tenant, claiming them as his own from his said purchase, then

<sup>49</sup> Murray v. Hudson, 32 N. W. 889, 65 Mich. 670.

<sup>50</sup> Alabama State Land Co. v. Matthews, 53 So. 174, 168 Ala. 200.

<sup>51</sup> Omaha & Florence Land & Trust

Co. v. Hansen, 49 N. W. 456, 32 Neb. 449.

<sup>52</sup> Omaha & Florence Land & Trust Co. v. Hansen, 49 N. W. 456, 32 Neb. 449.

his adverse possession would run from that time, although he did not receive his deed from ——— till ———.<sup>53</sup>

**§ 684(2). Virginia**

The court instructs the jury that if they believe from the evidence in this case that ——— and the defendants to whom he conveyed same were at any time living upon, occupying, and in actual possession of the land in controversy, then such possession during its continuance was notice to all persons whomsoever of whatever claim said ——— and said defendants had to said land in question.<sup>54</sup>

The court further instructs the jury, if they believe from the evidence in this case that ——— was at any time living upon, occupying, and in actual possession of the land in question, then such possession during its continuance was notice to all persons whomsoever of whatever claim said ——— had to said land in question.<sup>55</sup>

**§ 685. Character of fence inclosing land**

You are instructed that the fence claimed to inclose the lands must be a permanent one. The mere inclosing a portion of the lands of an adjacent owner with a pole or brush fence does not amount to taking exclusive possession. Such a fence does not indicate an intention to claim to own the land, and does not show adverse possession.<sup>56</sup>

**§ 686. Effect of possession of small part of land in dispute**

The court charges the jury that, in order to sustain the defense of adverse possession, the possession must have been actual, open, notorious, and continuous for a period of ——— years before suit brought; and, if the possession was of such a small portion of the land sued for that a reasonably prudent owner would not have notice from it that his lands were included in such inclosure, then the possession would be insufficient to sustain the defense of adverse possession of any of the lands sued for outside of the inclosure.<sup>57</sup>

<sup>53</sup> *Barron v. Barron*, 25 So. 55, 122 Ala. 194.

<sup>54</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

<sup>55</sup> *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 54 S. E. 593, 105 Va. 574.

<sup>56</sup> *Hockmoth v. Des Grands Champ*, 39 N. W. 737, 71 Mich. 520.

<sup>57</sup> *Lawrence v. Doe ex dem. Alabama State Land Co.*, 41 So. 612, 144 Ala. 524.

**D. HOSTILITY OF POSSESSION****§ 687. Necessity, in general, that occupancy be under claim of ownership****§ 687(1). Iowa**

The jury are instructed that such possession must be under a claim of title or right to the land occupied, or, in other words, the fact of possession, and the intention with which it was commenced and held, are the only tests. If, therefore, the intention is wanting of claiming the title to the land against the true owner the possession will not be adverse, and, however long and continued, will not bar the owner's right to recover.<sup>58</sup>

**§ 687(2). Michigan**

You are instructed that, when a party claims to have acquired title to the lands of another by having held possession a length of time sufficient to bar the owner from retaking possession, he must, to succeed, show that his possession has been of that exclusive, permanent, open, hostile, and adverse character as to put the owner in the position of failing to assert his rights, knowing or having reason to know they were encroached upon, for full ——— years.<sup>59</sup>

**§ 687(3). Missouri**

The court instructs the jury that mere possession of the land described in the petition by defendants, or those under whom they claim, no matter for what period, will not divest plaintiff of his title thereto, unless such possession was adverse, as that term is elsewhere defined in these instructions; and therefore, even if you find that the defendant, or those under whom they claim, have been in possession of the land up to the line of the old fence, you must find for the plaintiff, unless you also find that such possession was adverse to plaintiff, and those under whom he claims.<sup>60</sup>

The court instructs the jury that by the term "adverse possession," as used in these instructions, is meant an actual, open, visible, notorious, adverse, and continuous possession under a claim of ownership; and it must be a possession indicated by such acts of possession and ownership exercised over the property as indicates to the world at large, including the owner of the legal or record title, that the party in possession claims to own the property in

<sup>58</sup> Davenport v. Sebring, 3 N. W. 403, 52 Iowa, 364.

<sup>59</sup> Hockmoth v. Des Grands Champ, 39 N. W. 737, 71 Mich. 520.

<sup>60</sup> Quisenberry v. Stewart, 219 S. W. 625.

his own right and not as subordinate to any other person, and such possession must be hostile to and inconsistent with the right of ownership of the holder of the paper title.<sup>61</sup>

**§ 687(4). North Carolina**

The court instructs the jury that if you find from the testimony that the plaintiffs' alleged possession of the small field near the corner of ——— extended to the extent of  $\frac{1}{2}$  part of an acre or less into the boundary of ———, and the jury further find that such possession of the plaintiffs was accidental or unintentional, and taken and held with no intent and purpose to claim title to the lands in controversy by reason of such possession, then you will find that such possession was not adverse to the defendant nor sufficient to vest title in the plaintiffs to the land in dispute.<sup>62</sup>

**§ 687(5). Virginia**

The court instructs the jury that in order to constitute adverse possession, it is not necessary that the land should be inclosed or built upon, but the entry by the defendants and those under whom they claim must have been made under a claim of title, with the intention of taking possession, and be accompanied with such visible, actual, adverse, continuous, and exclusive acts of ownership as from their nature indicate a notorious claim to and possession of the property, and if they believe from the evidence that the defendants and their father through whom they claim took possession under such a claim of title of the land in controversy, and have continuously, for the period of ——— years prior to the institution of this action, exercised such actual, hostile, visible, and exclusive acts of ownership over the land as, from their nature, indicated a notorious claim to and possession of the property, they must find for the defendants.<sup>63</sup>

**§ 687(6). West Virginia**

The court instructs the jury that the possession of land which the law protects is open and notorious possession, and not a secret or a furtive possession, and further, that if adverse possession is held without color of title, such possession is limited to the portion actually occupied, and that to constitute adverse possession there must be an actual claim of present ownership, accompanied with possession, and possession with mere intent to claim it in the

<sup>61</sup> *Quisenberry v. Stewart*, 219 S. W. 625.

<sup>62</sup> *Waldo v. Wilson*, 92 S. E. 692, 173 N. C. 689.

<sup>63</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

future is not adverse possession, and that adverse possession must be hostile in its inception and continue uninterruptedly for ten years; it must be open, notorious, adverse, exclusive, and must be held during all of such time under a claim of ownership by the occupant; and all of these facts must be proved by a preponderance of the evidence, and the possession, to be adverse, must be such as was consistent with the nature of the property, and is indicative of an honest claim of ownership, and adverse possession is not proved by inference, but must be proved by clear and positive proof, and to constitute adverse possession it must appear from the evidence that what the adverse claimant did on the land was not with the leave or permission of the owner, but was done under a claim of right in himself, and in hostility to the right of the owner; and if you believe from the evidence that M. entered into possession of any part of the lands in controversy with the consent of R., the owner, for any other purpose except to claim the land as his own, such possession alone, no matter how long it is continued, will never bar the right of the owner to take possession of his land when he sees fit to do so.<sup>64</sup>

**§ 688. Effect of mere trespass**

The court instructs the jury that, where a party enters upon land and takes possession without claim of title, his acceptance is subservient to the paramount title, not adverse to it. It is nothing more than a trespass, and, no matter how long continued, can never ripen into a good title, and, where the occupant expressly disclaims title, he cannot, of course, acquire title by adverse possession.<sup>65</sup>

**§ 689. Character of claim asserted**

The court instructs the jury that a claim of title, in order to be hostile for the purpose of an effective adverse possession, must be a claim to title or ownership in fee. A claim simply of an unexpired term of years is not in hostility to, but in accord with, the true title.<sup>66</sup>

**§ 690. Necessity of claim of present ownership**

The court charges you that, to constitute adverse possession, there must be an actual claim of present ownership, accompanied

<sup>64</sup> Billups v. Woolridge, 91 S. E. 1082, 80 W. Va. 13. It was objected to this instruction that it indicated that the plaintiff was owner of the land in dispute, unless the defendant

had acquired good title by adverse possession.

<sup>65</sup> Carr v. Mouzon, 68 S. E. 661, 86 S. C. 461.

<sup>66</sup> Carr v. Mouzon, 68 S. E. 661, 86 S. C. 461.

with possession, and a possession with a mere intention to claim in the future is not adverse possession.<sup>67</sup>

### § 691. Effect of claim to improvements

The jury are instructed that if defendants, during the time they have held this land in dispute, only claimed to own the improvements made on said land, then no length of possession will give them title to the land in dispute; and in considering this case you will take into consideration the acts and declarations of the defendants, and their statements of the claim made by them, and if the evidence offered upon the trial of this cause satisfies you that the claim of defendants was a claim for improvements only, then you must find for the plaintiffs.<sup>68</sup>

### § 692. Original entry into possession in subordination to title of another

#### § 692(1). Alabama

The court instructs the jury that if ——— once went into the possession and control of the land for his sister, recognizing her title, then his possession continued to be her possession, unless he brought the knowledge home to her by word or act that he no longer claimed the possession for her, but claimed it adversely to her, and for himself; and the burden is on the defendant to show this notice to her of his adverse claim.<sup>69</sup>

#### § 692(2). West Virginia

The jury are further instructed that the defendants, to make out a title by adverse possession, must show that such possession was adverse in its inception; and where the entry is under the title of the legal owner, the holder cannot controvert that title without an express disclaimer, or its equivalent, and the assertion of an adverse title with notice to the owner.<sup>70</sup>

### § 693. Permissive occupancy as tenant

You are instructed that, if you find from the evidence that the plaintiff held possession and claimed ownership of the strip of land in controversy for seven years before the defendant took possession about the first of the present year, this would vest title in the plaintiff if adverse, and the testimony as to the alleged rent contract can only be considered to determine whether the possession of the plaintiff prior to the time of taking possession by the

<sup>67</sup> Edmondson v. Anniston City Land Co., 29 So. 596, 128 Ala. 589.

<sup>68</sup> Davenport v. Sebring, 3 N. W. 403, 52 Iowa, 364.

<sup>69</sup> Inglis v. Webb, 23 So. 125, 117 Ala. 387.

<sup>70</sup> Maxwell v. Cunningham, 40 S. E. 499, 50 W. Va. 298.

defendant was adverse to the right or claim of the defendant, and cannot be considered at all unless you find that the rent contract was made unconditionally.<sup>71</sup>

**§ 694. Encroachment in constructing boundary fence or in marking out boundaries**

The court instructs the jury that if you believe from the evidence that the plaintiffs and their predecessors in interest occupied the premises in dispute, claiming to be the owners thereof, and having the same inclosed by a fence for a period of ——— years prior to the date that defendants took possession and disputed the ownership of the plaintiffs, your verdict should be for plaintiffs.<sup>72</sup>

**§ 695. Same—Intention to claim only to true line**

**§ 695(1). Alabama**

The court charges the jury that if two adjacent landowners claim up to a certain line, believing it to be the true line, and intending to claim only to the true line, wherever the true line may be, and it afterwards develops that the line to which they claim is not the true line, then their holding is not adverse.<sup>73</sup>

**§ 695(2). Iowa**

You are instructed, on the other hand, that, if, when the defendant took possession of the strip of land in controversy, he only intended to occupy and claim the government subdivision of the land described in his deed, but by mistake extended his possession too far north, and included the disputed strip, and has since occupied and cultivated it, with no intention of claiming it as his own, unless it was in fact included within the true boundaries of the land described in his deeds, then his possession, however long continued, was not adverse; and, if you so find, your verdict will be for the plaintiff.<sup>74</sup>

The court instructs the jury that, where the intention in taking possession of a piece of land is to occupy only up to the true line, no occupancy beyond that is adverse, or, in other words, where one takes possession of a piece of land, and claims a right to occupy the same up to the true line only, and by mistake of measurement, or otherwise, takes possession beyond the true line

<sup>71</sup> Turquett v. McMurray, 161 S. W. 175, 110 Ark. 197.

<sup>72</sup> Sommer v. Compton, 96 P. 124, 52 Or. 173. This instruction applies, although there is a mistake as to the true boundary.

<sup>73</sup> Cooper v. Slaughter, 57 So. 477, 175 Ala. 211.

<sup>74</sup> Heinz v. Cramer, 172 N. W. 173, 84 Iowa, 497,



and occupies it for the statutory period, he acquires no title by such occupancy.<sup>76</sup>

§ 695(3). **Kansas**

The court instructs the jury that if, during the ——— years, or any part thereof, next preceding the commencement of this action, the defendant, though in possession of the strip in controversy, intended only to claim to the true west boundary line of his quarter sections, then his possession was not hostile or adverse, and such possession gave him no title to the strip in controversy in this case.<sup>76</sup>

You are instructed that, although you may believe from the evidence that the fence dividing the subdivisions of land now owned by the parties to this action was constructed west of the true line, and that the defendant and his grantors have been in possession of the tract of land now in dispute lying east of the fence for a period of more than ——— years next preceding the commencement of this action, yet if you believe from the evidence that such fence was constructed under an agreement as to the location of the true line with the intention of placing it upon the true line, not with the intention of fixing a permanent boundary, but simply locating it upon the true line, each party claiming up to the true line of said tracts, then you are instructed the occupancy of such disputed strip by the defendant or his grantors would not constitute adverse possession until after the defendant or his grantors had notified the plaintiff or the parties under whom he claims of the adverse character of the occupancy of said disputed strip of land.<sup>77</sup>

§ 695(4). **Missouri**

The court instructs the jury that even if the defendants, and those under whom they claim, have been in the actual possession of the land described in the petition up to the line of the old fence for more than ——— years prior to ———, yet if they only claimed and intended to claim ownership up to the true boundary line, wherever it might be, then such possession was not adverse to plaintiff and to them under whom he claims, and plaintiff is entitled to recover possession of the land to the true boundary line, no matter how long defendants, or those under whom they claim, may have been in the possession thereof.<sup>78</sup>

<sup>76</sup> *Evert v. Turner*, 169 N. W. 625, 184 Iowa, 1253.

<sup>77</sup> *Kyte v. Chessmore*, 188 P. 251, 106 Kan. 394.

<sup>77</sup> *Kyte v. Chessmore*, 188 P. 251, 106 Kan. 394.

<sup>78</sup> *Quisenberry v. Stewart*, 219 S. W. 625.



The court instructs the jury that the defendants in this case claim that more than \_\_\_\_\_ years ago the old fence was built, and that it was then agreed between those under whom plaintiff and defendants respectively claimed that said fence should be taken as a true boundary line. Even if you should find from a fair preponderance of the evidence that such an agreement was made more than \_\_\_\_\_ years prior to \_\_\_\_\_, nevertheless you should find for the plaintiff, unless you further find that the defendants, or those under whom they claim, more than \_\_\_\_\_ years prior to said \_\_\_\_\_, took possession of all the land up to the line of said fence and kept the possession thereof continuously for more than \_\_\_\_\_ years under a continuous claim of ownership, without regard to where the true line might in fact be; and although the defendants, or those under whom they claim, may have taken possession of the land up to the old fence more than \_\_\_\_\_ years since, claiming the fence to be the true boundary, yet if they held the land subject to correction of the boundary, then they could acquire no title beyond their true line.<sup>79</sup>

The court instructs the jury that if the defendants, or those under whom they claim, were in possession of the land described in the petition up to the old fence under a mistaken belief that the old fence was on the true line, and without intending to claim any land beyond the true line, then your verdict must be for the plaintiff.<sup>80</sup>

**§ 695(5). Nebraska**

You are instructed that title to real estate by adverse possession can only be acquired under claims of absolute ownership, and if, where two or more parties are the owners of adjoining lands, and the dividing line between them is not definitely known, and each claim only so much land as they would be entitled to according to government survey, no title to real estate can be acquired by either of them under such circumstances by adverse possession, and the dividing line between them will be that established by the government survey, whenever the same is found and established, and, no matter which one holds possession of the land prior to the establishing of the true line according to government survey, their rights and ownership to the land will be governed by said survey and boundary lines, whenever found and established.<sup>81</sup>

<sup>79</sup> Quisenberry v. Stewart, 219 S. W. 625.

<sup>80</sup> Quisenberry v. Stewart, 219 S. W. 625.

<sup>81</sup> Williams v. Shepherdson, 95 N. W. 827, 4 Neb. (Unof.) 608.

§ 695(6). *South Carolina*

You are instructed that, where the owners have a fence which they consider the true line and each claims only to the true line, wherever that may be, they are not bound by the location of the fence, but must conform to the true line when it is ascertained.<sup>82</sup>

§ 696. *Same*—Intention to claim to boundary fence, whether true line or not

You are instructed that adjacent proprietors are supposed ordinarily to claim to the true line; but, if it appears from a visible boundary mark like a fence, a substantial fence, and if it also appears, in addition to that, from improvements maintained, that Mr. G. intended to claim title to that property up to that fence, whether it was the right line or not, and if the circumstances and character of his occupation was such as to give notice to I. that that was his claim, and if he did so occupy that property for more than ——— years before the bringing of this suit, then he would obtain title to the property in dispute by statute of limitations by ——— years' use under adverse possession. But to maintain that adverse possession of title under the circumstances it was necessary that the occupation must be such as to satisfy the jury that he claimed up to that point as his land, whether it was the true line or was not the true line, and that his occupation was such as to give notice to I. that that was his claim.<sup>83</sup>

§ 697. *Same*—Slight encroachment§ 697(1). *Michigan*

You are instructed that you cannot presume that the owner of the west half of the southwest quarter of ———, in going along the highway where the fence is shown to be nearly on the line, and seeing a fence extending north, has thereby notice that the fence incloses any portion of his land. On the contrary, he is justified in assuming that his neighbor is only inclosing what he is entitled to.<sup>84</sup>

§ 697(2). *North Carolina*

The court instructs the jury that when two persons own adjoining land, and one runs the fence so near the line as to induce

<sup>82</sup> *Holden v. Cantrell*, 84 S. E. 826, 100 S. C. 265.

<sup>83</sup> *Ingalls v. Gunderson*, 157 N. W. 1055, 37 S. D. 295. This instruction lays down the rule as prevailing in some jurisdictions, but the court, in this case, expressly declines to say

whether in this jurisdiction one might not acquire title by adverse possession, although not intending to claim to other than to the true line.

<sup>84</sup> *Hockmoth v. Des Grands Champ*, 39 N. W. 737, 71 Mich. 520.

the jury to find that any slight encroachment was inadvertently or unintentionally made, and that it was the purpose to run the fence on the line, the possession constituted by such inclosure may be regarded as permissive, and not adverse even for the land inside the inclosure.<sup>85</sup>

The court instructs the jury that if the possession taken by the plaintiffs under their claim of title at or near the corner of ——— was of a portion of the lands covered by the defendant's paper title so very minute that the true owner in the exercise of ordinary diligence might remain ignorant that such possession included his land, or might fairly mistake the character of the possession and the intention of the occupants, then the jury may, if they are so satisfied from all the evidence, find that such possession of so small a part of the land in dispute was not adverse to the true owner.<sup>86</sup>

The court instructs the jury that if you find from the testimony and by its greater weight that the extent of the possession of the plaintiffs and their agents, if any possession they had of any part of the land covered by entry ——— at or near the corner of entry ———, was so limited or small as to afford a fair presumption, that the plaintiffs' agents and tenants mistook their boundaries or did not intend to set up a claim within the lines of the grant or deeds under which the defendant ——— claims, then you would be justified in finding that such possession was not adverse.<sup>87</sup>

### § 698. Necessity of claim of land to a definite boundary

#### § 698(1). Nebraska

The jury are instructed that if the jury find that defendant, by himself or his employees, lessees, or privies, has had exclusive control and actual occupancy of said lots, or any of them, under a claim of ownership, for the full period of ——— years next before the commencement of this suit, the fact that he may have occupied or had inclosed with them other grounds, or even portions of the public streets, would not of itself be sufficient to prevent a recovery by the defendant as to such lots, provided the defendant exercised such acts of ownership and control over such lots as to indicate clearly his intention to claim the same as if his fence had inclosed only said lots, and, as to lots so occupied and controlled, the jury should find in favor of the defendant.<sup>88</sup>

<sup>85</sup> Waldo v. Wilson, 92 S. E. 692, 173 N. C. 689.

<sup>86</sup> Waldo v. Willson, 92 S. E. 692, 173 N. C. 689.

<sup>87</sup> Waldo v. Wilson, 92 S. E. 692, 173 N. C. 689.

<sup>88</sup> Omaha & Florence Land & Trust Co. v. Hansen, 49 N. W. 456, 32 Neb. 449.

## § 698(2). Pennsylvania

The court instructs the jury that title acquired by adverse possession must be by a possession for ——— years or more, which is open, notorious, continuous, uninterrupted, and adverse or hostile to the rights of the owner, and it must be indicated in some way upon the ground, by marks or boundaries. It would not do for a man to go and squat on a big piece of land, that had no fences or boundaries, except the surveyor's boundaries, and claim that he owned the whole piece of land because he lived in the house for ——— years; in order for him to acquire possession of a certain piece of land, it must be marked in such a way that its boundaries could be easily ascertained or determined, and it must have the evidences upon the ground of work done or acts done which would lead a jury to the conclusion from all the evidence in the case that the party claiming by right of adverse possession, had, by his acts, and for the period of ——— years or over, continuous, open, notorious, uninterrupted, and hostile possession of the land. There would have to be such a marking of the boundaries, either by natural boundaries or by artificial, as would fairly satisfy you that there was a certain piece of land there, marked out.<sup>89</sup>

## § 698(3). South Carolina

You are instructed that the defendant sets up first, under the plea of statute of limitations, a presumption of deed by possession prior to the deed of ——— by way of parol agreement between his father and himself in reference to this land under which he went into possession, and he sets up as color of title a plat. I think the face of it covers about 4,000 acres of land. Under that defendant, according to his own statement on the stand, claimed 500 acres of that land. Now, the rule is, any paper showing the extent of a man's boundaries under which he claims, is made color of title; and if the defendant had claimed the whole of that land, and set up that as his color of title, then he could have recovered so much of it as other people did not have a better title to. But when a man goes into possession of a part of a tract of land, say 4,000 acres, claiming only 500 acres, or 400 acres, as the case may be, of it, then the question is, does that color of title indicate at all what his boundaries are? I think not. I think, for the very same reason, a man living in any part of this county might say, "I own 500 acres of land, and I present the map of Aiken county

<sup>89</sup> Monroe Water Supply Co. v. Starnes, 88 A. 782, 242 Pa. 18.

as my color of title." Well, it is a very strong case against the defendant's view of that, and yet it illustrates the principle.<sup>90</sup>

**§ 699. Possession under instrument calling for less land than that embraced in boundaries designated by it**

You are instructed that it makes no difference that there should be more land embraced in the boundary than the writing calls for; possession under the writing, with boundaries defined, whether by course and distance or by natural boundaries, continued for ——— years uninterrupted, perfects the title to all the land embraced within the boundary.<sup>91</sup>

**E. CHARACTER OF POSSESSION AS AFFECTED BY RELATIONS OF PARTIES**

**§ 700. Possession by vendor as against vendee**

The court instructs the jury that the defendant, having conveyed the property in question to the plaintiff, cannot be deemed to hold adversely to the said plaintiff, unless you believe from the evidence that the defendant made an explicit disclaimer of any holding under said plaintiff and made a notorious assertion of right in itself. Nothing less than such an explicit disclaimer and notorious assertion of right by the defendant will be enough to change the character of defendant's possession and to make its holding adverse to the plaintiff.<sup>92</sup>

**§ 701. Possession by tenant or licensee as against landlord or licensor**

**§ 701(1). Kentucky**

The court instructs the jury that if you believe from the evidence that the defendant occupied the lands in controversy either under a written or oral contract by which he agreed to hold the lands as the tenant of plaintiffs' predecessor in title, ———, then defendant's possession thereof was not adverse to plaintiffs, and you cannot find for him either under instruction No. ——— or instruction No. ———.<sup>93</sup>

**§ 701(2). Michigan**

You are instructed that, if you find that the trustees of the ——— Church recognized that the plaintiff was the owner of the lot in

<sup>90</sup> Garvin v. Garvin, 19 S. E. 79, 40 S. C. 435.

<sup>91</sup> Holly River Coal Co. v. Howell, 15 S. E. 214, 36 W. Va. 489.

<sup>92</sup> Trask v. Success Mining Co., 155 P. 288, 28 Idaho, 483.

<sup>93</sup> Le Moyne v. Neal, 164 S. W. 964, 158 Ky. 316.

question in the spring of ———, and requested permission of the council of ——— to remove their old church building upon this lot for temporary purposes, and that such permission was granted by the council, and that, acting under that permission solely, the church people moved on said lot, then I charge you that plaintiff is entitled to recover.<sup>94</sup>

You are instructed that it matters not what may have been in the minds of the church people, if they did obtain permission from the council, before their possession would commence to be adverse, they must notify the landlord of such hostility before adverse possession can commence.<sup>95</sup>

#### § 701(3). Missouri

You are instructed that, although you may believe from the testimony in the case that in the year ——— the defendant agreed with plaintiff and one M., the then occupant of said land, that he (defendant) would assume the obligations of said M. contained in a lease of said lands by M. from plaintiff, and that defendant agreed to hold said lease as a tenant of plaintiff, yet, if the court finds that at the time of making said lease between M. and plaintiff the said M. was in possession of said land as the tenant of B. under the written lease read in evidence by defendants, and dated on the ——— day of ———, ———, then the attempted leasing of said lands by plaintiff to M. was void as to B., and the subsequent agreement by defendant with plaintiff to take M.'s place in said lease, and hold said land as a tenant under plaintiff was void, and did not constitute defendant as the tenant of plaintiff, provided the court finds that defendant purchased said lands from B. and took possession of said land as such purchaser.<sup>96</sup>

#### § 702. Estoppel of tenant to dispute title of landlord

The court declares the law to be that if M., in ———, leased the land from B., and thereunder received from B. possession thereof, and in ——— said M. attorned to plaintiff without the knowledge and consent of B., and in ——— defendant bought out said M., and took from said M. an assignment of his holding under plaintiff, and accepted plaintiff as his landlord, and afterwards said defendant purchased from B. his title to the land, the said attornment and the said proceedings thereunder are utterly void as a matter of public policy, and the plaintiff obtained no posses-

<sup>94</sup> City of St. Joseph v. Seel, 80 N. W. 987, 122 Mich. 70.

<sup>95</sup> City of St. Joseph v. Seel, 80 N. W. 987, 122 Mich. 70.

<sup>96</sup> Cook v. Farrah, 16 S. W. 692, 105 Mo. 492.

sion either by said attornment or the said proceedings thereunder; and although B. may have been privy to said proceedings of said defendant, nevertheless neither he nor the said B. is estopped in this case from disputing the said landlordship or the title of plaintiff.<sup>97</sup>

**§ 703. Possession by one tenant as against cotenant**

The court instructs the jury that L., under the law, when his two sisters died intestate, acquired an interest as tenant in common in the land, if the land had been exchanged with the sisters for their interest in their father's lands; and, if he took control of the land as a tenant in common with his sister A., then his possession was the possession of A. One tenant in common cannot claim adversely to another until he first brings it to the knowledge of his cotenant that he is claiming it adversely to such tenant.<sup>98</sup>

**§ 704. Possession by donor of land as against donee**

You are charged further, to be considered by you in connection with the charge given to you, the following: That if C. purchased the land in question from ———, and gave the same to E., and placed her in possession of the same, then, before he could hold adversely to those holding under E., there would have to be some act on the part of the said C. repudiating the claim of E., before the statute of limitation would begin to run against the heirs of E., and if you should find that there was nothing done by C. to put those holding under E. on notice, you will answer special issue No. ——— No; otherwise, answer the same Yes.<sup>99</sup>

**§ 705. Possession by widow as against heirs of decedent**

The court charges the jury that, if they believe from the evidence that ——— went into possession of the lands sued for as the widow of ———, then the statute of limitations will not begin to run in her favor until knowledge of such adverse claim is brought home to the plaintiff or those under whom he claims.<sup>1</sup>

**§ 706. Possession as against remainderman**

You are instructed that if you find that, at the termination of the life interest of Mrs. T. some person under whom defendant claims, under whom he derives title, took possession of this land, and excluded the remainderman, F. T., or those to whom he had willed the property, from all interest of F. T. in it, then that would

<sup>97</sup> Cook v. Farrah, 16 S. W. 692, 105 Mo. 492.

<sup>98</sup> Inglis v. Webb, 23 So. 125, 117 Ala. 387.

<sup>99</sup> Kendrick v. Polk (Tex. Civ. App.) 225 S. W. 826.

<sup>1</sup> Hays v. Lemoine, 47 So. 97, 156 Ala. 465.



give rise to the running of the statute of limitations. And if that holding continued notoriously and actually for ——— years or more, it would oust the parties who sought to derive title under F. T., and would mature into a perfect title, which might be passed by partition sale, or any other sale to the defendant in this case. But it would require full ——— years' possession by some one person after the death of Mrs. T. before such a title by adverse possession could mature.<sup>2</sup>

**§ 707. Possession by grantee of life tenant as against remainderman**

The court charges you that adverse possession does not run against remaindermen while the life tenant is living, and they cannot be deemed to be guilty of delay in asserting their right during said period.<sup>3</sup>

The court charges you that the statute of limitations cannot run against the remaindermen during the existence of the life estate, and no right of action vests in the remaindermen during the said time for the recovery of the possession of the land, and the court further charges you that, if you are reasonably satisfied from the evidence that the plaintiffs are remaindermen, and the defendant grantee of the same life tenant, and if you are reasonably satisfied that the said life tenant died in ———, then no adverse possession such as would ripen into a title existed in favor of the defendant prior to the death of the life tenant.<sup>4</sup>

**§ 708. Possession by wife as against husband**

The court instructs the jury that, if you are satisfied from the whole evidence that this property was originally paid for with the money of Mrs. ———, or that the property for which the property in controversy was exchanged was so paid for, this may be looked to by the jury, in connection with all the other evidence, in determining the nature of the possession alleged to be held by said Mrs. ———.<sup>5</sup>

**F. COLOR OF TITLE AND GOOD FAITH .**

**§ 709. Necessity of color of title**

**§ 709(1). Alabama**

The jury are instructed that if you believe from the evidence that ——— bought land in the fall of ——— from Mrs. ——— and

<sup>2</sup> Mitchell v. Cleveland, 57 S. E. 33, 78 S. C. 432.

<sup>3</sup> Vidmer v. Lloyd, 63 So. 943, 184 Ala. 153.

<sup>4</sup> Vidmer v. Lloyd, 63 So. 943, 184 Ala. 153.

<sup>5</sup> Stiff v. Cobb, 28 So. 402, 126 Ala. 381, 85 Am. St. Rep. 38.



went into actual adverse possession of such land by himself and by his tenant, claiming it as his own by virtue of said purchase, then his adverse possession would run from that time, although he did not receive his deed from Mrs. \_\_\_\_\_ until \_\_\_\_\_.<sup>6</sup>

§ 709(2). **Kentucky**

The court says to the jury that they will find for the plaintiff unless they believe from the evidence that \_\_\_\_\_ entered upon the land in controversy and outside his patent boundaries, or some parts thereof, for at least \_\_\_\_\_ years before the entry of the plaintiff, or those under whom it claims, and before the filing of its petition herein, and that he and those claiming under him used, occupied, controlled, and claimed the same or some parts thereof as their own continuously, openly, and notoriously for a period of \_\_\_\_\_ years to a well-defined or marked boundary; and if they so believe they will find for the defendants such land and the poplar, cucumber, and ash trees standing upon such lands as they believe from the evidence they have so held that bears the brands of the letter "C" or figure "2" and the figure "4" inclosed in a circle, unless they believe as in instruction No. \_\_\_\_\_.<sup>7</sup>

You are instructed that if you believe from the evidence that the mouth of \_\_\_\_\_ creek is at "X." but further believe from the evidence that defendant and those under whom he claims title have been in the actual, open, adverse and continuous possession of the land in controversy for more than \_\_\_\_\_ years prior to the institution of this action, holding and claiming the same to a well-defined boundary, they should find for defendant, unless they believe he is estopped to assert claim to it as defined in instruction No. \_\_\_\_\_.<sup>8</sup>

§ 709(3). **Nebraska**

The jury are instructed that it is not necessary that one who takes possession of lands or lots, and holds the same adversely to the owner should have a deed or other written evidence of title in order to cause the statute of limitations to run in his favor; but it is sufficient if he take actual, open possession, under a claim of ownership, and continue it for the full period of \_\_\_\_\_ years. If he do so, his title and ownership are complete.<sup>9</sup>

<sup>6</sup> *Barron v. Barron*, 25 So. 55, 122 Ala. 194.

<sup>7</sup> *Kentucky Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.*, 157 S. W. 1109, 154 Ky. 523.

<sup>8</sup> *Ward v. Middleton*, 124 S. W. 823. Defendant had no paper title to the land in controversy, and whether or

not plaintiff had paper title depended upon the correct location of the mouth of the creek mentioned in the instruction.

<sup>9</sup> *Omaha & Florence Land & Trust Co. v. Hansen*, 49 N. W. 456, 32 Neb. 449.

**§ 710. What constitutes color of title****§ 710(1). South Carolina**

The court instructs the jury that, although the sheriff's sale and the deed made in pursuance of that sheriff's sale, under which E. entered into possession of the land in controversy, was a nullity, yet since the deed purported to designate by metes and bounds a tract of land and purported to convey that land to E., it constituted color of title; and if E. took possession of that ——— acres of land under that deed or supposed deed, and held it continuously, either himself or by somebody that was holding it under him and in pursuance of some arrangement with him, if he held it continuously for ——— years from the date of that sheriff's deed, ———, that would be sufficient to establish in E. a title by adverse possession.<sup>10</sup>

**§ 710(2). Virginia**

The court instructs the jury that color of title is a writing purporting to convey land, and if they believe from the evidence in this case that the defendants or their father under whom they claim entered upon any part of the land described in the deeds of ——— and ———, from ——— to ———, and held the same adversely for a period of ——— years prior to the institution of this action claiming the same, under said color of title, then you must find for the defendants, it matters not what grant you believe it lies in.<sup>11</sup>

The court instructs the jury that, even should you believe by a preponderance of the evidence that the land in controversy lies within the patent to ——— yet if you believe that the plaintiff has not proven the same had been conveyed by ———, prior to ———, to ———, or that the defendants have held the same or any part thereof in adverse possession as defined in the instructions given in this case on adverse possession for a period of ——— years prior to the institution of this suit under color of title, then you must find for the defendants. And in this connection the court tells the jury that any deed or writing purporting to convey land constitutes color of title, and it makes no difference whether the color of title is a good or bad title, or whether the same has been lost or seen by anybody but the parties thereto, so it sufficiently describes the land.<sup>12</sup>

<sup>10</sup> Kennedy v. Kennedy, 68 S. E. 664, 86 S. C. 483.

<sup>11</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>12</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

**§ 711. Payment of consideration for land**

The court charges the jury that it is wholly immaterial what M. paid F., or what defendant paid M. for the land sued for, if the defendant has held the land sued for adversely for more than ten years before the commencement of this suit.<sup>13</sup>

**§ 712. Claim under gift****§ 712(1). Kentucky**

The jury are instructed that if the jury believe from the evidence that the plaintiff made an absolute and unconditional verbal gift of his entire title to the land described in the petition to his son R., and in pursuance of such gift, he, the said R., entered into the possession thereof, claiming title thereto according to such gift, and that such possession of said land continued for a period of fifteen years previous to R.'s death, and during such period his said possession was actual, visible, and notorious, then such possession is adverse, and the jury should find for the defendant.<sup>14</sup>

**§ 712(2). Missouri**

The jury are instructed that if the jury believe from the evidence that ——— gave the property in question to the defendant absolutely and unqualifiedly, and that the defendant, prior to the death of ———, took possession, pursuant to such gift, of the premises described in the petition, claiming title according to such gift, and that such possession was visible, notorious, continued, adverse and actual, and that such possession continued for a period of ——— years next before the commencement of this suit, and that such possession was visible, notorious, continued, adverse, and actual for that period, then the jury should find for the defendant.<sup>15</sup>

**§ 713. Void tax deed**

The court instructs the jury that, to acquire title by adverse possession under a void tax deed, the statute of limitations does not begin to run until actual possession is taken thereunder, and to be adverse the party setting up such adverse possession, and those through whom he or she claims, must have been in actual possession uninterruptedly during a continuous period of three consecutive years thereafter, and unless you believe from the evidence that actual possession was taken by defendant and her predecessor in title under the tax deed from the judge of probate to ———, and that such possession was continuous for a period of three consecu-

<sup>13</sup> *Anniston City Land Co. v. Edmondson*, 30 So. 61, 127 Ala. 445.

<sup>14</sup> *Thomson v. Thomson*, 20 S. W. 373, 93 Ky. 435, 14 Ky. Law Rep. 513.

<sup>15</sup> *Coshov v. Otey*, 222 S. W. 804.

tive years you must find for plaintiff for the northwest quarter of the northwest quarter, unless you further believe from the evidence that defendant and her predecessors in title under the deed of ——— had ten years of adverse possession to the said quarter section, and unless you believe from the evidence that defendant has acquired title by the statute of three consecutive years under a tax deed, or ten consecutive years under color of title, your verdict should be for plaintiff for said quarter section.<sup>16</sup>

**§ 714. Distinction between color of title and claim of title**

You are instructed that color of title and claim of title are not in their strict sense synonymous terms. To constitute color of title, a paper title—that is, a deed or other instrument purporting to convey title—is requisite; but claim of title may exist wholly in parol, and may be manifested by acts as well as by words; and if you find from the evidence that the defendant built a house or houses, a barn, and other outbuildings, dug a well or wells, planted an orchard, and otherwise improved and cultivated the premises in controversy, this is competent evidence tending to show claim of title on part of defendant upon which an adverse possession may be predicated, and which if continued for ——— years or more would bar the plaintiffs from maintaining this action.<sup>17</sup>

**§ 715. Necessity of good faith**

**§ 715(1). Alabama**

The court charges the jury that the actual claim of the lands sued for, without any reference to whether or not the claimants thought the title was good, is all the law requires as an element of claim of adverse possession.<sup>18</sup>

**§ 715(2). Missouri**

The court instructs the jury that if the defendant ——— had the land in dispute within her inclosure for a period of more than ——— years consecutively prior to the filing of this suit and during all that time held the open, exclusive, and adverse possession of the same, claiming title thereto, then such possession has ripened into a title in the defendants, although she may have known that the record title to such land was in other persons, and that her title to said land was in dispute.<sup>19</sup>

<sup>16</sup> Veitch v. Hard, 75 So. 405, 200 Ala. 77.

<sup>17</sup> Bartlett v. Secor, 14 N. W. 714, 56 Wis. 520.

<sup>18</sup> Barron v. Barron, 25 So. 55, 122 Ala. 194.

<sup>19</sup> Cousins v. White, 151 S. W. 737, 246 Mo. 296.

## § 715(3). Virginia

The court instructs the jury that adverse possession is the actual occupied possession under color and claim of title, and it is wholly immaterial whether this claim of title be under a good or bad, a legal or an equitable, title.<sup>20</sup>

## G. CONTINUITY AND DURATION OF POSSESSION

## § 716. Necessity of continuous possession for statutory period

## § 716(1). Missouri

The court instructs the jury that the defense of the statute of limitations is not to be made out by inference, and before the defendants can sustain such defense you must find from a fair preponderance of the evidence that the defendants, and those under whom they claim, have had and held, not only an open, visible, notorious, and adverse possession of the lands described in the petition, but also a continuous possession for a period of \_\_\_\_\_ years, at some time prior to \_\_\_\_\_; and if you find that the \_\_\_\_\_ year period of possession relied on by defendants was broken and interrupted at any time, then the possession taken subsequent to such interruption, as well as that held prior to the interruption, are distinct possessions and cannot be added or tacked together to make out such \_\_\_\_\_ year period, and such \_\_\_\_\_ year period must be complete and intact either before or after such interruption. In this connection you are further instructed that if the defendants, or those under whom they claim, at any time abandoned the said land and claimed or pretended to claim only to the true line, then such abandonment was an interruption in the possession as hereinabove mentioned. You are also further instructed that the burden is on the defendants to prove such adverse possession by a fair preponderance of the evidence.<sup>21</sup>

## § 716(2). Nebraska

You are instructed that if you find from the evidence that the possession and occupancy of the land in dispute by the plaintiff, while held by her, was broken or interrupted by the defendant claiming title thereto, with plaintiff's knowledge of such breach of possession or interruption, then the ten years would not begin to run until the time of such interruption, and you must determine from the evidence whether any such entry and breach of posses-

<sup>20</sup> Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 54 S. E. 593, 105 Va. 574.

<sup>21</sup> Quisenberry v. Stewart, 219 S. W. 625.

sion took place. This applies only to the question of title by adverse possession.<sup>22</sup>

### § 717. Temporary interruption by holder of legal title

#### § 717(1). Alabama

The court charges the jury that neither plaintiff's father—nor any of his children could obtain title to any part of the land in suit without having the exclusive, adverse possession thereof for a continuous period of ——— years, and, in order to establish such exclusive possession, it must be established reasonably to the satisfaction of the jury that neither Z. nor any of his heirs claiming under him were permitted to enjoy the possession thereof under their title even for a single day during the ten years, or even jointly or in common with the plaintiff's father.<sup>23</sup>

#### § 717(2). Texas

The jury are instructed that the action of the defendant in placing the wire around the land claimed by his wife would not be sufficient to interrupt the peaceable and continuous possession of the plaintiffs or those under whom they claim, if you find it was otherwise peaceable, adverse, and continuous, if you believe from the evidence that ———, who was then claiming said land, immediately upon discovering that said wire had been placed there, took it down and removed it.<sup>24</sup>

### § 718. Tacking possessions

#### § 718(1). Alabama

The court charges the jury that if they find from the evidence in this case that ——— and these defendants together have held the lands in controversy openly, notoriously, adversely, and exclusively, under a claim of title, from the year ———, then these defendants have a good title, and the plaintiff cannot recover.<sup>25</sup>

The court charges the jury that if you believe from the evidence that Mrs. ——— and J. B. had actual adverse possession of the lands sued for, claiming them as their own, and cultivating them, openly and notoriously, for more than ——— years before suit was brought for their recovery, in ——— then your verdict must be for the plaintiffs.<sup>26</sup>

The court charges the jury that it makes no difference when the

<sup>22</sup> Clark v. Thornburg, 92 N. W. 1056, 66 Neb. 717.

<sup>23</sup> Chastang v. Chastang, 37 So. 799, 141 Ala. 451, 109 Am. St. Rep. 45.

<sup>24</sup> Thomas v. Calahan (Civ. App.) 229 S. W. 602.

<sup>25</sup> Stiff v. Cobb, 28 So. 402, 126 Ala. 381, 85 Am. St. Rep. 38.

<sup>26</sup> Barron v. Barron, 25 So. 55, 122 Ala. 194.

adverse possession of Mrs. ——— and that of J. B., to whom she conveyed (if you find that she so conveyed), respectively, commenced, if the jury find from the evidence that both together held the land adversely for more than ——— consecutive years before the ——— day of ———, ———.<sup>27</sup>

**§ 718(2). Illinois**

The court instructs the jury, if you believe, from the preponderance of the evidence, that the grantors of the plaintiff held the open, notorious, adverse, hostile, peaceable, uninterrupted, and continuous possession of the land in question for some time, under claim of ownership thereto, and that they conveyed one from another down to the plaintiff herein, and that under said conveyance the plaintiff took possession of the land in question, and held the open, notorious, adverse, hostile, peaceable, uninterrupted, and continuous possession thereof, under claim and ownership, from the time of such conveyance to the time it is alleged in the declaration that the defendant took possession thereof, and that such possession of said grantors of the plaintiff and the possession of the plaintiff together amount to a period of ——— years or more prior to the time it is alleged in the declaration that the defendant took possession thereof, then the plaintiff would be the absolute owner of the said land. Then, if you further believe, from the preponderance of the evidence, that the defendant took and unlawfully withheld from the plaintiff the possession thereof, as alleged in the declaration, then you should find a verdict for the plaintiff.<sup>28</sup>

**§ 718(3). Nebraska**

The jury are instructed that if, as to any of the lots in controversy, the jury shall find that defendant took actual possession, and either in person, or by another person or persons, as his agents or lessees, held such possession for a time, and then sold his right to another, who continued in actual possession, and from whom he has since purchased it back, defendant may avail himself of their several occupancies in this action, provided that, taken together, they continued uninterruptedly for ——— years.<sup>29</sup>

**§ 718(4). South Carolina**

You are instructed that it is the established law, where one dies in possession of land and his heirs are there with him and remain in possession of the ancestor's possession, the law does, in a case

<sup>27</sup> Barron v. Barron, 25 So. 55, 122 Ala. 194.

<sup>28</sup> Lourance v. Goodwin, 48 N. E. 903, 170 Ill. 390.

<sup>29</sup> Omaha & Florence Land & Trust Co. v. Hansen, 49 N. W. 456, 32 Neb. 449.



like that, allow the ancestors and the heirs to put their possessions together to make up the ——— years.<sup>30</sup>

The jury are instructed that the defendants can tack the time during which they held possession with the time during which those under whom they claim held possession, so as to complete the statutory terms of adverse possession.<sup>31</sup>

§ 718(5). Virginia

The court instructs the jury that if they believe from the evidence that prior to the date of the deed of ——— in ———, W. executed a deed describing the land in controversy, and delivered the same to S., who was clearing or had cleared a portion thereof, and that S. continued to clear, occupy, and hold the land described in the said deed from W., or then entered thereon, or any part thereof, and continued to hold the same in the actual, continuous, and exclusive possession until the ———, and on that date or afterwards sold and conveyed the same to his sons and daughters, the defendants in this case, by writing describing the land in controversy and delivered to them the possession, and that they, the defendants in this case, continued to hold the lands, occupy or possess the same in continuous and exclusive possession, claiming the same as their own under the said deed or deeds, and to the full extent of the boundary lines thereof for a period of ——— years from the time that W. delivered the deed to the said S., at the end of the said period of ——— years a perfect legal title to the said land and each and every part thereof was thereby vested in the defendants, and after the end of the said ——— years no statement of any of them could affect or divest the same or any part thereof, and if the jury so believe they shall find for the defendants.<sup>32</sup>

The court instructs the jury that if they believe, from the evidence in this case, that J., W., and the defendant have been in adverse possession of the land described in the plaintiff's declaration under color of title since the deed, or either of the deeds, from W. to J., made in the year ———, continuously for ——— years or more prior to the bringing of this suit, they should find for the defendants.<sup>33</sup>

The court instructs the jury that if they believe, from the evidence in this case, that J. B. conveyed the land in controversy to J.

<sup>30</sup> *Brucke v. Hubbard*, 54 S. E. 249, 74 S. C. 144.

<sup>31</sup> *Sutton v. Clark*, 38 S. E. 150, 59 S. C. 440, 82 Am. St. Rep. 848.

<sup>32</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

<sup>33</sup> *Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co.*, 54 S. E. 593, 105 Va. 574.



C. by the deed of ——— offered in evidence, and that the said J. C. sold said land by a written contract in ——— to the said W. S., and that the said W. S., gave the said land to J. S. and ———, and that J. S., pursuant to said gift, took the actual possession of said land, claiming an undivided one-half interest therein as his own, then, in that event, his possession was the possession of the said W. S., and that if the said J. S. so remained in the actual, continuous, exclusive, adverse, and notorious possession of the said land, claiming the said undivided one-half interest therein as his own, for the period of ——— years from the ———, and that the said W. S. conveyed the whole of the said tract of land to the said J. S. in ———, then the jury should find for the defendant.<sup>84</sup>

**§ 719. Tacking to possession of one not claiming title**

You are instructed that, to defeat the claim of the plaintiffs in this action upon the defense of adverse possession, the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to ———, held actual, exclusive, continuous, open, notorious, and adverse possession of the said premises; and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises.<sup>85</sup>

**§ 720. Effect of possession of tenant**

**§ 720(1). Alabama**

The court instructs the jury that, if you find from the evidence that B. B. went into possession of said lands in ———, under a lease or as tenant of his son J. B., and that R. B. entered on said lands as his wife, then any claim of the said R. B. during said tenancy of her husband, to the lands, while she lived on them with her said husband, he having entered on them under a lease from J. B., would not have made a gap or chasm in said J. B.'s possession while her husband occupied as the tenant of J. B.<sup>86</sup>

The court instructs the jury that, if you find from the evidence that B. B. went on the lands sued for in ———, under a lease or as tenant of J. B., and after going on said lands he set up a claim to the lands in his own right or in the right of his wife, R. B., while his tenancy lasted, and that said J. B., on ascertaining that said B. B. was setting up such claim to said lands and property,

<sup>84</sup> Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 54 S. E. 593, 105 Va. 574.

<sup>85</sup> Holtzman v. Douglas, 18 S. Ct. 65, 168 U. S. 278, 42 L. Ed. 466.

<sup>86</sup> Barron v. Barron, 25 So. 55, 122 Ala. 194.

instituted a suit of unlawful detainer against him, and vigorously prosecuted the same, and in such suit recovered possession of said lands, then such possession and claim to the lands by the said B. B. would not make such a gap or chasm in the possession of J. B. as would break its continuity; if said J. B. was in the adverse possession of said lands.<sup>37</sup>

**§ 720(2). Georgia**

I charge you that the possession of the tenant is in the right of the person under whom he holds, and though such tenant enters under only an oral lease, his possession inures to the benefit of the person under whom he holds, and if such possession of a tenant should continue for seven years, and should have the necessary qualities which the law requires to constitute adverse possession, the person who put the tenant in possession would, if he had good color of title, acquire title by prescription.<sup>38</sup>

**§ 720(3). Virginia**

The court instructs the jury that if you believe from the evidence that ———, ———, or both of them, lived upon the land in controversy as tenants of the defendants, then their possession must be counted for the defendants.<sup>39</sup>

**§ 721. Effect of conflicting occupancy by third person**

The court charges the jury that if you find from the evidence that Mrs. B. went on the lands with her husband, and that her husband went on them under contract with J. B., and J. B. promptly expelled the said husband from the lands when he found out the lands were claimed against him, such going on the lands by Mrs. B. would not interrupt the statute of limitations, if it had begun to run.<sup>40</sup>

The court charges the jury that if you find from the evidence that J. B. was in the actual adverse possession of the lands, claiming them as his own, for more than ——— consecutive years prior to the ——— day of ———, or if you find from the evidence that Mrs. ——— was in the actual adverse possession of the lands, claiming them as her own, and she sold them to J. B., and turned her possession over to him, and the actual adverse possession of the two, when added together, covers a period of more than ——— consecutive years just prior to the ——— day of ———, then

<sup>37</sup> Barron v. Barron, 25 So. 55, 122 Ala. 194.

<sup>38</sup> Smith v. Donalson, 73 S. E. 577, 137 Ga. 465.

<sup>39</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>40</sup> Barron v. Barron, 25 So. 55, 122 Ala. 194.

this was sufficient to take the title out of the heirs of ———; and the court further charges the jury that the moving in of third parties on the land would not constitute a break in the adverse holder's possession, if said adverse holder took prompt action in the court to remove them, and did remove them. <sup>41</sup>

**§ 722. Effect of legal proceedings**

**§ 722(1). Alabama**

I charge you that the bringing of suit for land is not an interruption of possession. <sup>42</sup>

**§ 722(2). Virginia**

The court instructs the jury that a recovery in ejectment of land in the actual possession of another does not affect his possession or stop, prevent, or suspend the running of the statute of limitations in his favor, unless a writ of possession issued on such judgment of recovery, or the party recovering, afterwards entered into possession in such a manner that if he had no title it would be a sufficient possession to be adversary possession against the true owner, and merely walking over or surveying without such possession is not sufficient. Neither is an agreement that a person recovering in the ejectment may enter thereon sufficient to suspend the runnings of the statute, unless there was such an entry and possession. <sup>43</sup>

The court further tells the jury that unless they believe that the judgment for the land recovered in the ejectment suit of B. against D. covers the land in controversy or part thereof, and the burden is on the plaintiff to prove this, and the location and the extent thereof, by a preponderance of the evidence, then it cannot affect the possession any further than the plaintiff has shown it covers the land in controversy. <sup>44</sup>

The court instructs the jury that the ejectment suit of B. against D. cannot be considered by you in locating the lands in any particular grant, or as a muniment of title to any part of the lands in controversy, but can only be considered by you in determining the character of D.'s possession as to the land in controversy, whether adverse or not. <sup>45</sup>

The court further tells the jury that the ejectment suit of B.

<sup>41</sup> *Barron v. Barron*, 25 So. 55, 122 Ala. 194.

<sup>42</sup> *Bradford v. Wilson*, 37 So. 295, 140 Ala. 633.

<sup>43</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

<sup>44</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

<sup>45</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

against D. cannot in any event affect the rights or interest of any of the other defendants than D. in this case, in any manner or any account, or affect their possession to the land claimed under the deed to the ——— acre tract. <sup>46</sup>

The court further tells the jury that if they believe from the evidence in this case that the defendants held actual, open, adverse possession prior to the institution of this action of any part of the land in controversy for a period of ——— years continuously after the recovery in ejectment by B. against D. in ———, claiming under the deed of their father to them of ———, and to the extent of the boundary lines of the said deed, then they must find for the defendants. <sup>47</sup>

### § 723. Effect of abandonment of possession

The court instructs the jury that the defendants to sustain their defense of continued adversary possession must show that such possession was continuous for a period of ——— years prior to the institution of this suit, and the court tells the jury that abandonment of possession, if the jury should believe by a preponderance of the evidence there was an abandonment, would break the continuity, unless the abandonment was after the end of the continuous ——— year period. <sup>48</sup>

### § 724. Temporary abandonment of possession

I charge you that where the adverse occupant of land leaves it temporarily, with the intention of returning, his possession continues during such occasional absence, and so if the tenant quits the premises the landlord is to be regarded as still in possession if by taking possession himself, or putting in another tenant as soon as one can be procured, within a reasonable time, he gives evidence that he does not intend to abandon the land. An interval of two or three months, or from the harvesting of cultivated crops in the fall to the resumption of cultivation in the spring, does not of itself amount to abandonment or a break in the continuity of possession. <sup>49</sup>

### § 725. Time required to acquire title by adverse possession— Effect of failure of former owner to pay taxes

The jury are instructed that if the title to the land in controversy emanated from the government more than ——— years, and

<sup>46</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>47</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>48</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>49</sup> Mahoney v. Southern Ry., Carolina Division, 64 S. E. 228, 82 S. C. 215.

that the defendant and those under whom he claims has been in the lawful possession for one year before the institution of this suit and that the plaintiff and those under whom he claims have not paid any taxes on the said land for ——— years prior to ———, then the plaintiff cannot recover.<sup>50</sup>

**§ 726. Duration of possession as dependent on whether entry is under claim under color of title or is without right or claim of right**

You are instructed that it must be a continuous possession, and that, gentlemen, is the crucial question in this case I think, the closest question in the case on the testimony. It must be a continuous possession, in this case, for at least ——— years. F. owned these tax titles. If he went into possession of this land through H., claiming to own the land under his tax titles, then possession of the character which I am describing to you for ——— years consecutively would create a valid paramount title by adverse possession. If he did not go in claiming title under the tax deeds, then his possession must be of the same character for a period of ——— years before title by adverse possession will ripen and defeat the other title. The fact that these tax titles and tax claims were found afterwards to be void and worthless and of no force as deeds would cut no figure in this case. You may lay that question aside and not discuss it nor refer to it, because the law provides that when a man receives a deed of land from the state and goes into possession claiming to own it under that deed, and stays there and is adversely possessed of it in the way which I have described for ——— years, his title is good against everybody. And it does not make any difference that the deed is afterwards found to be void. But if he did not enter claiming under these tax deeds, but just entered without right and without claim of right, through H. then his possession, adverse possession, with all its constituent elements, must obtain for ——— years instead of ——— in order to make this title paramount and defeat the other title.<sup>51</sup>

**§ 727. Effect of war as suspending running of statute**

The court instructs the jury that if L. purchased the ——— land, and placed his sisters in possession, before the war, in consideration for the interest which they had as heirs at law in the lands of their deceased father, ———, and they each (his sisters and L.) went into the adverse possession of the lands they respective-

<sup>50</sup> Campbell v. Greer, 108 S. W. 54, 209 Mo. 199.

<sup>51</sup> Merritt v. Westerman, 147 N. W. 483, 180 Mich. 449.

ly acquired, and the sisters, or the survivor of them retained the possession for ——— years, claiming the same under said trade or exchange, then this vested the title in the sisters, subject to the laws of descent as his sisters successively died; but in computing the ——— years the time during the war must be deducted.<sup>52</sup>

## H. EXTENT OF POSSESSION

### § 728. Constructive possession

#### § 728(1). Georgia

The jury are instructed that “constructive possession” of lands arises where a person having paper title to a tract of land is in actual possession of a part thereof. In such a case the law construes that possession to extend to the boundaries of the tract.<sup>53</sup>

#### § 728(2). Michigan

You are instructed that a party’s possession of a single parcel or tract of land is coextensive with his claim of title; that is, if his deed is for an entire parcel of land, and he occupies a part, either personally or by tenants, his possession extends to the whole tract described in his deed or patent. If, therefore, you find that ——— was in possession of a part of the island under lease of the whole, the possession of the owners of the island, through him as their tenant, would extend to the whole island, it being a single parcel of land; and such possession would be adverse as to the whole world if such possession continued for ——— years, or was continued through other tenants to make in the aggregate ——— years.<sup>54</sup>

#### § 728(3). South Carolina

The court instructs the jury that, if you believe from the evidence that E. took possession of the land contained in the deed of ———, acting as sheriff, which we have defined in instruction No. ——— as constituting color of title, and held it continuously for ——— years, that would give title in him to all the land embraced in that deed, and if that title descended to his heirs, then the conveyance by those heirs to K. in ——— would confer upon K. a good title to the land, and if that should be your conclusion, then the plaintiff must recover, unless there is something else to show that she has been ousted of her right to recover.<sup>55</sup>

<sup>52</sup> *Inglis v. Webb*, 23 So. 125, 117 Ala. 387.

<sup>53</sup> *Smith v. Donalson*, 73 S. E. 577, 137 Ga. 465.

<sup>54</sup> *McKee v. City of Grand Rapids*, 95 N. W. 85, 133 Mich. 272.

<sup>55</sup> *Kennedy v. Kennedy*, 68 S. E. 664, 86 S. C. 483.

## § 728(4). Virginia

The court instructs the jury that if they believe from a preponderance of the evidence in this case that plaintiff has legal title to the land in controversy, under title papers introduced in evidence, as stated in plaintiff's instruction No. ———, and that the deed introduced in evidence by defendant from ——— to them, dated on the ———, for ——— acres covers any part of the land described in plaintiff's declaration for said ——— acres of land, that then before possession of defendants of said land can ripen into good title by adverse possession the defendants must have actual, open, notorious, exclusive, and continuous possession of some part of the land described in plaintiff's declaration for a period of ——— years, or possession of some parts of the ——— acre tract claiming the whole, prior to the institution of this suit. <sup>56</sup>

The court instructs the jury that if they believe from the evidence in this case that S. was in adverse possession of any part of the ——— acre tract of land under color of title, claiming to the extent of his boundary line prior to ———, and that the said tract of land was wholly within the ——— patent, that on the ——— day of ———, S. delivered a deed to and possession of said tract of land, which included the land in controversy, to the defendants in this case, who thereupon entered upon the same, or any part thereof, and cleared, cultivated, cut timber, paid taxes, improved, and used the same for farming purposes, and held possession thereof openly, notoriously, exclusively, and continuously for a period of ——— years thereafter claiming the same under said deed, then good and perfect legal title to the said land so described in the said deed and each and every part and parcel thereof was thereby vested in the defendants, and they must find for them in this case. And the court further says if the defendants so entered upon any part of the land described in the deed by their father, S., and so held the possession of the same or any part thereof for the said period of ——— years, the possession of the same or any part thereof was the possession of each and every part described in the said deed, and it makes no difference where such possession was if it was within the boundaries of the ——— acre tract described in the said deed to them by their father, so the same lies in grant ——— to ———; and if the jury so believes they must find for the defendants. <sup>57</sup>

<sup>56</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>57</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.



**§ 729. Same—Rule where possession is held without color of title**

The court charges the jury that, if adverse possession is held without color of title, such possession is limited to the portion actually occupied; and, if the deed from G. was not actually made until ———, then E.'s possession prior to that time is limited to the part actually occupied by him. <sup>58</sup>

**I. EFFECT OF PAYMENT OF TAXES****§ 730. Acquisition of title to vacant and unoccupied land**

You are instructed that so far as the claim of plaintiffs, founded upon color of title and payment of taxes for ——— consecutive years, while the land was vacant and unoccupied, and possession thereafter taken, is concerned, to establish title on that basis it must appear, from a preponderance of the evidence, that throughout the entire period, from the first to the last of such payments of taxes, the land was vacant and unoccupied. <sup>59</sup>

**J. EVIDENCE****§ 731. Presumptions and burden of proof****§ 731(1). Michigan**

You are instructed that the burden of proof would be upon the defendant to prove by a fair preponderance of the evidence what he claims under the second proposition, namely, fixing the line where it is because of adverse possession. In other words, to state it as the lawyers put it, if the plaintiff has established by fair preponderance of the evidence where the government survey line is, and that it is actually in the center, then the defendant assumes the affirmative of the defense, because he must assume, as far as the affirmative of the defense is concerned, the burden of proof. Now the burden of proof does not necessarily depend upon the number of witnesses sworn on the part of any party on any one proposition. <sup>60</sup>

**§ 731(2). Nebraska**

You are instructed that, under the pleadings, the law, and the evidence in this case, the only question for your consideration is the question of adverse possession of the property in controversy

<sup>58</sup> Edmondson v. Anniston City Land Co., 29 So. 596, 128 Ala. 589.

<sup>59</sup> Scott v. Bassett, 57 N. E. 835, 186 Ill. 98.

<sup>60</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.



set up by the defendant in his answer herein, wherein he alleges that he has been in the actual, open, notorious, and exclusive possession of the land in controversy, claiming the same adversely to the plaintiff and all the world, for more than ten years next before the commencement of this action; and the burden is upon the defendant to establish such defense by a preponderance of the evidence.<sup>61</sup>

The jury are instructed that under the issues in this case the burden of proof rests upon the plaintiff, and, before it can recover any of the lots in controversy from the defendant, the plaintiff must show to the satisfaction of the jury, and by a preponderance of evidence, a right to them superior and better than that of the defendant. Unless the plaintiff has succeeded in doing this, the jury should return a verdict in favor of the defendant.<sup>62</sup>

§ 731(3). Virginia

The court instructs the jury that the plaintiff must show the legal title in himself and a present right of possession at the time of the commencement of this action before the defendants are called upon to show anything, and the party in possession is presumed to be the owner until the contrary is proved.<sup>63</sup>

The court instructs the jury that one in bona fide possession of land is presumed to have a legal title until the contrary is shown, and therefore if they believe from the evidence that the defendant ——— and others were at the institution of this suit in bona fide possession of the ——— acre tract of land claimed by them, which includes the land in dispute, having cleared, cultivated, and built upon portions of said tract, claiming under a deed for the same, then they are presumed to have the legal title to the said ——— acre tract, including the land in dispute, until the contrary is shown.<sup>64</sup>

The court instructs the jury that the defense of adverse possession in this case is an affirmative defense, and that the burden of proof is on the defendants to establish such adverse possession by a preponderance of the evidence in the case.<sup>65</sup>

§ 732. Presumption of continuance

The court charges the jury that the adverse possession of land is a fact continuous in its nature, and that if it be shown to have

<sup>61</sup> *Hoffine v. Ewing*, 84 N. W. 93, 60 Neb. 729.

<sup>62</sup> *Omaha & Florence Land & Trust Co. v. Hansen*, 49 N. W. 456, 32 Neb. 449.

<sup>63</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

<sup>64</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

<sup>65</sup> *Sutherland v. Gent*, 93 S. E. 646, 121 Va. 643.

existed at any time it will be presumed to have continued thereafter until evidence is adduced showing that it is not.<sup>66</sup>

### § 733. Payment of taxes or failure to pay taxes

You are instructed that payment of taxes and assessments for local improvements tends to prove claim of ownership and title to land. Likewise, total failure to pay any taxes or assessments for local improvements tends strongly to prove lack of claim of title and ownership of land by the person in possession.<sup>67</sup>

### § 734. Sufficiency of evidence

You are instructed that adverse possession is not to be made out by inference, but by clear and positive proof.<sup>68</sup>

## K. EFFECT OF ADVERSE POSSESSION FOR STATUTORY PERIOD

### § 735. Character of title acquired

#### § 735(1). Alabama

The court charges the jury that if they believe from the evidence that the defendant entered upon the lands sued for in the year ——— under a contract for their purchase from N., and that he received from said N. in the year ——— a bond for title describing said lands, and undertaking to convey them to him in payment of their agreed price, that afterwards he paid and satisfied N. in full of the agreed purchase price for the lands described in the bond, and that for a period of more than ——— years after making such full payment, and before this suit was brought, the defendant was in the continuous, open, actual, visible, notorious, and exclusive possession of a part of the lands sued for, claiming in good faith the whole thereof under his contract of purchase and bond for title from said N., then the plaintiff is not entitled to recover in this action under the deed from N. to the plaintiff, dated ——— and after the expiration of such period.<sup>69</sup>

The court instructs the jury that if you find from the evidence that J. B., by himself and tenants, was in the actual adverse possession of the lands sued for, claiming them as his own, for more than ——— consecutive years prior to the ——— day of ———, then this was sufficient to divest the title out of the heirs of ———, if they ever had title, and invest the title in J. B.<sup>70</sup>

<sup>66</sup> Alabama State Land Co. v. Matthews, 53 So. 174, 168 Ala. 200.

<sup>67</sup> Peters v. Tackaberry, 135 N. W. 905, 117 Minn. 373.

<sup>68</sup> Merwin v. Morris, 42 A. 855, 71 Conn. 555.

<sup>69</sup> Alabama State Land Co. v. Matthews, 53 So. 174, 168 Ala. 200.

<sup>70</sup> Barron v. Barron, 25 So. 55, 122 Ala. 194.

## § 735(2). Kentucky

The court instructs the jury that if you believe from the evidence that the defendant, ———, and those through whom he claims, were, for a period of ——— years or more next before the commencement of this action, in the actual, open, notorious, continuous, adverse, and peaceable possession of said lands, claiming them to a well-marked or well-defined boundary, you will find for defendant, unless you believe as in instruction No. ———.<sup>71</sup>

The court instructs the jury that although they may believe from the evidence that the defendant, in ——— acquired from ———, then the owner of the lands now claimed by the plaintiffs, a release or grant of a right of way or easement over said lands upon which to locate and construct its railroad, yet if the jury believe from the evidence that the plaintiffs and those through whom they claim and derive title to said lands have had the actual, continuous, uninterrupted possession of all the lands sued for in the petition, claiming the same adversely to the defendant and all others, for ——— years or more next before the entries and trespasses by defendant thereon sued for in the petition, then all right of title acquired by the defendant under the release or conveyance from ——— is tolled and taken away, and the defendant and all claiming under it are barred of any right or easement in the lands described in the petition, and the full right and title thereto vested in the plaintiffs; and, if the jury shall believe from the evidence that defendant's right and grant from ——— was thus tolled and barred by adverse holding in the manner aforesaid, then they will find for the plaintiffs such damages as they have sustained by the defendant's entry, construction, and maintenance of its railroad upon their lands, not exceeding in all the sum of \$———, the jury being confined in their assessment of such damages to the rule laid down in instruction No. ———, and governed by all the evidence as to such damages, if any sustained.<sup>72</sup>

## § 735(3). Missouri

The court instructs the jury that one who holds the open, notorious, continued, uninterrupted, adverse, and actual possession of real estate for a period of ——— years or more acquires the legal title to the property as fully as if he had acquired the same by deed from the owner; therefore, if you believe from the evidence that the defendant has held the open, notorious, continuous, uninterrupted, adverse, and actual possession of the premises de-

<sup>71</sup> Le Moyne v. Neal, 164 S. W. 964, 158 Ky. 316.

<sup>72</sup> Maysville & B. S. R. Co. v. Holton, 39 S. W. 27, 100 Ky. 685, 19 Ky. Law Rep. 1.

scribed in the petition prior to the death of ———, and that such possession continued, and the defendant was in the visible, notorious, continued, actual, and adverse possession of the premises described in the petition, for a period of more than ——— years preceding the institution of this action, you must find for the defendant.<sup>73</sup>

**§ 735(4). Nebraska**

You are instructed that in his answer to the plaintiff's petition the defendant has interposed as a defense the statute of limitations, by which he asserts, in effect, that the lots in controversy have been under his control and occupancy for the full period of ——— years next before this suit for the possession was commenced. And if the jury shall find from the evidence that as to the lots in controversy, or any of them, defendant had been in the undisturbed, actual, open, and exclusive occupation and control, either personally or by his servants, agents, or lessees, for ——— years next before the commencement of this action (which was ———), and under a claim of ownership, then, in that case, the defendant is entitled to a verdict in his favor as to all of the lots so occupied and controlled by him.<sup>74</sup>

**§ 735(5). South Carolina**

The court instructs the jury that if the jury find that the plaintiff entered into possession of the land in dispute, under the paper introduced in evidence as Exhibit A, purporting to be signed by ———, under a claim of ownership, and if they find that he has personally or by his tenants continued in possession thereof for more than ——— years, then the jury must find he is presumed to have obtained a grant from the state.<sup>75</sup>

The jury are instructed that, if you believe from the evidence that the said ——— took possession of the land in dispute under a claim of title, and claimed it as his own adversely before the death of ———, and continued to so hold it until after the lapse of ——— years from his first taking possession of the land, then this action would be barred by the statute of limitations.<sup>76</sup>

**§ 735(6). Virginia**

The court further instructs the jury that if they believe that the defendants have had adverse possession of the land in dispute for the period of ——— years prior to the institution of this suit,

<sup>73</sup> Coshov v. Otey, 222 S. W. 804.

<sup>74</sup> Omaha & Florence Land & Trust Co. v. Hanson, 49 N. W. 456, 32 Neb. 449.

<sup>75</sup> Kolb v. Jones, 40 S. E. 168, 62 S. C. 193.

<sup>76</sup> Sutton v. Clark, 38 S. E. 150, 59 S. C. 440, 82 Am. St. Rep. 848.

that this gives the defendants the right to recover even against the strongest proof of title, which, independent of such adversary possession, would be better title, and the jury should find for the defendants.<sup>77</sup>

**§ 735(7). West Virginia**

Interstate Coal & Iron Co. v. Clintwood, 54 S. E. 593, 105 Va. 574. To the same effect, see Sutherland v. Gent, 93 S. E. 646, 121 Va. 643, § 735(6).

**§ 736. Sufficiency of title by adverse possession to support ejectment**

The court instructs the jury that although they may believe from the evidence that the defendants, or one of them, have introduced in evidence such a title, which, in the absence of proof as to the possession of the land in controversy by the plaintiff, would be held to be a perfect written title, and entitle the defendants to a verdict in their favor, yet if the jury further believe from the evidence that the plaintiff and those under whom she claims were in the uninterrupted, honest, continued, exclusive, visible, notorious, hostile, and adverse possession of the land in controversy, under colorable claim of title, for more than ——— years, and that the defendant, just a short time before the institution of this suit, entered upon the land in controversy, claiming the same, that then such prior possession of the plaintiff and those under whom she claims entitles the plaintiff to recover in this action, and the jury should find for the plaintiff.<sup>78</sup>

**§ 737. Effect of subsequent admissions**

The court further tells the jury that after an adverse possession of a tract of land under color of title for ——— years has ripened into a perfect legal title thereto, then no statement afterwards can in any wise affect the title thus acquired, and the former owner of the legal title cannot recover in ejectment from a person whose title has so ripened.<sup>79</sup>

**§ 738. Acknowledgment of tenancy by occupant after lapse of statutory period**

You are further charged in this case that if you believe from the evidence that plaintiff had possession of the land and occupied the land in question, cultivating, using, and enjoying the same by

<sup>77</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

<sup>78</sup> Summerfield v. White, 46 S. E. 154, 54 W. Va. 311.

<sup>79</sup> Sutherland v. Gent, 93 S. E. 646, 121 Va. 643.

himself and tenants for ——— consecutive years prior to the filing of this suit, but you should further believe that thereafter the plaintiff acknowledged himself to be the tenant of the defendant, either in writing or verbally, you will only consider such acknowledgment of tenancy, if any, as bearing upon the nature of plaintiff's prior possession; that is, whether the same was adverse to defendant or not.<sup>80</sup>

**§ 739. Effect of subsequent agreement to have survey made to ascertain boundaries**

The jury are instructed that, if plaintiff acquired a good title to the land in controversy by adverse possession under a claim of title for more than ——— years, a subsequent survey made for the purpose of finding the true ——— line of the land upon the consent and agreement of plaintiff that the survey should be made would not affect his title to the land.<sup>81</sup>

<sup>80</sup> Wickizer v. Williams (Tex. Civ. App.) 173 S. W. 288.

<sup>81</sup> Fatic v. Myer, 72 N. E. 142, 163 Ind. 401.

## CHAPTER LII

## ALTERATION OF INSTRUMENTS

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§ 740. Authority and consent—Alteration made to conform instrument to understanding of parties at time of execution

§ 740(1). Illinois

You are instructed that, if you believe from the evidence that after the signing and delivery by the defendant of the note in

suit the words "with seven per cent. per annum" were written into the note by the holder without defendant's knowledge or consent, then you must find for defendant, although you may further believe from the evidence that at the time of the signing of the note it was understood between the parties that it was to bear interest at the rate of seven per cent. per annum.<sup>1</sup>

§ 740(2). *Indiana*

You are instructed that if you believe, from the evidence, that defendant purchased a horse from ——— and agreed to give his note for the purchase price, and that by mutual mistake the note as executed named a less sum than said purchase price, then ———, the payee, was impliedly authorized to change the note, so as to name the purchase price agreed upon, and if you believe from the evidence that the said payee did make such change, then such alteration would not vitiate the note as against defendant.<sup>2</sup>

§ 741. *Same—Filling in blanks*

§ 741(1). *Alabama*

You are instructed that if the jury believe from the evidence that there was any agreement between the defendant and ——— to borrow money from plaintiff, and that, to borrow this money, defendant was to indorse a note, and that ——— should sign the note in such a way as to enable him to get the money, and they further believe from the evidence that the defendant indorsed the note before it was signed by ———, and that afterwards ——— signed the note in the name of ——— & Co., and in this condition discounted it to the plaintiff, then the defendant is bound by his indorsement, and the jury must find for the plaintiff on all the issues except the plea of usury.<sup>3</sup>

You are instructed that if the jury believe from the evidence that the defendant indorsed the note sued on before the note had been signed, and that he delivered said note in that condition to said ———, and that afterwards the said ——— signed the firm name of ——— & Co. to said note, and discounted the same to the plaintiff for a valuable consideration paid by the plaintiff to said ———, then you must find for the plaintiff on all the issues except the plea of usury, unless you further believe from the evidence that the defendant, when he indorsed said note or prior thereto, expressly stipulated with or instructed the said ——— as to the

<sup>1</sup> *Merritt v. Dewey*, 75 N. E. 1086, 218 Ill. 599, 2 L. R. A. (N. S.) 217.

<sup>2</sup> *Busjahn v. McLean*, 29 N. E. 494, 3 Ind. App. 281.

<sup>3</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.



mode in which the note should be signed, and that the said ———, in signing the firm name of ——— & Co. to said note, violated such stipulation or instruction.<sup>4</sup>

You are instructed that if the jury believe from the evidence that the defendant indorsed the note sued on before the note had been signed, and that he delivered said note in that condition to ———, and that afterwards the said ——— signed the firm name of ——— & Co. to said note, and discounted the same to the plaintiff, then you must find for the plaintiff on all the issues except the plea of usury unless you further believe from the evidence that the defendant, when he indorsed said note, or prior thereto, expressly stipulated with or instructed said ——— as to the mode in which the note should be signed, and that the said ——— in signing the firm name of ——— & Co. to said note violated such stipulation or instruction.<sup>5</sup>

You are instructed that if the jury believe from the evidence that, at the time the note sued on was indorsed by the defendant, ——— had not signed said note as maker; that after said note was indorsed by the defendant said ——— took said note to the plaintiff's office, and there signed to the said note the name of ——— & Co., and then discounted said note to the plaintiff for the sum of ——— dollars, and that there was no agreement, expressed or implied, between the defendant and ———, at the time the defendant indorsed said note, or prior thereto, as to how the note should be signed, whether by the name of ——— or by the name of ——— & Co.—then they must find for the plaintiff on all the issues except the plea of usury.<sup>6</sup>

#### § 741(2). Iowa

You are instructed that if you believe from the evidence that when the note in suit was delivered by defendant to the payee it did not provide for payment of interest, and that the blanks in the clauses in said note relating to the payment of interest on principal and the payment of interest on interest in arrears were not filled in, and if you believe that it was agreed between defendant and the payee that the note should not bear interest, and that defendant gave no power to fill such blanks, and that after the delivery of said note to the payee such blanks for the rate of interest were filled in without the knowledge or consent of defendant,

<sup>4</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>5</sup> *Montgomery v. Crossthwait*, 8 So.

498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>6</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

then in that event such filled-in blanks would constitute a material alteration of the note, and would render it void as between the defendant and the party who made the alteration, and unless you find from the evidence that plaintiff is a bona fide holder of said note as defined in other instructions, without notice of said alteration, if you find such alteration, your verdict must be for defendant.<sup>7</sup>

## § 742. Ratification of alteration

### § 742(1). Alabama

I charge you that if you believe from all the evidence that there was a memorandum attached to the note sued on as alleged by defendant, but that after defendant became fully informed and advised as to the fact (if it be a fact) that the memorandum was detached by ———, he made payments and had them indorsed on the back of the note or indorsed them there himself, without objection or condition, then you may reasonably infer and find from these facts that defendant has waived his objection to said alteration and has ratified the note in its present condition.<sup>8</sup>

The jury are instructed that the defendant would be liable on the bond named in the complaint, although there was a material alteration of the same after its execution, if the defendants had knowledge of such alteration, and, with such knowledge, offered to pay part of the amount due on said bond and asked indulgence with respect to the balance due.<sup>9</sup>

I charge you that ratification, like any other fact in this case, may be proven by circumstances, and that, if you find from the evidence that the defendant, after he had indorsed the note, saw and examined the same, and read the same over, and promised to pay the same, and waived protest and notice upon the same, then these are all circumstances which you may take into consideration in order to determine whether the defendant with a full knowledge ratified the said note.<sup>10</sup>

You are instructed that if the signature of the note was altered by the addition of the words “————” thereto, and if the defendant, with knowledge of this alteration, promised to pay the note as thus altered, this would be a waiver and ratification of the altera-

<sup>7</sup> Conger v. Crabtree, 55 N. W. 335, 88 Iowa, 536, 45 Am. St. Rep. 249.

<sup>8</sup> Payne v. Long, 25 So. 780, 121 Ala. 385.

<sup>9</sup> Dickson v. Bamberger, 18 So. 290, 107 Ala. 293.

<sup>10</sup> Montgomery v. Crossthwait, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

tion, and defendant would be bound by his indorsement, notwithstanding the alteration.<sup>11</sup>

I charge you that if you find from the evidence that the defendant took the note in his hands before the same was due, and read the same over, and saw and knew that the name of \_\_\_\_\_ was signed to the same, and made no objection at the time to such signature, and then and there promised the plaintiff that he would pay the same, then this was a ratification on the part of the defendant of the signature of \_\_\_\_\_, and he could not afterwards be heard to deny his liability, because the same was signed "\_\_\_\_\_"<sup>12</sup>

You are instructed that if you find from the evidence that the original signature to the note here sued on was "\_\_\_\_\_" and that after defendant signed the indorsement thereon the words "& Co." were added thereto, making the signature to read "\_\_\_\_\_ & Co.," and that the defendant, with knowledge of this alteration, consented to it, or waived any objection that he might have made thereto, and ratified the note as thus altered, he would be bound by his indorsement.<sup>13</sup>

You are instructed that ratification by the defendant of the manner in which the note was signed prior to bringing this suit, and after the note was signed, with knowledge on the part of the defendant of the manner in which the note was signed, as it appeared at the time of such ratification, if the jury believe that there was any such ratification, is binding upon the defendant as fully as if defendant had authorized said note to be so signed, or had authorized the signature to be afterwards altered by \_\_\_\_\_ so as to appear as it now appears.<sup>14</sup>

You are instructed that, if the jury believe from the evidence that the defendant, after he indorsed the note sued on, promised to pay the note, and that, at the time he made such promise, he knew that the note was signed by or in the name of \_\_\_\_\_ & Co., then this amounts to a ratification of the act of \_\_\_\_\_ in so signing said note, whether the note was signed "\_\_\_\_\_" at the time the defendant indorsed the note, and afterwards the words "& Co." were added to such signature, or whether, at the time defendant indorsed

<sup>11</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>12</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>13</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>14</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

the note, the note had not been signed at all, but was afterwards signed "——— & Co." by said ———.<sup>15</sup>

**§ 742(2). Indiana**

You are instructed that, although you believe from the evidence that the note sued on was altered after execution and delivery by the addition of other names as makers, yet, if you further believe from the evidence that with full knowledge of such alteration defendant retained the consideration of the note and promised to pay the same to plaintiff, then such facts constitute a ratification of the said alteration and the law is for the plaintiff.<sup>16</sup>

**§ 742(3). Tennessee**

You are instructed that if you believe from the evidence that the note sued on was altered as described in instruction No. ———, and that defendant, after discovering such alteration, proposed to renew the note on condition that plaintiff would give defendant further time to pay the note and reduce the rate of interest, and that plaintiff refused to accept such conditions, then such proposal to renew did not constitute a ratification of the said alteration.<sup>17</sup>

**§ 743. Materiality of alteration**

You are instructed that if you believe from the evidence that plaintiff indorsed a partial payment on the note in suit, and afterwards erased such indorsement, this is not such an alteration of the note as will avoid it as against the defendant.<sup>18</sup>

**§ 744. Same—Alteration as to parties**

**§ 744(1). Alabama**

You are instructed that, if you believe from the evidence that after the delivery of the note sued on by defendant to plaintiff the plaintiff added the name of ——— as comaker without defendant's consent, then this was a material alteration and vitiated the note as against defendant, and you must find for him.<sup>19</sup>

**§ 744(2). Kentucky**

The court instructs the jury that if they believe from the evidence that the note sued on in the petition herein was changed or

<sup>15</sup> *Montgomery v. Crossthwait*, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>16</sup> *Emerson v. Opp*, 34 N. E. 840, 9 Ind. App. 581.

<sup>17</sup> *McDaniel v. Whitsett*, 33 S. W. 567, 96 Tenn. 10.

<sup>18</sup> *Theopald Mercantile Co. v. Deike*, 78 N. W. 977, 76 Minn. 121, 77 Am. St. Rep. 607.

<sup>19</sup> *Brown v. Johnson*, 28 So. 579, 127 Ala. 292, 51 L. R. A. 403, 85 Am. St. Rep. 134.

altered after it was executed and signed by the defendant ——— by adding the word or abbreviation, "Pt.," after the name of J. B. in the body of said note, and that such change or alteration was made without the knowledge or consent of the defendant ———, the law is for said defendant ———, and the jury shall find a verdict in his favor.<sup>20</sup>

§ 744(3). Texas

You are instructed that, if you believe from the evidence that the check mentioned in the evidence and drawn by plaintiff was altered by the holder by changing the name of the bank on which such check was drawn to the name of the ——— bank, then such alteration was a material one.<sup>21</sup>

§ 745. Same—Alteration of liability as indorser

§ 745(1). Michigan

You are instructed that if you believe from the evidence that the defendant, the payee in the note sued on, indorsed it in blank, and that the words "or bearer" were inserted on the face of the note after such indorsement, such insertion was not a material alteration as to the defendant.<sup>22</sup>

§ 745(2). Nebraska

You are instructed that, if you believe from the evidence that after the defendant indorsed the note in suit in blank the note was altered by the holder, by writing above such indorsement the words "For value received we hereby guarantee the payment of the within note and waive presentment for payment, demand and notice of protest," then such alteration is a material alteration of the liability of defendant as indorser, and, unless you find from the evidence that it was made with his knowledge or consent, releases him from liability.<sup>23</sup>

§ 746. Same—Change of rate of compensation

§ 746(1). Arkansas

You are instructed that the defendant gives another reason for not complying with the contract, and that is that the contract was changed from \$—— per week to \$—— per week for the year. That would be a material change, and if you find from the testimony that the plaintiff or its agent did change the contract from

<sup>20</sup> Tyler v. First Nat. Bank of Winslow, 150 S. W. 665, 150 Ky. 515.

<sup>21</sup> Morris v. Beaumont Nat. Bank, 83 S. W. 36, 37 Tex. Civ. App. 97.

<sup>22</sup> Weaver v. Bromley, 31 N. W. 839, 65 Mich. 212.

<sup>23</sup> Harnett v. Holdrege, 97 N. W. 443, 5 Neb. Unof. 114.

\$—— a week to \$——, that would be such a change as would vitiate it and they cannot recover.<sup>24</sup>

**§ 746(2). Missouri**

You are instructed that, if you believe from the evidence that by written contract plaintiff employed the defendant as broker to sell the lands mentioned in the evidence for the sum of —— dollars, and that after the execution and delivery of such contract the defendant altered such contract by naming the sum of —— dollars as the price for which the lands were to be sold, and by giving to defendant, in addition to his commission, anything that might be realized above such named sum, then such alteration was material, and unless plaintiff agreed or consented to such alteration the whole contract was nullified.<sup>25</sup>

**§ 747. Same—Change in rate of interest**

You are instructed that if you believe from the evidence that the note sued on, as originally executed, did not bear interest, and that it was the understanding of the parties that it was not to draw interest, and that since the signing and delivery of the note an alteration has been made in the note by inserting the figure —— as the rate of interest it was to bear, then this is a material alteration, and plaintiff cannot recover unless you find the facts set out in instruction No. ——.<sup>26</sup>

**§ 748. Same—Alteration affecting medium of payment**

You are instructed that, if you believe from the evidence that after defendant indorsed the note in suit it was altered by adding on the face of the note the words, "This note to be exchanged for consolidated mortgage bonds of the —— company when issued at ——," then such alteration is a material one.<sup>27</sup>

**§ 749. Changing joint to several liability**

You are instructed that if, after you consider this evidence, you believe, by a preponderance of the evidence, that the guaranty at the time it was signed by ——, ——, and the other guarantors, read "We guarantee," etc., and that the word "we" was subsequently erased, and "I" inserted in its place without their knowledge or consent, then the court instructs that you shall find for these defendants, the guarantors, in this action.<sup>28</sup>

<sup>24</sup> Outcalt Advertising Co. v. Young Hardware Co., 161 S. W. 142, 110 Ark. 123.

<sup>25</sup> Harrison v. Lakenan, 88 S. W. 53, 189 Mo. 581.

<sup>26</sup> Davis v. Henry, 14 N. W. 523, 13 Neb. 497.

<sup>27</sup> Harnett v. Holdrege, 97 N. W. 443, 5 Neb. Unof. 114.

<sup>28</sup> Landauer v. Sioux Falls Imp. Co., 72 N. W. 467, 10 S. D. 205.

**§ 750. Alteration of note by attaching seal**

You are instructed that if the jury believe, from the evidence, that the seal was attached to the note in question before the commencement of this case by the plaintiff, without the knowledge or consent of the defendant, then the defendant is entitled to a verdict, and the jury should find accordingly.<sup>29</sup>

**§ 751. Effect of erasure of additional words constituting alteration**

You are instructed that if you believe from the evidence that the note sued on was given by defendant to plaintiff for the price of land sold to defendant, and that the note was altered by adding after the name of plaintiff as payee the words "or holder," and by also adding the words "a lien is retained on said lands until all the purchase money is paid," then such alteration was material, and if made by plaintiff after the execution and delivery of the note, without the knowledge or consent of defendant, plaintiff cannot recover, although you may further believe from the evidence that such additional words were erased by plaintiff before bringing this action.<sup>30</sup>

**§ 752. Time of alteration**

The court charges the jury that before they can find a verdict for the defendants, each juror must be satisfied from the evidence either that the note and mortgage, or one of them, was materially altered after being signed and delivered or recording fee was paid by ——— before the suit was brought.<sup>31</sup>

**§ 753. Effect of material alteration without knowledge or consent of party executing instrument****§ 753(1). Missouri**

The jury are instructed that, if you believe from the evidence in the cause that the promissory note dated ———, read and shown to the jury in the case, was made by the defendant M., and indorsed by the defendant A., and delivered by the latter to his co-defendant M., for the purpose of enabling M., the maker, to raise money thereon for his own use, and if you still further believe from the evidence that, after the defendant A. had so indorsed and delivered said note to said M., the words and figures "with interest at 10 per cent. per annum after maturity," now appearing in said

<sup>29</sup> Schwarz v. Herrenkind, 26 Ill. 208. The note was sued on as a simple instrument.

<sup>30</sup> McDaniel v. Whitsett, 33 S. W. 567, 96 Tenn. 10.

<sup>31</sup> Hart v. Sharpton, 27 So. 450, 124 Ala. 638.



note, were written therein without the knowledge, consent, or authority of A. by said M., or by any agent or clerk of his whether done in the presence of any officer or agent of plaintiff or not, and whether with or without the knowledge of the plaintiff, the verdict should be for the defendant A.<sup>32</sup>

**§ 753(2). South Carolina**

You are instructed that the next defense is a certain alteration of the note. The law is that where a contract has been entered into and signed, no party to it has any right to make any alteration in it without the consent of the other. If any material alteration has been made without the knowledge or consent of the party executing the note, it would vitiate it. If an alteration is made without the knowledge or consent of the party, and she afterwards acquiesced in it, it would bind her. So you will take into consideration the facts and circumstances under which the change was made, if it was material, and if she consented to it or acquiesced in it.<sup>33</sup>

**§ 754. Effect of alteration made without consent of party seeking to enforce instrument**

You are instructed that if the jury find, from the evidence, that the seal was attached to the note after it was made and delivered, without the knowledge and consent of the plaintiff, then the objection to the note that it is a sealed instrument should be wholly disregarded by the jury, and a verdict should be found for the plaintiff.<sup>34</sup>

The jury are instructed that, if you believe from the evidence that the attorneys of plaintiff, employed by him, and who brought the suit on the note and took judgment thereon, altered the note without the knowledge or consent of plaintiff, and without being authorized by him to make the alteration in question, such alteration would not relieve the defendant from liability on the note for the amount included therein when the note was executed.<sup>35</sup>

The jury are instructed that, if you believe from the evidence that defendant executed the note in evidence with a provision for an attorney's fee of ——— dollars in the warrant of attorney, and that some person, not the plaintiff, changed the amount of the attorney's fee in the warrant to ——— dollars without the

<sup>32</sup> Capital Bank v. Armstrong, 62 Mo. 59.

<sup>33</sup> Jacobs v. Gilreath, 22 S. E. 757, 45 S. C. 46.

<sup>34</sup> Schwarz v. Herrenkind, 26 Ill. 208. Plaintiff sued on the note as a simple instrument.

<sup>35</sup> Lanum v. Patterson, 143 Ill. App. 244.



knowledge or consent of plaintiff, your verdict should be for the plaintiff for the amount of the note and interest.<sup>36</sup>

**§ 755. Effect of alteration by stranger**

The court instructs the jury that if you find from the evidence that the note in question was at all times the property of and owned by this plaintiff, that she made the loan and owned the note, and that G. had no authority, express or implied, from this plaintiff to make any change or alteration of the note, and that such alteration thereof by him was made after delivery, without the knowledge and without the consent of the plaintiff, and that the plaintiff had not ratified the act of G. in altering the note, then you should find a verdict in favor of plaintiff.<sup>37</sup>

**§ 756. Alteration made by plaintiff before becoming holder of instrument sued on**

You are instructed that it is claimed by defendant that, after he signed a note similar in all respects to the one sued on, excepting that the written words, "with interest at ten per cent.," were not then in the note, but that the printed words, "with interest at ten per cent. per annum after maturity," were in the note, and that since he signed the note, without his knowledge or consent, the said printed words were stricken out, and the said written words inserted. You are instructed that if such an alteration of the note was made by any holder of the note, or made with the knowledge of any holder of the note, without the knowledge of defendant, it would be a material alteration, and would release him from all liability on the note, and if the defendant proves this by a fair preponderance of the evidence the verdict must be in his favor, and in the case of ———, the present plaintiff, if you find from the evidence that he made the alteration when not a holder of the note sued on, and afterwards became the holder of the note, it would be void in his hands, if you further find that he made the alteration after the defendant signed it.<sup>38</sup>

**§ 757. Suspicious appearance of instrument altered**

You are instructed that although the jury may believe, from the evidence, that the note, at the time it was executed by the defendant, had the words "after the sale of fourteen mills," and although the jury may believe from the evidence that said words have been

<sup>36</sup> Lanum v. Patterson, 143 Ill. App. 244.

<sup>37</sup> Spreng v. Juni, 122 N. W. 1015, 109 Minn. 85, 18 Ann. Cas. 222.

<sup>38</sup> Brooks v. Allen, 62 Ind. 401.

erased, yet if the jury further believe from the evidence that those words were put upon the paper with such light material that they could be erased without leaving any trace upon the paper which could be detected by a prudent and careful man, and if they further believe from the evidence that said words were erased from the paper without leaving any traces behind them to show that they had ever been upon the paper, and that said erasure was made without the knowledge of the plaintiff and before he purchased the same, then the law is for the plaintiff, and the jury should so find.<sup>39</sup>

### § 758. Presumptions and burden of proof

#### § 758(1). Alabama

You are instructed that, if you believe from the evidence that the mortgage under which plaintiff claims was altered as alleged by defendant, by changing the date from which interest was to run from \_\_\_\_\_ to \_\_\_\_\_, then such alteration was suspicious, and required explanation, and the burden of proof is upon the plaintiff to show that such alteration was made before the execution of the mortgage or with the consent of defendant.<sup>40</sup>

You are instructed that the burden of proof is upon the defendant in this cause to show that the note sued on was altered after the defendant indorsed the same; and, if the evidence fails to satisfy you that the note was so altered, then you should not find that there was any such alteration.<sup>41</sup>

You are instructed that on the question of the alteration of the note sued on by adding to the signature "\_\_\_\_\_" the words "& Co." the burden of proof is upon the defendant to show that such alteration was made after the defendant indorsed the said note.<sup>42</sup>

You are instructed that the law presumes that the note sued upon was not altered after defendant indorsed it; and the burden of proof is upon the defendant to show by a preponderance of evidence that the note was altered; and, if he has failed to satisfy you by a preponderance of evidence that the note was altered, you will find this issue in favor of the plaintiff.<sup>43</sup>

<sup>39</sup> Harvey v. Smith, 55 Ill. 224.

<sup>40</sup> Hart v. Sharpton, 27 So. 450, 124 Ala. 638.

<sup>41</sup> Montgomery v. Crossthwait, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>42</sup> Montgomery v. Crossthwait, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

<sup>43</sup> Montgomery v. Crossthwait, 8 So. 498, 90 Ala. 553, 12 L. R. A. 140, 24 Am. St. Rep. 832.

**§ 758(2). District of Columbia**

You are instructed that, if you believe from the evidence that the note in suit was altered by adding ———, then such alteration was material and such as to constitute reasonable ground for suspicion, and the burden is upon the plaintiff to give evidence in explanation of such alteration. If you believe from the evidence that such alteration, if you find that it was made, was made before the delivery of the note by defendant, or was made with the knowledge or consent of defendant, then you will find for the plaintiff. If, on the other hand, you believe from the evidence that such alteration was made after delivery of the note by defendant, and without his knowledge or consent, then you must find for the defendant.<sup>44</sup>

**§ 758(3). Illinois**

You are instructed that the burden of proof is upon the plaintiff in this case, and unless the jury are satisfied, from the evidence, that the seal in question was added to the note since its execution, without the knowledge and consent of the parties thereunto, then they should find for the defendant.<sup>45</sup>

You are instructed that the law imposes upon the party offering a paper in evidence, the explanation of any alterations which may appear therein, and therefore, if the jury believe, from the evidence, that any alteration has been made in the note in question, the burden of proof is upon the plaintiff to explain the same, and unless the jury believe, from the evidence, that such alteration has been explained by the plaintiff, the presumption of the law is that it was made by the plaintiff, and the jury should find for the defendant.<sup>46</sup>

**§ 758(4). Indiana**

You are instructed that, if you believe from the evidence that after the note in suit was signed and delivered by defendant it was altered by the addition of other names to the note as makers, then such alteration was material, and the presumption arises that the alteration was made by the holder of the note, and the burden of proof is on the plaintiff to show that such alteration was made with the consent of defendant.<sup>47</sup>

You are instructed that, if you believe from the evidence that the

<sup>44</sup> *Ofenstein v. Bryan*, 20 App. D. C. 1.

<sup>45</sup> *Schwarz v. Herrenkind*, 26 Ill. 208.

<sup>46</sup> *Schwarz v. Herrenkind*, 26 Ill. 208.

<sup>47</sup> *Emerson v. Opp*, 34 N. E. 840, 9 Ind. App. 581.

note in suit was altered after its execution as described in instruction No. ———, then it will be presumed, until the contrary is shown, that such alteration was made by the party claiming under it, and that the burden of removing that presumption rests upon the plaintiff.<sup>48</sup>

§ 758(5). Iowa

You are instructed that it is admitted that the note sued on was altered, after its execution and delivery by defendant, by raising the amount payable from ——— dollars to ——— dollars, and you are told that such alteration was a material one, and that therefore the burden is on the plaintiff to show that the alteration was made innocently by a stranger or for a proper purpose.<sup>49</sup>

You are instructed that if you find that either or both the notes in suit have been altered since their execution, by crossing out the word "order" printed therein, and writing in place thereof the word "bearer," such an alteration would be a material one, "and, when found to have been so made, the burden of proof is on the plaintiff to show that such alteration was made with the knowledge and consent of the defendant; and if you find that such an alteration was made in both of said notes after the execution thereof, and if you further find that the plaintiff has failed to establish by a fair preponderance of the evidence that it was done with the knowledge and consent of this defendant, then your verdict should be for the defendant, even though you also find that plaintiff bought and paid for said notes before they matured, without knowledge of the equities existing between the payee, ———, and the defendant."<sup>50</sup>

You are instructed that, if you believe from the evidence that the note sued on was materially altered as set out in the preceding instruction without the knowledge or consent of defendant, the plaintiff must show, in order to recover, that he purchased said note for a valuable consideration without notice of such alteration, and the burden of proof is upon the plaintiff to establish that he is such a purchaser.<sup>51</sup>

<sup>48</sup> Green v. Beckner, 29 N. E. 172, 3 Ind. App. 39.

<sup>49</sup> Maguire v. Eichmeier, 80 N. W. 395, 109 Iowa, 301.

<sup>50</sup> Shroeder v. Webster, 55 N. W. 569, 88 Iowa, 627.

<sup>51</sup> Conger v. Crabtree, 55 N. W. 335, 88 Iowa, 536, 45 Am. St. Rep. 249.

## CHAPTER LIII

## AMUSEMENT ENTERPRISES

§ 759. Liability for injuries to patrons or spectators.

759(1). Oklahoma.

759(2). Texas.

760. Same—Object falling on child.

761. Care required in operation of merry-go-round.

762. Contributory negligence of child.

763. Who liable for injuries to spectators, where exhibition conducted by independent contractor.

See, also, Fair Associations; Theaters.

Liability of fair association under lease by it of amusement privileges, see post, § 2415.

Liability to spectators for injuries caused by explosion, see post, § 2374.

§ 759. Liability for injuries to patrons or spectators

§ 759(1). Oklahoma

The jury are instructed that the operator of a scenic railway is bound to use the highest degree of care and caution for the safety of his patrons, and do all that human care and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents to patrons for hire while riding in its cars.<sup>1</sup>

The jury are instructed that where the plaintiff, by proof of the happening of an accident, presumptively due to the negligence of the carrier, in a case of this kind, has made out a case against the carrier, the carrier may show as a sufficient defense that, in all matters which, under the evidence, might have been connected with the accident, they have exercised that high degree of care, skill and foresight which was required to be exercised by them by the nature of the business, and if you find from the evidence that the owners and operators of said scenic railway in this case prior to the accident in the operation of said railway, through their agents exercised that high degree of care, skill, and foresight that a reasonably prudent person would exercise under like circumstances and in a like situation, then your verdict should be for the defendant and against the plaintiff.<sup>2</sup>

<sup>1</sup> Sand Springs Park v. Schrader, 198 P. 983.

<sup>2</sup> Sand Springs Park v. Schrader, 198 P. 983.

**§ 759(2). Texas**

The jury are instructed that unless you find and believe that the stairway herein referred to was defective as alleged by plaintiff, and that such defect, if any, was brought to the notice of defendants or their agents or employes, before the accident herein complained of, or had existed for such a length of time that by the exercise of ordinary care the defendants or their agents or employes would have discovered such defect, if any, then your verdict must be for the defendants on this issue.<sup>3</sup>

**§ 760. Same—Object falling on child**

The court instructs the jury that if you find and believe from the testimony that the tank described in plaintiff's petition was placed or caused to be placed by ——— or his employes at a point outside of the pavilion and its porches, and if you further find and believe from the testimony that said tanks were placed upon the ground at a point near the street car track and away from the first floor of the collonade pavilion and its porches and away from the place of the accident, and if you further find and believe from the testimony that some one not an employe of ——— or the defendant traction company, without the knowledge of said ——— or the company, moved the said tank from the place where it was placed, to the place of the alleged accident, and if you further find and believe from the testimony that the defendant company its agents and employes did not know that said tank had been moved from the place where it had been placed to the place of the alleged accident and could not by use of ordinary care and diligence have ascertained within the time said tank was moved, if you find it was moved, that it had been moved, then you are instructed to find for the defendant.<sup>4</sup>

**§ 761. Care required in operation of merry-go-round**

You are instructed that it is the duty of a person owning and operating a merry-go-round to which the public is invited to ride for hire to provide for them a safe vehicle, machinery, appliances, guards and approaches for their protection against injury, and of such person the law exacts great care, diligence and skill in the management and operation of the same, and the use of wise precaution in protecting his patrons from injury. In the merry-go-round in question, it is conceded that there were two platforms—one stationary and the other rotary. In considering the issues of fact, involved in this case, we instruct you that the stationary plat-

<sup>3</sup> Dalton v. Hooper (Civ. App.) 168 S. W. 84.

<sup>4</sup> Wichita Falls Traction Co. v. Adams, 183 S. W. 155, 107 Tex. 612.

## § 758(2). District of Columbia

You are instructed that, if you believe from the evidence that the note in suit was altered by adding ———, then such alteration was material and such as to constitute reasonable ground for suspicion, and the burden is upon the plaintiff to give evidence in explanation of such alteration. If you believe from the evidence that such alteration, if you find that it was made, was made before the delivery of the note by defendant, or was made with the knowledge or consent of defendant, then you will find for the plaintiff. If, on the other hand, you believe from the evidence that such alteration was made after delivery of the note by defendant, and without his knowledge or consent, then you must find for the defendant.<sup>44</sup>

## § 758(3). Illinois

You are instructed that the burden of proof is upon the plaintiff in this case, and unless the jury are satisfied, from the evidence, that the seal in question was added to the note since its execution, without the knowledge and consent of the parties thereunto, then they should find for the defendant.<sup>45</sup>

You are instructed that the law imposes upon the party offering a paper in evidence, the explanation of any alterations which may appear therein, and therefore, if the jury believe, from the evidence, that any alteration has been made in the note in question, the burden of proof is upon the plaintiff to explain the same, and unless the jury believe, from the evidence, that such alteration has been explained by the plaintiff, the presumption of the law is that it was made by the plaintiff, and the jury should find for the defendant.<sup>46</sup>

## § 758(4). Indiana

You are instructed that, if you believe from the evidence that after the note in suit was signed and delivered by defendant it was altered by the addition of other names to the note as makers, then such alteration was material, and the presumption arises that the alteration was made by the holder of the note, and the burden of proof is on the plaintiff to show that such alteration was made with the consent of defendant.<sup>47</sup>

You are instructed that, if you believe from the evidence that the

<sup>44</sup> *Ofenstein v. Bryan*, 20 App. D. C. 1.

<sup>45</sup> *Schwarz v. Herrenkind*, 26 Ill. 208.

<sup>46</sup> *Schwarz v. Herrenkind*, 26 Ill. 208.

<sup>47</sup> *Emerson v. Opp*, 34 N. E. 840, 9 Ind. App. 581.



note in suit was altered after its execution as described in instruction No. ———, then it will be presumed, until the contrary is shown, that such alteration was made by the party claiming under it, and that the burden of removing that presumption rests upon the plaintiff.<sup>48</sup>

§ 758(5). Iowa

You are instructed that it is admitted that the note sued on was altered, after its execution and delivery by defendant, by raising the amount payable from ——— dollars to ——— dollars, and you are told that such alteration was a material one, and that therefore the burden is on the plaintiff to show that the alteration was made innocently by a stranger or for a proper purpose.<sup>49</sup>

You are instructed that if you find that either or both the notes in suit have been altered since their execution, by crossing out the word "order" printed therein, and writing in place thereof the word "bearer," such an alteration would be a material one, "and, when found to have been so made, the burden of proof is on the plaintiff to show that such alteration was made with the knowledge and consent of the defendant; and if you find that such an alteration was made in both of said notes after the execution thereof, and if you further find that the plaintiff has failed to establish by a fair preponderance of the evidence that it was done with the knowledge and consent of this defendant, then your verdict should be for the defendant, even though you also find that plaintiff bought and paid for said notes before they matured, without knowledge of the equities existing between the payee, ———, and the defendant."<sup>50</sup>

You are instructed that, if you believe from the evidence that the note sued on was materially altered as set out in the preceding instruction without the knowledge or consent of defendant, the plaintiff must show, in order to recover, that he purchased said note for a valuable consideration without notice of such alteration, and the burden of proof is upon the plaintiff to establish that he is such a purchaser.<sup>51</sup>

<sup>48</sup> Green v. Beckner, 29 N. E. 172, 3 Ind. App. 39.

<sup>49</sup> Maguire v. Eichmeler, 80 N. W. 395, 109 Iowa, 301.

<sup>50</sup> Shroeder v. Webster, 55 N. W. 569, 88 Iowa, 627.

<sup>51</sup> Conger v. Crabtree, 55 N. W. 335, 88 Iowa, 536, 45 Am. St. Rep. 249.



## CHAPTER LIV

## ANIMALS

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- 766. Matters considered in determining issue.
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## A. OWNERSHIP

## § 764. Persons deemed owners

The jury are instructed that under the law of this state a dog is recognized as a species of property. The word "owner," alone, is not of technical significance, and is to be construed according to the context and approved usage of the language. It means the person to whom the dog belongs. As bearing on the question as to who was the owner of this dog, you are instructed that if you find from the evidence that Mrs. ———, wife of the defendant, herself bought the dog, and paid for it out of her own separate money, then you should find that the dog in question was owned by Mrs. ———, and, if you so find, then your verdict should be for the defendant.<sup>1</sup>

## § 765. Claim of interest in offspring as consideration for paying for services of sire

The court instructs the jury that this case is what is known in law as an action in trover and is brought by the plaintiff, ———, to recover from the defendant the value of an undivided one-half interest in a certain colt foaled of a mare owned by the defendant, and brought under an alleged agreement made between the plaintiff and ———, who was at that time the owner of the mare, and by the terms of which agreement the plaintiff was to pay for the services of the horse, and was to have a half interest in the colt at the time it was old enough to be weaned. You are instructed that this was a proper and legal contract to have been made by the parties, and in case you find such a contract to have been made, it would be binding upon the plaintiff and ———, the parties to such agreement.<sup>2</sup>

You are further instructed that the defendant would be bound by this agreement between the plaintiff and ———, provided he knew of the agreement under which the mare was bred, or provided he had such notice relative to the agreement as would put a reasonably careful man upon inquiry as to the terms of such contract. If he knew of such contract or had notice such as would have put him on inquiry regarding such contract or agreement relative to the breeding of the mare, then he is bound by it, and under the proofs in this case you should find a verdict for the plaintiff. If the defendant did not know of the alleged agreement and

<sup>1</sup> Alexander v. Crosby, 129 N. W. 959, 150 Iowa, 239.

<sup>2</sup> Dorris v. Rice, 108 N. W. 700, 145 Mich. 216.

didn't have notice regarding such agreement which should have put him upon inquiry regarding such agreement, you should then find for the defendant.<sup>3</sup>

### § 766. Matters considered in determining issue

#### § 766(1). Delaware

You are instructed that, whether the dog which it is admitted was killed was owned by the plaintiff, you will determine from all the facts and circumstances surrounding this case as testified to by the witnesses.<sup>4</sup>

#### § 766(2). Iowa

The jury are instructed that, if the defendant had the dog in his possession and was harboring him on his premises as owners usually do with their dogs, then he is the owner within the meaning of the law. If the dog was only casually upon his premises, and was not being harbored by defendant as owners usually harbor their dogs, then he was not the owner. In determining how this was at the time of the alleged attack you will consider the defendant's former treatment of the dog, his declarations concerning him, and the habit of the dog as to staying at the defendant's place.<sup>5</sup>

### § 767. Brands and marks as evidence

You are instructed that on the question of ownership you will not consider the evidence of the brand of ———, as it was not shown to have been recorded.<sup>6</sup>

## B. AGISTMENT

Priority of agister's lien, see post, § 1781.

### § 768. Liability of bailee for losses

#### § 768(1). United States

The jury are instructed that defendant, under the written contract, was to preserve the hides of the cattle which died and the ears of any which had earmarks. Under this provision the defendant was bound to preserve the hides of all the cattle which died and unless he has done so he is bound to account for the whole of the ——— cattle, less such as he has preserved the hides of, or unless the preservation of them was waived. There is testi-

<sup>3</sup> Dorris v. Rice, 108 N. W. 700, 145 Mich. 216.

<sup>4</sup> Harrington v. Hall, 63 A. 875, 6 Pennewill, 72.

<sup>5</sup> O'Hara v. Miller, 20 N. W. 760, 64 Iowa, 462.

<sup>6</sup> Turner v. State, 160 S. W. 357, 71 Tex. Cr. R. 477.

mony showing the number of hides preserved by defendant, and as to an agreement with plaintiff waiving the preservation of some of the hides. If the whole of the steers which are claimed to have died have thus been accounted for to your satisfaction, defendant cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect or carelessness of defendant, as you have already been instructed. The offer to count the hides claimed to have been made by defendant to plaintiff, if made as claimed and the count actually made as testified to, if satisfactorily proven, may be taken by you as showing that defendant had the number of the hides claimed. There are no provisions in the contract as to when the hides of cattle which had died should be counted and the reasonable construction therefore is that the hides should be counted at the time and with a view of making the hides themselves available for use or sale.<sup>7</sup>

§ 768(2). **Nebraska**

The court instructs the jury that under the terms of the contract herein sued upon the defendant is liable for the value of any cattle delivered to defendant, or any of the increase thereof, which were lost, died, or not returned, if you believe from the evidence that such loss, death, or failure to return such stock could have been prevented by the defendant in exercising reasonable and ordinary care in handling such stock. On the other hand, it is provided by said contract, and the law is, that he would not be liable to plaintiff on account of the death of any of the ——— head of cattle, or the increase thereof, resulting from disease, old age, or other causes which the defendant by reasonable and ordinary care could not have prevented.<sup>8</sup>

C. LIABILITY FOR INJURIES INFLICTED BY ANIMALS

1. *Personal Injuries or Injuries to Other Animals*

§ 769. **Animals running at large—Wild steer**

§ 769(1). **United States**

You are instructed that the negligence of defendant must have been the proximate cause of plaintiff's injuries, to enable her to recover in this cause. If defendant, through its employés, suffered said steer to be at large, and such act by the defendant was negligence on its part, and was the real cause of the injuries to plaintiff, then, in law, such negligence on the part of defendant would

<sup>7</sup> Teal v. Bilby, 8 S. Ct. 239, 123 U. S. 572, 31 L. Ed. 263.

<sup>8</sup> Mattern v. McCarty, 102 N. W. 468, 73 Neb. 228.

be the proximate cause of plaintiff's injuries. Was there negligence on the part of defendant in suffering said steer to run at large? Defendant was chargeable with such care as an ordinary prudent man would have used under the circumstances in keeping said steer from going at large in the city of ———. Any less care on its part would be negligence, and the amount of care indicated, if used by the railroad, would save it from responsibility. If it occurs to you that such injuries as were inflicted on plaintiff were unusual and seldom occur, that fact will cut no figure in the case if you find that defendant was negligent, as indicated above, in suffering said steer to be at large.<sup>9</sup>

§ 769(2). Washington

The plaintiff in this case, gentlemen of the jury, claims that while he was on a public highway in this county he was injured by a steer belonging to the defendant, which had been left by the defendant loose upon the public highway, and which was by the defendant permitted to roam unattended on the public highway near ———; that the said steer was wild, vicious, and dangerous, and was known to be so by the defendant, and by reason of being so dangerous the plaintiff was injured. Now, gentlemen of the jury, the ownership of this steer is admitted in this case. It is admitted that the defendant owned the steer which the plaintiff refers to in his complaint, so there is no issue on that. Neither is there any contention that this steer referred to in the complaint, which was the particular steer alleged to have injured plaintiff, was being driven at the time these injuries are alleged to have occurred by the employes of the defendant. Now, as a matter of fact, gentlemen, the owner of an animal which he knows to be wild and dangerous—it makes no difference whether it is wild or not, but knows it to be dangerous—has no right to permit such animal to go at large unattended, and, if the owner of this animal knew it to be dangerous or vicious, and permitted said animal to run loose or roam at large, such owner is liable for any damage which said animal did.<sup>10</sup>

You are instructed that if you believe from the evidence in this case that the defendant, or drivers of the animal in question, should have known that the said steer was of such a disposition, or of such a nature that it would be dangerous and likely to commit an injury, such as is complained of in this case, and that such steer did

<sup>9</sup> *Texas & P. Ry. Co. v. Juneman* (C. C. A. Tex.) 71 F. 939, 18 C. C. A. 334.

<sup>10</sup> *Harris v. Carstens Packing Co.*, 86 P. 1125, 43 Wash. 647, 6 L. R. A. (N. S.) 1164.

injure the plaintiff, it will be your duty to find a verdict for the plaintiff, etc.<sup>11</sup>

**§ 770. Injuries by stallion**

You are instructed that there are some questions in this case which the jury must decide, and the jury will be the sole judge as to those questions. The first of these questions is, Was the defendant, at the time the stallion escaped, using that degree of care and precaution to prevent the escape of the stallion which a person of ordinary caution and prudence would have used under like circumstances? In deciding this question, you should take into consideration all the evidence of the case, as to the size and age of the stallion and the manner in which he had been used and handled, his disposition, character, and propensities, the kind and character of halter which was used, the lack of fence about the barnyard, the purpose for which the stallion was brought out of the barn, the probable consequences of his escape, and any and all other facts and circumstances in evidence which, in your opinion, will aid you in determining whether the defendant used due care and precaution to prevent the escape of the stallion.<sup>12</sup>

**§ 771. Injuries by dogs**

**§ 771(1). Indiana**

The court instructs the jury that, if you find from a preponderance of all the evidence that the defendant kept a dog which had a propensity to bite mankind, and which fact was known to the defendant, then it was his duty to keep said dog confined, and, if he failed to do so, and through such failure plaintiff was damaged, then you should find for the plaintiff, etc.<sup>13</sup>

The jury are instructed that the fact that the defendant or defendant's wife may have been able to control the dog by calling him off or speaking to him when he would run at any one, even if the jury believe this fact proven, is not such a restraining as is contemplated by the law, and would not relieve or excuse the defendant from the charge of negligence, if the other facts in said cause are proven that would require the defendant to restrain his dog.<sup>14</sup>

<sup>11</sup> *Harris v. Carstens Packing Co.*, 86 P. 1125, 43 Wash. 647, 6 L. R. A. (N. S.) 1164.

<sup>12</sup> *Whitney v. Ritz*, 151 N. W. 762, 30 N. D. 38.

<sup>13</sup> *Holt v. Myers*, 93 N. E. 31, 47 Ind. App. 118.

<sup>14</sup> *Dockerty v. Hutson*, 25 N. E. 144, 125 Ind. 102.

**§ 771(2). Rhode Island**

The court instructs the jury that a man in this state keeps a dog at his peril, unless he keeps him in an inclosure, and you are instructed that an inclosure is land which is surrounded by some sort of a fence or hedge, or something of that kind.<sup>15</sup>

**§ 771(3). Texas**

The court charges the jury that it is the duty of the owner, keeper, or harbinger of a ferocious and vicious dog to restrain such dog, and not allow such dog to run at large on the streets of the city, where such dog may have opportunity to attack persons lawfully using the streets; and if you find and believe from the evidence before you that the dog which bit the plaintiff was a dog of ferocious and vicious habits, and that the defendant ———, knew it was a vicious dog, and you further find that the said ——— was, at the time plaintiff was bitten, the owner, keeper, or harbinger of the dog, you will find for the plaintiff.<sup>16</sup>

**§ 772. Injuries by dogs to other animals**

The court charges the jury that each owner of a dog which is concerned in or engaged in the killing, wounding, and worrying of sheep is liable for the whole amount of damages which his dog was concerned or engaged in doing.<sup>17</sup>

**§ 773. Same—Apportionment of damages for sheep killing**

The court further instructs the jury that, if you find for the plaintiff on the first count in his petition, then it is not an absolute essential to plaintiff's recovery that he prove what particular damage was done by defendant's dog and what particular damage was done by the other dog; for, if you find that both dogs were of equal power to do mischief, and that there were no circumstances to render it probable that greater damage was done by one dog than by the other, then each owner is liable for an equal share of such damage; but, if you find that the defendant's dog had greater or less power than the other dog to do mischief, and that there were circumstances to render it probable that greater or less damage was done by defendant's dog than was done by the other, then the defendant is liable for the amount of the damages that you may find were done by his dog in proportion to his power and ac-

<sup>15</sup> *Whittet v. Bertsch*, 97 A. 18, 39 R. I. 31, L. R. A. 1916E, 710.

<sup>16</sup> *Barklow v. Avery*, 89 S. W. 417, 40 Tex. Civ. App. 355.

<sup>17</sup> *Nelson v. Nugent*, 82 N. W. 287, 106 Wis. 477, 80 Am. St. Rep. 51—rule under statute.



ording to said circumstances when compared with said other dog.<sup>18</sup>

**§ 774. Duty to keep dog off race track**

The court instructs the jury that if the defendant ——— took the dog onto the fair grounds, or permitted the same to follow him, knowing that horses were to race upon the track while said dog was there, and that said animal by nature was inclined to interfere with and run after horses, and that the defendant ——— knew such fact, and that if he took the animal upon the grounds and failed to exercise such care and caution as a reasonably careful and cautious person would use under the same and similar conditions to prevent said dog getting upon said track or interfering with the running horses, and by reason of such want of care the dog went upon the track and caused the injury sued for, such defendant would be liable.<sup>19</sup>

**§ 775. Liability of one having temporary custody of dog for injuries inflicted by it**

The court instructs the jury that if the defendant ——— did not know of the presence of the dog until about the time the race, in which the injury occurred, was being run, and until defendant was inside of the fair ground, and at the time the race was run the dog was with defendant, and was a dog kept about the premises of ———, in which defendant lived, then it was incumbent upon defendant to use due care and caution to keep the dog off of the track; and the fact that one ——— had his hand upon the collar of said dog would not alone and of itself mean that due care was being exercised, and under such conditions the fact that a race was being run, and the fact that dogs are likely to become excited and use strenuous efforts and get away and upon said track, should be considered; and it must appear that such care and caution was taken as would reasonably prevent the dog getting upon the track; and it was for the jury to determine whether the dog entered upon the track with the knowledge of defendant, or without his knowledge, and if said defendant permitted the animal to go with him to the track or remain with him after being upon the track, and failed to use reasonable care and caution as a reasonable, prudent, and cautious person would do, under the same or similar conditions, and the dog did enter the track and cause

<sup>18</sup> Miller v. Prough, 221 S. W. 159, 203 Mo. App. 413.

<sup>19</sup> McClain v. Lewiston Interstate

Fair & Racing Ass'n, 104 P. 1015, 17 Idaho, 63, 25 L. R. A. (N. S.) 691, 20 Ann. Cas. 60.

the injury, then the defendant would be guilty of negligence, regardless of whether he was the owner of the dog or not.<sup>20</sup>

**§ 776. Duty of owner of animal to warn others as to its viciousness**

The court instructs you as a matter of law that the owner of a dangerous mule or other animal, knowing the same to be dangerous to any one who might drive or use it, owes the duty of not permitting others to drive the same without informing any such other person or persons of the fact of the dangerousness of such animal; and this is true whatever may be the relation of such owner to such other person or persons. And in this case, if you believe from the preponderance of the testimony that the defendants knowingly permitted the plaintiff to use or drive any mule dangerous to be used or driven, without informing plaintiff of the dangerousness of the same, and the plaintiff, while endeavoring to use said mule, without fault or neglect upon his part, and without knowing the dangerousness of the same, was injured, then the defendants are liable to plaintiff for such damages as he may have sustained by reason thereof.<sup>21</sup>

**§ 777. Necessity of showing knowledge, by owner or keeper of animal, of viciousness**

**§ 777(1). Indiana**

The court instructs the jury that, before the plaintiff is entitled to recover, the evidence must show by a fair preponderance that the defendant kept a vicious dog at his place, which he permitted to run at large, and on the public highway near his place, and that he knew that said dog was vicious and likely to attack and injure persons while passing along the public highway.<sup>22</sup>

The jury are instructed that the plaintiff has alleged in each paragraph of his complaint that the steer in question was of a dangerous and vicious disposition, in the habit of attacking mankind and animals. He has also alleged that the defendant knew of such dangerous and vicious disposition of said steer, and that he (plaintiff) had no knowledge of such dangerous and vicious disposition. To entitle the plaintiff to recover, he must have proved, by a fair preponderance of the evidence, not only that the steer

<sup>20</sup> McClain v. Lewiston Interstate Fair & Racing Ass'n, 104 P. 1015, 17 Idaho, 63, 25 L. R. A. (N. S.) 691, 20 Ann. Cas. 60.

<sup>21</sup> Fererira v. Silvey, 176 P. 371, 38 Cal. App. 346.

<sup>22</sup> Holt v. Myers, 93 N. E. 31, 47 Ind. App. 118.

was dangerous and vicious, but that the defendant knew that fact and the plaintiff was ignorant of it.<sup>23</sup>

**§ 777(2). Michigan**

The jury are instructed that notwithstanding they might find that the animal was not actually vicious up to the time of the injury, and that ——— had no knowledge of any viciousness in the bull, yet in view of the known and ordinary propensities of such an animal, if the jury find that the manner of driving and managing the bull was negligent, then the plaintiff could recover, if her conduct on the occasion was not wanting in reasonable care and prudence, in view of all the circumstances and surroundings of the injury.<sup>24</sup>

**§ 778. Same—Injuries inflicted by animal while trespassing on premises of plaintiff**

The jury are instructed that if the defendant's horse was at the time trespassing in plaintiff's field, on plaintiff's land, or on the land of a third party where plaintiff was pasturing his horse by the month for a consideration paid by plaintiff to such owner, and there attacked and killed plaintiff's horse, defendant is liable for the injury, whether he knew, or not, of the vicious propensity of his horse.<sup>25</sup>

The jury are instructed that if the jury find that the defendant's horse was in pasture on his wife's premises, and while there broke over her part of the partition fence separating her said lands from the field in which plaintiff's horse was being rightfully pastured by him, then the defendant's horse was unlawfully in the place where the plaintiff's horse was on pasture; and in such case, if the jury find that he killed plaintiff's horse, the defendant is liable to plaintiff for the injury, whether his horse was in fact vicious or not, and whether he knew of such viciousness or not.<sup>26</sup>

**§ 779. Effect of notice to owner of vicious propensities**

**§ 779(1). Indiana**

The jury are instructed that if you find from a preponderance of all the evidence that the defendant kept a dog which had a propensity to bite mankind, and which fact was known to the defendant, then it was his duty to keep said dog confined, and, if he

<sup>23</sup> Todd v. Danner, 46 N. E. 829, 17 Ind. App. 368.

<sup>24</sup> Barnum v. Terpening, 42 N. W. 967, 75 Mich. 557.

<sup>25</sup> Morgan v. Hudnell, 40 N. E. 716,

52 Ohio St. 552, 27 L. R. A. 862, 49 Am. St. Rep. 741.

<sup>26</sup> Morgan v. Hudnell, 40 N. E. 716, 52 Ohio St. 552, 27 L. R. A. 862, 49 Am. St. Rep. 741.

failed to do so, and through such failure plaintiff was damaged, without his fault, then they should find for the plaintiff.<sup>27</sup>

**§ 779(2). New Jersey**

The court instructs the jury that, if you believe from the evidence that the dog mentioned in the evidence bit plaintiff in the cheek, and that defendant is the owner of such dog, and that prior to the time of the inflicting of such injury upon the plaintiff by the dog it had to the knowledge of defendant a mischievous propensity to bite people in play then you are instructed that the law is for the plaintiff.<sup>28</sup>

**§ 779(3). Oklahoma**

You are instructed that if you find from the evidence that the dog of defendant bit the plaintiff, and that prior to the time of such injury defendant had actual or constructive notice that such dog was vicious and dangerous, you will find for the plaintiff.<sup>29</sup>

**§ 779(4). Texas**

The jury are instructed that one who keeps a dangerous dog, with knowledge of its vicious propensities, incurs a liability for any injury caused by it to another person. Before the plaintiff can recover anything in this suit, he must establish by a preponderance of the testimony that the defendant owned the dog that did the injury to plaintiff; that said dog was of a ferocious, vicious, and dangerous disposition; and that defendant knew that said dog was dangerous as aforesaid. But, after the owner of a vicious dog has notice of its vicious propensities, he cannot exonerate himself by showing that he used care in keeping and restraining the animal, for after such knowledge he assumes the risk of keeping him securely. If, therefore, you believe from the evidence and a preponderance thereof that the defendant, on or about the \_\_\_\_\_ day of \_\_\_\_\_ had a vicious dog; that he knew said dog was vicious and ferocious, and liable to attack and bite persons coming in contact with it; that the defendant permitted said vicious and ferocious dog, if any, to run at large on the public streets of \_\_\_\_\_, and that while so running at large the said dog attacked and bit the plaintiff, then you will find for the plaintiff such damages as you find from the evidence he has suffered.<sup>30</sup>

<sup>27</sup> *Holt v. Myers*, 93 N. E. 31, 47 Ind. App. 118.

<sup>28</sup> *Dranow v. Kolmar*, 104 A. 650, 92 N. J. Law, 114. There was no question of contributory negligence in the case.

<sup>29</sup> *Ayers v. Macoughtry*, 117 P. 1088, 29 Okl. 399, 37 L. R. A. (N. S.) 865. The question of contributory negligence was not raised.

<sup>30</sup> *Triolo v. Foster* (Civ. App.) 57 S. W. 698.

**§ 780. Contributory negligence****§ 780(1). Illinois**

The jury are instructed that, if you believe from the evidence that at the time of the injury to the plaintiff there was displayed conspicuously in the auction ring in question a sign reading: "Do not stand in the ring. Persons standing in this ring do so at their own risk"—and that the plaintiff knew of such sign and that the plaintiff received his injuries while standing in the ring in question, then you are instructed that plaintiff cannot recover and your verdict must be for the defendant.<sup>31</sup>

**§ 780(2). Indiana**

The jury are instructed that the plaintiff has alleged in each paragraph of his complaint, among other things, that he received the injury complained of without fault or negligence on his part. This is a material and necessary allegation. Without such allegation his complaint would not have been sufficient to have constituted a cause of action, and before the plaintiff can recover, he must have proved by a fair preponderance of the evidence that he did receive said injuries without fault or negligence on his part directly and materially contributing to the injury. It is not enough to enable the plaintiff to recover that he shall have proved fault and negligence on the part of the defendant. He must also prove that he himself was free from such fault or negligence, and, if he has failed to prove by a fair preponderance of the evidence that he received the injury without such fault or negligence on his own part, he cannot recover.<sup>32</sup>

**§ 780(3). Iowa**

The jury are instructed that the defendant claims that the plaintiff, in passing the bull, provoked the bull to make the attack upon him, by striking the bull with a cane or stick, without reasonable cause. If you find that the plaintiff struck the bull, and thereby excited him to make the attack, you will not assume, as a matter of law, that the plaintiff was in fault, but you will inquire whether, under the circumstances, the plaintiff had or had not reasonable cause to strike the bull with his cane. You will carefully notice what the plaintiff did, if anything; his situation at the time, as it appeared to him; and all the circumstances surrounding him; and decide whether he acted as a man of ordinary prudence or not.<sup>33</sup>

<sup>31</sup> *Craney v. Schloeman*, 145 Ill. App. 313.

<sup>32</sup> *Todd v. Danner*, 46 N. E. 829, 17 Ind. App. 368.

<sup>33</sup> *Meier v. Shrunk*, 44 N. W. 209, 79 Iowa, 17.

**§ 780(4). Nebraska**

You are instructed that, if you believe from the evidence that plaintiff voluntarily exposed himself to danger by attempting to break up a fight between his dog and that of defendant, and while so endeavoring to separate such dogs so engaged in combat, he received the injuries from defendant's dog for which he sues, you will find for the defendant.<sup>34</sup>

**§ 781. Knowledge of injured person of viciousness**

**§ 781(1). Kansas**

At defendant's instance, the court instructs the jury that if they believe from the evidence that defendant, ———, told the plaintiff, ———, before he bought the horse in question, or at the time when the sale and purchase was made, and before it was consummated, that the horse had previously run away, and was not entirely trustworthy, or words to that effect, then the plaintiff cannot recover in this case, and your verdict must be for the defendant.<sup>35</sup>

**§ 781(2). Kentucky**

The court instructs the jury that if the mule was dangerous and vicious, and was known by the defendant to be such, or if by the use of ordinary care this might have been known by it or its servants, you should find for the plaintiff, unless you find from the evidence that plaintiff knew before he was kicked by the mule that it was dangerous, and liable to kick and injure him, and after this voluntarily went on hauling with the mule, in which case he assumed the risk, and you should find for the defendant.<sup>36</sup>

**§ 782. Burden of proof**

The jury are instructed that in this case the burden of proof rests upon the plaintiff.<sup>37</sup>

The jury are instructed that the plaintiff's alleged cause of action is set forth in his complaint, and, before he can recover, he must have proved by a fair preponderance of the evidence all the material allegations of his complaint, or enough of such material allegations to constitute a cause of action against the defendant.<sup>38</sup>

**§ 783. Matters considered on issue of vicious propensities**

The jury are instructed that a dog cannot be proven to be vicious, and liable to bite mankind, by evidence that the general reputa-

<sup>34</sup> Warrick v. Farley, 145 N. W. 1020, 95 Neb. 565, 51 L. R. A. (N. S.) 45.

<sup>35</sup> Adams v. Snyder, 55 P. 498, 8 Kan. App. 245. Plaintiff was kicked by the horse.

<sup>36</sup> Brady v. Straub, 197 S. W. 938, 177 Ky. 468, L. R. A. 1918D, 197.

<sup>37</sup> Todd v. Danner, 46 N. E. 829, 17 Ind. App. 368.

<sup>38</sup> Todd v. Danner, 46 N. E. 829, 17 Ind. App. 368.

tion is that the dog is vicious and so liable. You will therefore not regard the evidence of the witness ——— that such is the reputation of the dog upon the issues of whether or no said dog was vicious, and liable to bite mankind.<sup>39</sup>

**§ 784. Damages for personal injuries**

You are instructed that if you find for the plaintiff in this case you may return a verdict in such sum as you believe from the evidence will compensate him for the damages which he has sustained by reason of the injuries. And in determining said damages you may take into consideration the expenses which you believe from the evidence he has paid, incurred, or become liable for, on account of medical and surgical services, if any, in consequence of being bitten by the dog, if he was so bitten; and in determining such amount you may take into consideration the apprehension of poisoning from the bite of said dog and the fear of evil results therefrom, and of the physical and mental suffering endured by him in consequence of being bitten by said dog.<sup>40</sup>

**§ 785. Same—Exemplary damages**

The jury are instructed that, before you can find exemplary damages, you must believe from the evidence that plaintiff has established by a preponderance of the evidence that defendant owned the dog that bit plaintiff, that he knew the dog was of a vicious and dangerous disposition, and that he knowingly let the dog run at large, with a reckless disregard of the rights of the public.<sup>41</sup>

*2. Injuries to Crops*

**§ 786. Liability for injuries to crops or pasturage**

**§ 786(1). Arkansas**

You are instructed that if you find from the evidence in this case that the defendant was herding his cattle on land in the fencing district, or was permitting them to run at large on such land, and they escaped and went upon the land of plaintiff inside the district and damaged the crop, then you will find for the plaintiff, notwithstanding the district fence was not a lawful fence, and assess plaintiff's damage at such sum as the evidence shows was caused by the stock of defendant.<sup>42</sup>

<sup>39</sup> *Trilolo v. Foster* (Tex. Civ. App.) 57 S. W. 698.

<sup>40</sup> *Ayers v. Macoughtry*, 117 P. 1088, 29 Okl. 399, 37 L. R. A. (N. S.) 865.

<sup>41</sup> *Trilolo v. Foster* (Tex. Civ. App.) 57 S. W. 698.

<sup>42</sup> *Hill v. Gibson*, 154 S. W. 203, 107 Ark. 130.



**§ 786(2). Iowa**

The jury are instructed that if you believe from the evidence that the land mentioned in the evidence was the property of the plaintiff, and that the land was fenced, and the defendant broke down the fence and thereby allowed his cattle to go upon the land, or if said land was fenced, and the fence had been broken down without the fault of defendant, and he drove his cattle upon the land, plaintiff would be entitled to recover.<sup>43</sup>

**§ 786(3). Utah**

You are instructed that, if you find and believe by a preponderance of the evidence that the plaintiffs were lawfully in possession and entitled to the possession and control of the lands described in their complaint during the time alleged in the complaint, and that during the said time the boundary lines of said lands were marked by posts or monuments or other signs, so that the defendant could see, or by reasonable investigation could ascertain by going upon the premises, where the lands of the plaintiffs were, so as to enable the defendant with reasonable care and observation to distinguish or know the lands claimed by the plaintiffs from the lands upon which the defendant could lawfully graze or pasture his cattle, or if you find by a preponderance of the evidence that the defendant knew, or by reasonable care and attention should have known, where the lands of the plaintiffs were, by being told by the plaintiffs or otherwise, and you further find that the defendant was notified to keep his cattle off from the said lands claimed by the plaintiffs, and under either of these conditions, after receiving such notice, the defendant suffered or permitted his cattle to trespass upon the said lands of the plaintiffs, and to graze thereon, then the defendant would be liable to the plaintiffs for such damages as they may have proved that they suffered by reason of such trespass during the times alleged in the complaint.<sup>44</sup>

**§ 787. Injuries by stock of occupant of land to hay owned and left on premises by former occupant**

I instruct you, gentlemen of the jury, that as a matter of law, if you find that by the agreement of the parties the plaintiff had a right to the use of the premises for the purposes of raising and harvesting this millet, that the plaintiff had a reasonable time after the maturity of the hay within which to remove the same from the premises, and a duty was incumbent upon the plaintiff to remove the same within a reasonable time after that allotted him for the

<sup>43</sup> Erbes v. Wehmeyer, 28 N. W. 447, 69 Iowa, 85.

<sup>44</sup> Hall v. Bartholomew, 169 P. 943, 51 Utah, 279.



removal of the same. And if you find that the plaintiff did not exercise reasonable diligence, and did not remove the same within a reasonable time after the expiration of his rights, or after the expiration of the date given him, and he then suffered damages by reason of the stock of the defendant running upon said premises, the plaintiff could not in such event recover damages for injury to his hay.<sup>45</sup>

The jury are instructed that these parties had rights and responsibilities resting upon each of them. Plaintiff had a right to occupy the premises for a given time. He had a duty to remove his property, and to terminate his interests therein within a reasonable time, and it was the duty of the defendant to observe the rights of the plaintiff during such reasonable time as the plaintiff had. The question for the jury to determine under such circumstances is: What would be a reasonable time? That is a question of fact, which the jury must determine in this case. If you find that the plaintiff had certain rights of occupancy, and rights to crops grown upon these premises for a space of time, or for a reasonable time, it would be a question for the jury to determine whether or not the plaintiff removed his property and terminated his occupancy of the premises within a reasonable time. And if you find that the plaintiff did not remove his property within a reasonable time, and that after the expiration of a reasonable time his property received injuries at the hands of the defendant's stock, the plaintiff could not in such event recover any damages. But if you find that the plaintiff had a reasonable time within which to remove this millet hay from the premises, and during that time the same was injured or destroyed by the defendant's stock, then the defendant is responsible, as I have already stated, in damages to the plaintiff for the injuries sustained, and it will be for the jury to determine in that event what the reasonable damages were. It will be for the jury to determine the amount of hay which you find was destroyed, and the reasonable value of the same at the time it was destroyed, if you find that it was destroyed. In no event, of course, could the plaintiff recover damages for injuries resulting from loss by reason of injuries by the elements, or by any other injury, excepting injury inflicted by the defendant's stock, if any.<sup>46</sup>

<sup>45</sup> Griffin v. Wiese (N. D.) 179 N. W. 373.

<sup>46</sup> Griffin v. Wiese (N. D.) 179 N. W. 373.

**§ 788. Duty of crop owner to have sufficient fence or to prevent damage**

**§ 788(1). Indiana**

The jury are instructed that, if you find from the evidence that the fence over which the stock of the defendant entered on the land of the plaintiff was a partition fence, dividing the lands of the parties to the suit, and that the stock of the defendant crossed over such fence at a place where it was the duty of the plaintiff to maintain such fence, then the defendant would not be liable in this case, unless the plaintiff has shown that the fence was such as good husbandmen generally keep, by the testimony of skillful men.<sup>47</sup>

**§ 788(2). Indian Territory**

You are instructed that it is claimed by the plaintiff that he was the tenant of a man by the name of ———, and that the land upon which he was farming was adjoining a pasture owned by the defendant. The plaintiff insists that the division fence between the land which he was working was a good and sufficient fence to turn cattle of ordinary disposition; but that the cattle of defendant were not cattle of ordinary disposition, but were breachy cattle, and destructive in their disposition, and that they broke through the fence, and destroyed a large part of his crop of corn, to his damage, and that plaintiff gave notice to the defendant of the destruction that was being done by his cattle. The defendant insists that the division fence between the plaintiff's land and defendant's pasture was owned by the landlord of the plaintiff, and that the plaintiff's landlord, ———, and the defendant had an agreement by virtue of which the landlord of the plaintiff was to keep the fence in repair, and that defendant sent notice to the plaintiff or to his landlord that the fence was not in repair. The court instructs you that this is a grazing country, and the rule is that cattle have a right to run at large, and that people who have inclosures must have a good and sufficient fence—sufficient to turn cattle of ordinary disposition; and the owners of cattle are not liable to the owners of inclosures for damages unless the said cattle so running at large are breachy and vicious cattle, and not cattle of ordinary disposition. In this case, if you are satisfied that there was an agreement between the landlord of the plaintiff and the defendant that the landlord of the plaintiff should keep the fence in a good state of repair, then the court would instruct you that the same

<sup>47</sup> *Hinshaw v. Gilpin*, 64 Ind. 116.

rule would apply as to the character of the fence to be maintained between these two adjoining owners as applies when the cattle are running at large on the range. Hence the question for you to determine from the evidence is whether the plaintiff or his landlord kept the division fence in a good condition, sufficient to turn cattle of ordinary disposition; and if you find that they did not keep such a fence, then your verdict should be for the defendant. But if you are satisfied by a fair preponderance of the evidence that the fence was a good and sufficient fence to turn cattle of ordinary disposition, and that the damages were done by the cattle of the defendant by reason of their vicious and breachy character, then your verdict should be for the plaintiff.<sup>48</sup>

The jury are instructed that if the damages complained of could have been prevented by timely labor on the part of the plaintiff, or his landlord, after notice of the insufficient fence to turn defendant's cattle, and protect his crops, that it was the duty of the plaintiff and his landlord to repair, or to act and prevent the damage if it could be done, for he cannot sit idly by and allow damage which he might avert by a small outlay, and then compel defendant to pay damage which he has allowed to be done.<sup>49</sup>

You are instructed that the proof tends to show that the fences were repaired some time in ———, or possibly the ———, which date the jury are to fix for themselves, and the jury are instructed that if the damage was done prior to this date, and the fence was in a defective condition prior to this time and at the time the damage was done, that the plaintiff cannot recover for any damage done by the defendant's cattle prior to the repairing of the fence in ——— or ———.<sup>50</sup>

You are instructed that should you be satisfied from the evidence that the division fence was not of sufficient character to turn cattle of ordinary disposition, or that defendant's cattle did not damage the plaintiff's corn, or that defendant's cattle were not breachy or vicious, more than cattle of ordinary disposition, then your verdict should be for the defendant.<sup>51</sup>

### § 788(3). Iowa

The jury are instructed that a man has no right to carelessly look on at the destruction of his property. It is his duty to use reasonable care to prevent such destruction; and if he fails to use

<sup>48</sup> Perry v. Cobb, 76 S. W. 289, 4 Ind. T. 717.

<sup>49</sup> Perry v. Cobb, 76 S. W. 289, 4 Ind. T. 717.

<sup>50</sup> Perry v. Cobb, 76 S. W. 289, 4 Ind. T. 717.

<sup>51</sup> Perry v. Cobb, 76 S. W. 289, 4 Ind. T. 717.

ordinary care, he cannot recover for the injury which by ordinary care he might have prevented.<sup>52</sup>

The jury are instructed that if you find from the evidence that the defendant's part of the partition fence, with the exception of one or two small gaps, was sufficient to have turned the stock, and find that the plaintiff knew of these gaps, and that the stock would come through such gaps, and that the stock did come through said gaps, and if you find that plaintiff could, with the exercise of ordinary care, have prevented said stock from thus trespassing, and did not do so, he cannot recover for the damage which he might have thus prevented.<sup>53</sup>

The jury are instructed that if you find that the plaintiff could, by the use of ordinary care, have prevented the horses and cattle from eating and destroying his hay and corn, he cannot recover for such hay and corn thus destroyed, which by ordinary diligence he might have prevented. The plaintiff, after he knew the horses and cattle of others were destroying his hay and corn, should have used reasonable caution to have prevented further injury, such as fencing his stacks, and fencing his corn beyond the reach of such stock, provided he could reasonably have done so.<sup>54</sup>

## § 789. Measure of damages

### § 789(1). Indian Territory

You are instructed that, if you find for the plaintiff, the measure of damages which the plaintiff could recover in this action would be the value of the corn crop at the time of its destruction, and all evidence that has been admitted in relation to the condition of the corn crop that does not throw light upon the question of the value of the corn crop at the time of its destruction should not be considered by you. If you find for the plaintiff, and allow him damages, the court would instruct you that the amount so allowed should draw interest at the rate of ——— per cent. per annum from the date of the last damage that was done to the plaintiff's corn crop, as may be shown by the evidence.<sup>55</sup>

### § 789(2). Iowa

The jury are instructed that the measure of the plaintiff's damage for the loss or injury to the grass for the years ——— and ———, if you find that he has sustained any damages in that regard, will be the actual damage done to the grass crop for these

<sup>52</sup> Little v. McGuire, 38 Iowa, 560.

<sup>53</sup> Little v. McGuire, 38 Iowa, 560.

<sup>54</sup> Little v. McGuire, 38 Iowa, 560.

<sup>55</sup> Perry v. Cobb, 76 S. W. 289, 4 Ind. T. 717.

years by the defendants' cattle; that is, the difference between the actual market value of the crop upon the land for those years as it was and what its market value would have been had the plaintiff's cattle not been driven or herded or pastured upon the land. To state it in other words, the question for you to determine from the evidence in fixing the amount of damages, if any, on this claim is, how much less was the actual rental value of the land for the grass crop of these years by reason of the defendants' cattle having been driven or herded upon the land than it would have been had the cattle not been driven or herded upon the land? If you find that the plaintiff is entitled to recover in this case, you will ascertain whether he has sustained any damages by reason of any permanent injury to the growth of grass on said land. The plaintiff's damages upon this claim, if he is entitled to recover any, will be such only as injuriously affect the market value of the land, and must be fixed at the difference between the actual market value of the land at the time the defendants' cattle ceased to be herded upon said land and what would have been its market value at that time if the cattle had not been herded or driven upon it at all; or, in other words, the question here to be determined is, how much less, if any, was the land worth in the market by reason of the defendants' cattle having been driven or herded upon the land than it would have been had the cattle not been herded or driven on the land? If you find from the evidence that the plaintiff is entitled to recover damages from the defendants, you will declare the same by your verdict; but in determining the amount of damages you must confine the same to the damages committed by the defendants' cattle. You will not allow him for any injuries to the grass on the land that may have been committed by other cattle, nor will you allow him damages for any injuries that may have been committed in prior years, or prior to the time of giving the notice, if one was given, as has been defined to you in these instructions.<sup>56</sup>

**§ 790. Damages contributed to by cattle of others than defendant**

You are further instructed that any damage that may be shown to have been committed by cattle belonging to other people than the defendant cannot be recovered for in this action, no matter through what fence such cattle entered; and such damage, if any, committed by other cattle, must not be included in your verdict in estimating the damages.<sup>57</sup>

<sup>56</sup> Harrison v. Adamson, 53 N. W. 334, 86 Iowa, 693.

<sup>57</sup> Perry v. Cobb, 76 S. W. 289, 4 Ind. T. 717.

**§ 791. Right of owner of premises to take up trespassing animal as running at large**

**§ 791(1). Iowa**

You are instructed that if you find from the evidence that the bull in question was placed by plaintiff in the pasture on his own premises, and escaped therefrom and came upon defendant's premises; and if you so further find that such escape was because the division fence between the pastures, or some part of it, was not sufficient to properly restrain a bull under the circumstances in which the pastures on the two premises were used at the time; and if you further so find that plaintiff had knowledge or notice of the insufficiency herein described when he placed the bull in his own pasture—then the bull was not properly restrained, and, if taken upon defendant's premises, was "found at large," within the meaning of the law.<sup>58</sup>

**§ 791(2). Texas**

You are instructed that, at the time of said homicide, the running at large in ——— county of mules was prohibited under the laws of this state. If, therefore, you believe from the evidence that the defendant's mules entered inclosed lands leased and occupied by C., and were roaming about the cultivated land of the said C., without the consent of said C., then you are instructed that the said C. had the lawful right to impound said stock and retain the same in his possession until it was determined by three disinterested freeholders appointed by the justice of the peace of said precinct what damages, if any, had been done to the crop of the said C., by said mules and what fees, if any, he was entitled to under the law for impounding said stock.<sup>59</sup>

**D. LIABILITY FOR VIOLATION OF MUNICIPAL REGULATIONS AGAINST RUNNING AT LARGE**

**§ 792. Knowledge of owner**

The jury are instructed that, before you can find the defendant guilty, you must believe from the evidence that the hogs of the defendant were running at large within the corporate limits of the town of ——— and that said hogs were so running at large within the said corporate limits by the sufferance of defendant. Although you may believe from the evidence that the hogs of defendant strayed from their usual place of running into and within the cor-

<sup>58</sup> Conway v. Jordan, 81 N. W. 703, 110 Iowa, 462.

<sup>59</sup> Barnett v. State, 176 S. W. 580, 76 Tex. Cr. R. 555.

porate limits of said town, yet if the jury further believe from the evidence that they were so running within said corporate limits without the knowledge or sufferance of defendant, you will find the defendant not guilty.<sup>60</sup>

**§ 793. What constitutes suffering animals to run at large**

The jury are instructed that if you believe from the evidence that defendant suffered his hogs to run at large outside the corporate limits of the town of ———, having reason to expect that they would run at large within the said corporate limits of ——— and they came within the limits of said corporation by reason of their being so permitted to run at large outside of the limits of said town, then the said defendant has suffered the said hogs to run at large in said town within the meaning of said ordinance, and you must find him guilty and assess penalty within the provisions of said ordinance.<sup>61</sup>

**E. LIABILITY FOR INJURIES TO ANIMALS**

See, also, Railroads.

**§ 794. Duty of owner of lands with respect to cattle or hogs straying thereon**

The court instructs the jury that an owner of uninclosed, or insufficiently inclosed, lands is not liable for injuries to animals straying upon the land, unless he maintains or permits to remain thereon something in itself calculated to attract such animals to their injury, and in this case, if you find from a preponderance of the evidence that the pots of poison were mixed by the defendant for a lawful purpose, that is, to destroy useless timber upon his lands, and that he did not and had no reason to anticipate that plaintiffs' cattle would drink the poison, the defendant will not be liable in damages, and your verdict should be for the defendant.<sup>62</sup>

**§ 795. Same—Duty and liability as dependent upon sufficiency of fence**

The court instructs the jury that this is an action under section ——— of the ———, which provides that if a person does not have a lawful fence, and on account of such fact hogs enter into his fields and injure him in any way, and he worries them with dogs or otherwise, and by such worrying they are killed or injured, such per-

<sup>60</sup> Town of Collinsville v. Scanland, 58 Ill. 221.

<sup>61</sup> Town of Collinsville v. Scanland, 58 Ill. 221.

<sup>62</sup> Abbott v. Vanmeter, 219 S. W. 330, 142 Ark. 601.



son shall be liable to the owner of said hogs in double damages, with costs. A lawful fence, if composed of posts, boards, or palisades, shall be four and one-half feet high, with posts set firmly in the ground, and not more than eight feet apart, and with rails, palings, boards, or palisades securely fastened thereto, and placed at proper distances apart so as to resist horses, cattle, swine, and like stock. A worm fence shall be at least five feet high to the top of the rider, or, if not ridered, shall be five feet to the top rail or pole, and shall be locked with strong rails, poles, or stakes. In this case, however, the fact that the fence was not of a height required by law will not make the defendant liable in this action unless you believe from the evidence that the hogs entered the field by going over the fence; that is to say, no defect of any kind in the fence would fix the liability on the defendant unless you believe from the evidence that such defect was the place where the hogs entered the field. If the defect through which or by which the hogs entered the defendant's field was caused by the action of the water or any other agency not under the control of the defendant, then he would have a reasonable time, after such defect was so caused, within which to repair the same, and during such time would not be liable for damages to stock under above section.<sup>63</sup>

You are instructed that, if you find from the evidence that defendant's fence around the field in question was not a lawful fence as herein defined, and if plaintiff's hogs entered defendant's field by or through any defect in such fence which prevented it from being a lawful fence, and if defendant worried them with dogs, or caused it to be done, or beat them, and if such worrying or beating killed or injured and caused the death of such hogs, or any of them, you should find for the plaintiff, and also find the value of same hogs so killed at the same time, or injured so they died therefrom soon afterward: Provided, however, if you find that the hogs entered said field at a place where the defect was not in the fence when first built, and was caused by some agency not under the control of the defendant, and he had not had a reasonable time after such defect was caused to repair the same, then you find for the defendant, or if they entered by such defect in the fence, which was unknown to the defendant, and if it had not existed for such a length of time that a reasonably prudent man would have discovered the same, then the issues should be found for the defendant.<sup>64</sup>

<sup>63</sup> Woods v. Carty, 85 S. W. 124, 110 Mo. App. 416.

<sup>64</sup> Woods v. Carty, 85 S. W. 124, 110 Mo. App. 416.



You are instructed that a reasonable time within which to so repair is such time as a reasonably prudent man would take to repair a fence in like condition and under like circumstances. If the hogs entered the defendant's field at a hole or defect in the fence of which he had no knowledge, and which did not exist when the fence was built, then he would not be liable in this action, unless such defect had existed for a sufficient time that a reasonably prudent man would have ascertained the same. The plaintiff is not required to prove the manner and place of entrance of the hogs into said field by positive testimony, but he may prove it by circumstances, provided the proof of the circumstances relied upon to establish the facts are sufficiently strong to satisfy you of the fact sought to be established.<sup>65</sup>

**§ 796. Injuries to domestic animals by automobile**

The court instructs the jury that, if you should find by a fair preponderance of the evidence that the defendant was traveling along the public highway and came to these cattle and saw this last cow, as they testified to, on the side of the road, and in order to get past, and believing he could get past, he speeded up his automobile and the cow or heifer ran in front of him and was thereby injured, and that the defendant was using ordinary care in traveling on that road to get past them and to avoid the injury, then the defendant in this action is not liable, and you should so say by your verdict, and find your verdict in favor of the defendant.<sup>66</sup>

**§ 797. Same—Liability for injuries to stock running at large**

You are instructed that the mule of plaintiff, which plaintiff alleges was injured by the defendant, was running at large, in violation of law, in the lane at the time the same was struck by the defendant, if he was so struck, and that, in order to entitle plaintiff to recover, you must believe from the evidence that the defendant after discovering the presence of the mule and the peril that the mule was in, did not exercise ordinary care in attempting to stop his machine and to avoid injury to said mule, and you are instructed that ordinary care in this regard means such care as an ordinary, prudent person would have exercised under the same and similar circumstances, and, unless you so believe, you will return your verdict for the defendant.<sup>67</sup>

<sup>65</sup> Woods v. Carty, 85 S. W. 124, 110 Mo. App. 416.

<sup>66</sup> Armann v. Caswell, 152 N. W. 813, 30 N. D. 406.

<sup>67</sup> Dillon v. Stewart (Tex. Civ. App.) 180 S. W. 648.

You are charged that the stock law was in force at the time and place the mule was injured, and that said mule was in the road in violation of said law, and defendant was not required to be on the lookout for loose animals in the road, and, before you can find for plaintiff, you must believe from the evidence that the defendant saw the danger to said mule in time to have prevented the same by the ordinary use of the means at hand, or that the defendant was guilty of gross negligence in not discovering said mule in time to prevent the injury thereto, and you are charged that the term "gross negligence" means a reckless disregard of the rights of others.<sup>68</sup>

**§ 798. Dogs—Liability of railroad company for killing**

The court instructs the jury that if you believe from the evidence that the plaintiff's dog stood on the track of the defendant near a crossing for about ten minutes before the train which struck him passed, that the track was straight, that the train did not slow up, except for the crossing, that no whistle was blown for the dog, that the engine only blew at the crossing, and that the engineer could see the dog, you may infer that the killing of the dog was wanton and malicious.<sup>69</sup>

**§ 799. Liability for injuries to dogs by motor vehicles**

The court instructs the jury that the defendant had a right to assume that the hound in question would exercise the ordinary instincts of such animals and would keep itself out of danger of collision with his automobile and if the jury believe from the evidence that at the moment immediately prior to the collision the hound was off the traveled part of the highway and out of the line of travel of said automobile and away from danger of collision then defendant had the right to assume that the hound would remain at such distance unless there was something in the circumstances calculated to rebut such presumption.<sup>70</sup>

The court instructs the jury that if you believe from the evidence that the hound dog in question was traveling along the road in front of the defendant's automobile as said automobile approached said dog, the defendant had a right to believe and assume that the dog, by reason of its peculiar instincts and ability to take care of itself and get out of danger would get out of the way, and that the defendant was not bound to anticipate danger for the dog nor

<sup>68</sup> *Dillon v. Stewart* (Tex. Civ. App.) 180 S. W. 648.

<sup>69</sup> *Seaboard Air Line v. Parrish*, 85 S. E. 200, 16 Ga. App. 254.

<sup>70</sup> *Flowerree v. Thornberry* (Mo. App.) 183 S. W. 359.

to be on the lookout for his safety, unless the jury believe that the defendant discovered the peril of the hound in time to have averted the collision by the exercise of such care as an ordinarily prudent person would exercise under the same or similar circumstances.<sup>71</sup>

**§ 800. Liability for killing registered dog**

You are instructed that at common law, the owner of a dog might maintain a civil action for the unlawful injury thereto or killing thereof. There is evidence in this case that the plaintiff's dog was registered under an act of Assembly at the time when it is alleged he was shot and killed, said act being ———; and if you find that the dog was, at the time of the killing, so registered, he was the personal property of the owner, and as such was the subject of larceny, and any person unlawfully killing a dog registered under said act is unquestionably liable to the owner thereof for the value of the dog.<sup>72</sup>

**§ 801. What matters justify killing of dogs**

**§ 801(1). Delaware**

You are instructed that a person may not maliciously injure or kill a dog for a mere trespass upon his premises, and the posting of notices against trespassing by dogs will not thereafter excuse or justify an unlawful killing of a dog found upon the premises. The remedy against such trespassing is, in a proper case, against the owner of the dog.<sup>73</sup>

You are instructed that the defendant justifies the killing of a dog, whosoever it was, on the day in question, because, as he claims, the dog was, at the time of the shooting, in the act of killing one of a flock of his turkeys then upon his premises. We say to you that if you find under the evidence that the defendant himself, or his son under the father's directions, did kill the plaintiff's dog under such circumstances, it was justifiable, and the plaintiff would not be entitled to recover. For, if the dog was upon the land of the defendant in the act of destroying his turkeys, the defendant was justified in killing him. If, however, you find that the plaintiff owned the dog and the latter did not so attack the defendant's turkeys, but was running across the field of the defendant in pursuit of a fox, or was merely trespassing upon the premises of the defendant, then if the dog was killed by the defendant or by another by his direction, it was an unlawful killing and without justification, and your verdict should be for the plaintiff.<sup>74</sup>

<sup>71</sup> Flowerree v. Thornberry (Mo. App.) 183 S. W. 359.

<sup>72</sup> Harrington v. Hall (Del.) 63 A. 875, 6 Pennewill, 72.

<sup>73</sup> Harrington v. Hall, 63 A. 875, 6 Pennewill, 72.

<sup>74</sup> Harrington v. Hall, 63 A. 875, 6 Pennewill, 72.

**§ 801(2). Missouri**

The court instructs the jury that if you believe from the evidence that at the time defendant shot at a dog or dogs the said dog or dogs were on the defendant's premises and were engaged in chasing defendant's calves, then the defendant had a right under the laws of this state to shoot and kill said dog or dogs, and your verdict must be for the defendant.<sup>75</sup>

The court instructs the jury that if you believe from the evidence that just prior to the time the defendant shot a dog or dogs the said dog or dogs were engaged in chasing the calves of the defendant, and that such fact was communicated to the defendant, and that the defendant immediately got his gun and shot said dog or dogs, then the defendant was justified in shooting said dog or dogs, and your verdict must be for the defendant.<sup>76</sup>

**§ 802. Right to kill dog running at large**

The court instructs the jury that if you believe from the evidence that prior to the shooting the dog that was killed was on the defendant's land, that said dog was within calling distance, and in sight of the plaintiff's family and under their control, then, and in that event, the dog was not running at large.<sup>77</sup>

**§ 803. Criminal liability for killing of domestic animals****§ 803(1). Alabama**

The court charges the jury that, although the defendant stands indicted with others, he is not chargeable with anything which any other one named in the indictment may have done, unless he advised, aided, or abetted others in the commission of the offense, intending at the time, by his word or act, to aid or encourage the commission of the offense.<sup>78</sup>

**§ 803(2). Missouri**

The court instructs the jury that it is not necessary in the trial of a case of this kind that the state prove that the defendant had malice against the owner of the property or against the animal, but, if the act was wrongfully, intentionally, and willfully done, it may be inferred that it was done maliciously.<sup>79</sup>

<sup>75</sup> *Lale v. Laughlin* (App.) 203 S. W. 244.

<sup>76</sup> *Lale v. Laughlin* (App.) 203 S. W. 244.

<sup>77</sup> *Brown v. Graham*, 114 N. W. 153, 80 Neb. 281. The statute made it lawful to kill a dog running at large without a collar.

<sup>78</sup> *Howser v. State*, 23 So. 681, 117 Ala. 176.

<sup>79</sup> *State v. Sillbaugh*, 157 S. W. 352, 250 Mo. 308. This instruction is proper in connection with other instructions, telling the jury that malice is necessary to a verdict of guilty, and defining malice.

**§ 804. Same—Right to kill domestic animals in protection of crops**

Gentlemen of the jury, you are instructed that if in this case you believe from the evidence beyond a reasonable doubt that defendant did wound and kill the cattle described in the indictment, yet if you find and believe from the evidence that he did so wound and kill same in the defense of his property or to protect his crop, then in that event you will acquit the defendant.<sup>80</sup>

**§ 805. Same—Acts done after killing of animal**

The jury are instructed that, even though the jury should believe that ——— and ——— threw the hog in controversy over the fence some time between ——— and ——— o'clock of the day on which the hog was found dead, and the hog was dead at the time it was thrown over the fence, the defendant's participation in the act of throwing the hog over the fence would not constitute him guilty of the offense charged in this case, unless the jury believe beyond a reasonable doubt that he had before that time killed the hog, or assisted in killing it, or aided or abetted, counseled or encouraged, some one or more in killing the hog.<sup>81</sup>

**F. CONTAGIOUS OR INFECTIOUS DISEASES****§ 806. Duty of owner of animals infected with disease**

The jury are instructed that if you believe from the evidence the defendant, ———, brought, or caused to be brought, into the county of ———, state of ———, Texas cattle or cattle liable to communicate Texas, Spanish, or splenic fever to the domestic cattle of this state, and that said cattle came from the country south of this state, between the 1st day of ———, and the 1st day of ———, and said defendant knew or had reason to know, or could by ordinary diligence have known, that said cattle were diseased cattle, or were cattle liable to communicate Texas, Spanish, or splenic fever to the domestic cattle of this state, or if the defendant knew, or could with ordinary diligence have known, that such cattle were diseased with such disease, and were liable to communicate it to the domestic cattle of this state, and such cattle so brought, or caused to be brought, into said ——— county, communicated such disease to the domestic cattle of the plaintiff, and thereby plaintiff's

<sup>80</sup> *Huffman v. State*, 110 S. W. 749, 53 Tex. Cr. R. 489. The defendant had a good fence, which was broken by the cattle.

<sup>81</sup> *Howser v. State*, 23 So. 681, 117 Ala. 176.

cattle died, you will find for the plaintiff, and the value of such cattle as she lost as shown by the evidence.<sup>82</sup>

The court instructs the jury that if you find from the evidence that the defendant, ———, purchased the cattle described in the petition in good faith in ———, this state, without any knowledge that said cattle were infected with Texas, splenic, or Spanish fever, and that he had no reason to know or believe that such cattle could or would communicate to the cattle of this state Texas, splenic, or Spanish fever, and that he did not know or have reason to believe or know that such cattle would or could communicate the said Texas, splenic, or Spanish fever to the cattle of this state, till they arrived at ———, and that the sheriff immediately seized said cattle by virtue of a process issued by ———, a justice of the peace, and before the plaintiff's cattle had been exposed, and were by the sheriff placed in quarantine, and the defendant, ———, was deprived of any control over said cattle, and that during the time the said cattle were quarantined by the said sheriff, and the defendant deprived of the control of said cattle, the plaintiff's cattle took said disease by going upon said quarantined grounds, either while defendant's cattle were there in the custody of the sheriff or his deputy, or after they were removed therefrom, then the plaintiff cannot recover in the action.<sup>83</sup>

#### § 807. Same—Effect of knowledge of agent

I charge you that while defendants, before they could be held liable for damages for the injury complained of, must have known these mules were infected with a contagious and infectious disease, yet if you find from a preponderance of the testimony that the defendants' agent who had said mules in charge knew that said mules were so infected with a contagious and infectious disease known as distemper, then the defendants are held in law to have known this fact, as knowledge of the agent is in law knowledge of the principal.<sup>84</sup>

#### § 808. Sale of animals affected with disease—Liability of seller

The court instructs the jury that if they find from the evidence that the defendants sold some hogs to the plaintiff, and that at the time of their delivery to the plaintiff they were infected with cholera to the knowledge of the defendants, and that the plaintiff was injured by reason of such condition of the hogs, he can recover

<sup>82</sup> Patee v. Adams, 14 P. 505, 37 Kan. 133.

<sup>83</sup> Patee v. Adams, 14 P. 505, 37 Kan. 133.

<sup>84</sup> M. C. Brown & Co. v. Bennett, 184 S. W. 35, 122 Ark. 570.

damages for such injury, and that he is not necessarily bound to prove actual knowledge on the part of the defendant of such disease; but if you find from the evidence in this case that the defendants had notice of such facts as would put a prudent person upon inquiry as to whether the hogs were infected with cholera, and that a reasonable investigation prosecuted by them would have apprised them of the fact that said hogs had cholera before they were delivered to the plaintiff, then you will be justified in imputing to the defendants knowledge of the fact that the hogs were affected with such disease.<sup>85</sup>

### G. CRUELTY TO ANIMALS

#### § 809. Elements of offense—Malice

##### § 809(1). Michigan

You are instructed that before you convict the respondent of the crime with which he is charged in the information, you must find from the evidence that the deed was done willfully and maliciously, and I charge you that malice is an essential ingredient of the crime. but, as I have already stated to you, malice may be inferred by you from the facts and circumstances surrounding the commission of the offense. If you find from the evidence in this case that the respondent ——— had the intent to do the act charged against him in the information unlawfully, it makes no difference whether it be from spite or revenge or hope of gain and profit, malice may be presumed from that conduct. It is a general rule governing the law of malice that, when a man commits an act unaccompanied by any circumstances excusing or justifying him in such act, the law presumes that he acted with the intent to produce the results that follow his act. This statute upon which this information is based does not require malice to be shown towards the owner or his business or property, but the malice required to be shown is the general malice of the law of crime, and the acts proven and the evidence proven and the evidence produced may furnish that presumption of malice. The acts need not be inspired by any particular wantonness, cruelty, or revenge against the owner of the property to furnish that presumption of malice.<sup>86</sup>

##### § 809(2). Mississippi

The jury are instructed that, if you believe from the evidence that defendant killed the hogs mentioned in the evidence while

<sup>85</sup> Cheesman v. Felt, 142 P. 285, 92 Kan. 688.

<sup>86</sup> People v. Tessmer, 187 N. W. 214, 171 Mich. 522, 41 L. R. A. (N. S.) 433.



they were depredating on his crop, and to protect it from destruction, and not out of a spirit of cruelty to the animals, you will find him not guilty.<sup>57</sup>

**§ 810. Prosecution for cruelly overdriving horse**

The jury are instructed that the commonwealth must prove that the defendant overdrove the horse knowingly and intentionally; that the defendant, like all other men, is presumed to know what he did, and to intend the natural and necessary results of his acts; that if, in the proper exercise of his own judgment, he thought he was not overriding the horse, he must be acquitted; and that upon these instructions the jury might come to the conclusion that the question of defendant's guilt is a question of fact to be determined by the result to which they should come as to the truth respectively of the testimony introduced by the commonwealth and by the defense.<sup>58</sup>

<sup>57</sup> *Stephens v. State*, 3 So. 458, 65 Miss. 329.

<sup>58</sup> *Commonwealth v. Wood*, 111 Mass. 408.



**CHAPTER LV****APPRENTICES**

§ 811. Right of apprentice with respect to wages.

812. Discharge of apprentice for neglect of duty.

**§ 811. Right of apprentice with respect to wages**

The jury are instructed that the plaintiff was bound by the terms of said contract to the same extent as the defendant. Plaintiff had no right to demand more wages than the contract provided, and had no right to resent the action of the defendant in refusing to give him higher wages, if you find he did resent it.<sup>1</sup>

**§ 812. Discharge of apprentice for neglect of duty**

The jury are instructed that if you find that plaintiff, after he was refused a raise of wages by defendant, willfully neglected and slighted his work for the purpose of forcing the defendant to discharge him, he cannot recover.<sup>2</sup>

<sup>1</sup> *Lepan v. MacKinnon Boiler & Machine Co.*, 144 N. W. 693, 178 Mich. 18.

<sup>2</sup> *Lepan v. MacKinnon Boiler & Machine Co.*, 144 N. W. 693, 178 Mich. 18.

## CHAPTER LVI

## ARBITRATION AND AWARD

- § 813. Requisites of agreement to submit to arbitration.
- 814. Revocation of agreement to submit to arbitration.
- 815. Termination of authority of arbitrators.
- 816. Hearing of parties by arbitrators.
- 817. Award by less than all of arbitrators.
- 818. Effect of award.
  - 818(1). Arkansas.
  - 818(2). Iowa.
  - 818(3). Texas.

Arbitration of question of amount of loss of an insured, see post, §§ 2552-2555.

**§ 813. Requisites of agreement to submit to arbitration**

You are instructed that it is not necessary that the evidence show that the parties plaintiff and defendant actually agreed, in so many words, to submit the matter in controversy to, and abide by, the award, but such agreement may be inferred by you from the acts and conduct of the parties plaintiff and defendant, and all the facts and circumstances introduced, as evidence must show that both parties agreed to submit the matter and to abide by the award; for if one of the parties agreed, and the other did not, the verdict should be for the defendant. You are further instructed that the plaintiff is required to make out his case by a preponderance of the evidence.<sup>1</sup>

**§ 814. Revocation of agreement to submit to arbitration**

The court instructs you that, where an agreement in writing is entered into between two parties to submit to arbitration any matter of difference between them, such written submission to so arbitrate such differences cannot be revoked by a verbal notification by either of the parties, but the same must be revoked, if at all, by some notice in writing.<sup>2</sup>

The court instructs the jury that, when two parties have agreed to submit matters in difference between them to arbitration, such submission can be revoked only by express and positive notification to that effect by the party wishing to withdraw such submis-

<sup>1</sup> Couch v. Harrison, 60 S. W. 957, 68 Ark. 580.

<sup>2</sup> Grand Rapids & I. Ry. Co. v. Jaqua, 115 N. E. 73, 66 Ind. App. 113.

sion, or by such acts, conduct, or language as that such revocation may be clearly and unequivocally inferred therefrom.<sup>3</sup>

**§ 815. Termination of authority of arbitrators**

You are instructed that if you find from the evidence that after said arbitrators had the matter under investigation they adjourned, and notified the parties that they could not agree and had adjourned, then your verdict should be for the defendant, unless you further find from the evidence in the case that the parties afterwards agreed to submit to and abide by any award they might render.<sup>4</sup>

**§ 816. Hearing of parties by arbitrators**

The court instructs the jury that ordinarily the common-law form of arbitration requires that a hearing be had as to the merits of the controversy at which each of the parties shall have an opportunity to be heard; but if the conditions of the submission are that no evidence is to be heard, but that the arbitrators are simply to view the premises and render their awards, then the jury may be justified in assuming that notice of hearing and the hearing itself has been waived.<sup>5</sup>

**§ 817. Award by less than all of arbitrators**

The court instructs the jury that where an agreement to arbitrate has been entered into, and the matters in difference are to be submitted to two arbitrators, of which each party selects one, and in the event of such arbitrators failing to agree they are to select a third, and if after such disagreement a third arbitrator is selected, and thereafter one of such arbitrators refuses to act further in the matter, the remaining two arbitrators may proceed to the rendition of the award.<sup>6</sup>

**§ 818. Effect of award**

**§ 818(1). Arkansas**

The jury are instructed that if you find from the evidence in this case that the plaintiff and defendant mutually agreed to submit a matter in controversy between them to arbitrators, and to abide by their award, and that said arbitrators did meet under said agreement and render an award, you should find for the plaintiff.<sup>7</sup>

<sup>3</sup> *Grand Rapids & I. Ry. Co. v. Jaqua*, 115 N. E. 73, 66 Ind. App. 113.

<sup>4</sup> *Couch v. Harrison*, 60 S. W. 957, 68 Ark. 580.

<sup>5</sup> *Grand Rapids & I. Ry. Co. v. Jaqua*, 115 N. E. 73, 66 Ind. App. 113.

<sup>6</sup> *Grand Rapids & I. Ry. Co. v. Jaqua*, 115 N. E. 73, 66 Ind. App. 113.

<sup>7</sup> *Couch v. Harrison*, 60 S. W. 957, 68 Ark. 580.

## § 818(2). Iowa

The jury are instructed that if you find, from the evidence, that the plaintiff and defendant agreed to submit their differences to arbitration, and if you find such award was made as agreed, you should find for the plaintiff for the amount found by the arbitrators in such matter, unless you further find—First, that said award does not include all the differences in dispute between plaintiff and defendant at time of the alleged award; or, second, that defendant was not accorded a reasonable notice of the time of the hearing.<sup>8</sup>

## § 818(3). Texas

You are instructed that the arbitrators are the judges both of the law and of the facts; and, if you believe from the evidence that they have honestly and without partiality to either party exercised their deliberate judgment as to the matters submitted to them, both on the law and the facts, then you are instructed that the award would not be invalidated by any mistake of the law made by the arbitrators, unless such mistake was of such a character as that, on account thereof, they arrived at a different conclusion from what they intended, or unless such findings indicate a gross mistake of, or a manifest injustice on the part of, the arbitrators, or unless such mistake of the law was so perverse as to work manifest injustice to one of the parties.<sup>9</sup>

<sup>8</sup> Amos v. Buck, 37 N. W. 118, 75 Iowa, 651.

<sup>9</sup> Slaughter v. Crisman & Nesbit (Civ. App.) 152 S. W. 205.

## CHAPTER LVII

## ARCHITECTS

- § 819. Contract entered into under mistake—Ratification.  
 820. Recovery of compensation as dependent upon whether plans used.  
 821. Duty of architect to follow instructions of owner with respect to cost of building.  
     821(1). Arkansas.  
     821(2). Delaware.  
 822. Recovery for reasonable value of services in absence of contract.  
 823. Time of payment.  
 824. Authority of architect to bind owner by contract.  
 Conclusiveness of decision, see post, § 1317.

## § 819. Contract entered into under mistake—Ratification

You are instructed that if the plaintiff, ———, agreed, from what ——— said about the building, to build the house for \$———, thinking it would be about the size of the silk mill, and discovered his mistake when he was furnished with the plans given, and went on and superintended the building, it is too late to object to the plans, and he is bound by his contract.<sup>1</sup>

## § 820. Recovery of compensation as dependent upon whether plans used

We say to you that if the plaintiff prepared the plans and specifications, at the request of the defendant, for alterations that the defendant desired to make, and the defendant indicated to the plaintiff what such alterations were to be before the plans were prepared, then the plaintiff would be entitled to recover a fair and reasonable sum as compensation for his work, labor and materials, notwithstanding the defendant rejected or abandoned the plans, provided they reasonably and substantially complied with the defendant's instruction, and were in conformity with the alterations he proposed to make.<sup>2</sup>

## § 821. Duty of architect to follow instructions of owner with respect to cost of building

## § 821(1). Arkansas

I charge you that each and every stipulation that is a material inducement to a contract should be considered together, in order to determine its legal and binding force; and if you believe from the evidence that defendant, ———, informed the plaintiff when he

<sup>1</sup> *Burton v. Rosemary Mfg. Co.*,  
43 S. E. 480, 132 N. C. 17.

<sup>2</sup> *Brinckle v. England* (Del.) 78 A.  
638, 2 Boyce, 16.

undertook to draw the plans and specifications for said buildings that he would not expend a greater sum than \$—— in the construction and completion of the same, and that he requested the plaintiff to furnish him with plans and specifications for buildings not to exceed that amount, then he would not be bound to carry out plans and specifications for buildings that would largely exceed that amount, unless he consented and agreed to do so, or accepted said plans after they were drawn.<sup>3</sup>

I charge you that when the defendant employed the plaintiff to draw the plans and specifications for the said building, and agreed to pay him therefor, he had a right to direct the plaintiff to draw the same so as to keep within the limits of —— dollars, as the cost of said building; and it was the duty of plaintiff, when he undertook to do so, to observe and respect the wishes of the defendant, and to draw said plans and specifications so as to keep within the limits directed by the defendant as to the cost of said buildings, unless you find that defendant consented to a greater cost, or, after said plans were completed, defendant accepted same, or, after being informed by plaintiff that the building would cost \$——, if you find that he was so informed by plaintiff, directed plaintiff to go on and complete the plans, or unless you further find that defendant directed or knowingly permitted plaintiff to proceed to draw the plans in accordance with the wishes and desires of his (defendant's) wife and daughter.<sup>4</sup>

You are instructed that if the jury find that defendant employed plaintiff to draw plans for the —— avenue house, and was advised by plaintiff, before the completion of the plans, that the house would cost \$——, and that defendant, after being advised of the probable cost of the building, directed plaintiff to go on and complete the plans, he would be liable to plaintiff for his services as architect, although he may have previously determined not to invest so large amount in said building.<sup>5</sup>

You are instructed that if the jury find that the defendant, after knowing or being fully advised of the cost of the construction of the houses according to the plans and specifications therefor exhibited in evidence, by a payment or otherwise, accepted the work of plaintiff thereon, he would be liable in like manner as if he had originally contracted with plaintiff for plans of houses to cost such sum.<sup>6</sup>

<sup>3</sup> Hight v. Klingensmith, 87 S. W. 138, 75 Ark. 218.

<sup>4</sup> Hight v. Klingensmith, 87 S. W. 138, 75 Ark. 218.

<sup>5</sup> Hight v. Klingensmith, 87 S. W. 138, 75 Ark. 218.

<sup>6</sup> Hight v. Klingensmith, 87 S. W. 138, 75 Ark. 218.

## § 821(2). Delaware

You are instructed that, if the plaintiff was employed to furnish plans and specifications for alterations that were not to cost over \$——, he cannot recover in this action if the plans furnished provided for alterations the cost of which would substantially exceed that sum.<sup>7</sup>

You are instructed that the plaintiff was not required, however, to furnish plans that would make the cost of the alterations exactly the sum alleged to have been fixed by the defendant. It would be practically impossible to comply with such a requirement; but the plans must not have substantially exceeded such sum.<sup>8</sup>

You are instructed that in determining whether the plaintiff has substantially complied with the instructions received from the defendant, respecting the cost of the alterations, if you believe any such instructions were in fact given, you should consider all the testimony, including that which relates to the character of the work or alterations to be made, whether it was the construction of a new building, or the alteration or remodeling, if an old one, and any other facts tending to show whether the plaintiff complied with his client's instructions so far as it was reasonably practicable for him to do.<sup>9</sup>

You are instructed that it is not claimed that the plans and specifications furnished by the plaintiff were used in any way by the defendant in making the alterations in his house which were subsequently made, and therefore no recovery can be had by the plaintiff unless you are satisfied from the evidence that the plans and specifications, for which he seeks to recover, were made by him at the request of the defendant, and that they reasonably and substantially complied with the instructions given by the defendant.<sup>10</sup>

You are instructed that the plaintiff would be entitled to recover, notwithstanding the plans and specifications were not used by the defendant, and were in fact rejected by him; and notwithstanding they provided for alterations that would cost more than the defendant expected, provided they substantially complied with the defendant's instructions, were reasonably adapted to the alterations he desired to make; and provided, further, there was no limitation upon the cost of said alterations, which the plans and specifications substantially exceeded.<sup>11</sup>

<sup>7</sup> Brinckle v. England, 78 A. 638, 2 Boyce, 16.

<sup>8</sup> Brinckle v. England, 78 A. 638, 2 Boyce, 16.

<sup>9</sup> Brinckle v. England, 78 A. 638, 2 Boyce, 16.

<sup>10</sup> Brinckle v. England, 78 A. 638, 2 Boyce, 16.

<sup>11</sup> Brinckle v. England, 78 A. 638, 2 Boyce, 16.

**§ 822. Recovery for reasonable value of services in absence of contract**

You are instructed that if from the greater weight of the testimony the jury should find that the plaintiff honestly believed the contract was on a six and a half per cent. basis, and that the defendant honestly believed that the contract was for \$——, then their minds had not come together so as to make a contract, and if the jury should find from the greater weight of the testimony that no contract was made, then they should find what it was reasonably worth to build such a mill as the one about which the suit was brought, deducting therefrom what was already paid, if they should find that he had not been paid a sufficient amount.<sup>12</sup>

**§ 823. Time of payment**

You are instructed that if one party performs labor for another, for which the latter agrees to pay, and no time for payment is fixed, the law implies that payment shall be made in a reasonable time.<sup>13</sup>

**§ 824. Authority of architect to bind owner by contract**

The jury are instructed that if the jury believe, from the evidence, that the building in question was in process of erection by —— under the contract of the —— day of ——, between him and defendants, given in evidence, and that J. acted as architect under said contract, then, although the jury may further believe from the evidence, that J., while so acting, employed —— to remove the brick piers and put stone ones in their places, and that there was necessity for so doing, yet the court instructs the jury, as a matter of law, that J., by virtue of his position as architect, had no authority to bind defendants by employing said —— to do said work, and in the absence of proof that defendants authorized J. beforehand or at the time to do so, or with full knowledge of all the facts subsequently ratified such act of employment, the jury should find for defendants.<sup>14</sup>

<sup>12</sup> *Burton v. Rosemary Mfg. Co.*, 43 S. E. 480, 132 N. C. 17.

<sup>13</sup> *Hight v. Klingensmith*, 87 S. W. 138, 75 Ark. 218.

<sup>14</sup> *Campbell v. Day*, 90 Ill. 363.



## CHAPTER LVIII

## ARREST

- § 825. Authority to arrest.  
     825(1). Alabama.  
     825(2). Massachusetts.  
 826. Authority to arrest without warrant.  
     826(1). Delaware.  
     826(2). Massachusetts.  
 827. Same—Arrest by private person.  
 828. Delegation of authority.  
 829. Degree of force used in making arrest.  
 830. Right to kill escaping prisoner.

Arrest without warrant as ground for action for false imprisonment, see post, § 2430.

Criminal liability for killing by officer in attempt to arrest deceased, see post, § 2934.

Killing by private citizen while attempting to arrest deceased, see post, § 2941.

## § 825. Authority to arrest

## § 825(1). Alabama

The court charges the jury that if the jury believe from the evidence that the deceased was not appointed a deputy by the sheriff, ———, and if they further believe that the only authority that deceased had for the arrest of defendant was a request of S., a special deputy sheriff, that deceased should arrest and bring in the defendant, S. not being with deceased at any time, then the court charges the jury that the deceased had no authority in law to arrest the defendant.<sup>1</sup>

## § 825(2) Massachusetts

The jury are instructed that an officer has a right to summon others to assist him in making the arrest, subject always to the qualification that he shall use reasonable judgment and no unnecessary violence or force. What would be reasonable on the part of a peace officer in proceeding to make an arrest depends upon the fact in each particular case. It is the duty of the jury to consider all of the circumstances shown by the evidence in this case in passing judgment upon the question whether the peace officer used reasonable judgment in executing the authority which the commonwealth contends was conferred upon him by law to make the arrest.<sup>2</sup>

<sup>1</sup> Lewis v. State, 59 So. 577, 178 Ala. 26.

<sup>2</sup> Commonwealth v. Phelps, 95 N. E. 868, 209 Mass. 396, Ann. Cas. 1912B, 566.

## § 826. Authority to arrest without warrant

### § 826(1). Delaware

The court instructs the jury that a peace officer may arrest without a warrant any person whom he finds engaged in or involved in a breach of the peace. The bailiff of the town of ——— has the same authority as possessed by a county constable. The statute of this state expressly authorizes the arrest, without a warrant, of any person found drunk or excited by liquor, or noisy in the streets or highways, or other public places of the county.<sup>3</sup>

### § 826(2). Massachusetts

The jury are instructed that where a dangerous wound is inflicted, which proves to be a felony through the death of the person wounded, the peace officer is not required to wait until the fact is ascertained whether the assaulted person dies or not. But if, as a reasonable man, he has a suspicion and probable cause to believe that the wound is of such a nature that a felony is likely to result from it through the death of the person wounded, then a condition exists upon which the jury, if they believe the facts, would be justified in finding the officer had probable cause to believe a felony had been committed, because if the man dies of the dangerous wound, the criminal act dates from the time the act was done, and the felony, if ever committed, is committed when the wound is inflicted.<sup>4</sup>

## § 827. Same—Arrest by private person

The jury are instructed that any one liable to be arrested as a fugitive from justice by warrant may be arrested by a private person without warrant from necessity and sound policy on showing, prima facie, the commission of any offense in a sister state, which by law of the state in which the offense was committed is punishable either capitally or by imprisonment for ——— years or upwards in any state prison, and that the party arrested is the perpetrator.<sup>5</sup>

The jury are instructed, in connection with the statutory provisions heretofore given to you relating to the right of any person upon view of a felony committed, or upon certain information that a felony has been committed, to arrest the felon, and relating to the power of a peace officer, on satisfactory information laid before

<sup>3</sup> State v. Wyatt (Del.) 89 A. 217, 4 Boyce, 473.

E. 868, 209 Mass. 396, Ann. Cas. 1912B, 566.

<sup>4</sup> Commonwealth v. Phelps, 95 N.

<sup>5</sup> State v. Whittle, 59 S. C. 297, 37 S. E. 923.

him under the oath of any credible person, to issue warrants for fugitives from justice, that an officer or a private individual may lawfully arrest, without a warrant, one whom he has reasonable grounds to suspect of having committed a felony, and it is immaterial whether the suspicion arises out of information given by another, or whether it arises out of one's own knowledge.<sup>6</sup>

**§ 828. Delegation of authority**

The court charges the jury that a special deputy sheriff cannot, without being present, delegate his authority to another. He might call on some one to assist him, but cannot appoint another to act in his stead.<sup>7</sup>

**§ 829. Degree of force used in making arrest**

You are instructed that the law makes reasonable allowances for the infirmities of human judgment under the influence of human passion, and it does not require him to measure with methodical precision the degree of force necessary to arrest a person or repel an apparent attack, or to compel submission to an officer; it simply requires all men, whether under the heat of sudden passion or extraordinary circumstances, to exercise such reasonable discretion in the use of force as under those peculiar circumstances may seem to be necessary.<sup>8</sup>

**§ 830. Right to kill escaping prisoner**

The court instructs the jury that although the jury may believe from the evidence that ———, sheriff, and ———, deputy sheriff, one or the other, or both, shot and killed plaintiff's decedent, yet if the jury shall further believe from the evidence that defendant ——— was at the time sheriff of ——— county, and defendant ——— his deputy, and that said decedent had theretofore unlawfully broken into a railroad car with the intent to steal property therefrom, and that said ———, sheriff, and ———, deputy sheriff, had reasonable grounds to believe that said decedent had unlawfully broken into such car, and that said defendants had attempted to place said decedent under arrest for said offense, or had placed him under arrest therefor, and that the said decedent undertook to avoid arrest by running, or after being arrested undertook to escape from the defendants by running, and that it was necessary,

<sup>6</sup> State v. Whittle, 59 S. C. 297, 37 S. E. 923.

<sup>7</sup> Lewis v. State, 59 So. 577, 178 Ala. 26.

<sup>8</sup> Scibor v. Oregon-Washington R. & Navigation Co., 140 P. 629, 70 Or. 116.

for either or both the defendants to shoot decedent in order to prevent him from escaping, then under the law the defendants, either or both, had the right to shoot decedent, and, if necessary, to kill him, in order to effect his arrest, or to prevent him from escaping after he was arrested, and if the jury so believe the law is for the defendants, and you should so find.<sup>9</sup>

<sup>9</sup> Mylett's Adm'r v. Burnley, 173 S. W. 759, 163 Ky. 277. This was an action for damages.

## CHAPTER LIX

## ARSON

- § 831. Definition and elements of offense.  
831(1). Delaware.  
831(2). Missouri.
832. Necessity of destruction by fire.  
832(1). Alabama.  
832(2). Iowa.  
832(3). Texas.
833. Attempt to commit arson.
834. Intent and malice as elements of offense of attempted arson.
835. Parties to offense—Conspiracy.  
835(1). Illinois.  
835(2). Missouri.
836. Ownership by prosecuting witness.  
836(1). Alabama.  
836(2). North Carolina.
837. Corroboration of confession—Proof of corpus delicti.

## § 831. Definition and elements of offense

## § 831(1). Delaware

The court instructs the jury that the felony, the perpetration of which the prisoner is charged to have attempted, is arson, no better definition of which can be given you than by the inhibitory words of our own statute relating to that offense. This statute provides that "if any person shall willfully and maliciously burn or set on fire any dwelling house, whether it be his own or that of another, in which there shall be at the time some human being, \* \* \* such person shall be deemed guilty of arson of the first degree and felony; \* \* \* if any person shall willfully and maliciously burn or set on fire any dwelling house, whether it be his own, or that of another, in which there shall not be at the time some human being, such person shall be deemed guilty of arson of the second degree and felony. \* \* \*" From this definition of the felony of arson, you will observe that the gist of the offense is the danger to the lives of persons who may be dwelling in the house set on fire, and from this recital of the law you will discern that the crime is graded according to the degree in which it involves danger to human life.<sup>1</sup>

<sup>1</sup> State v. Lockwood (Del.) 74 A. 2, 1 Boyce, 28.

§ 831(2). **Missouri**

The court instructs the jury that if they find and believe from the evidence that at the county of \_\_\_\_\_ and state of \_\_\_\_\_, at any time within \_\_\_\_\_ years next before the \_\_\_\_\_ day of \_\_\_\_\_, the date of the filing of the information in this case, that the defendant, \_\_\_\_\_, did then and there unlawfully, willfully, maliciously, and feloniously set fire to and attempt to burn a certain building, to wit, a storeroom at No. \_\_\_\_\_ street, there situate and adjoining to a certain inhabited dwelling house of one \_\_\_\_\_, there situate, and that said inhabited dwelling house of the said \_\_\_\_\_, by the firing, if any, of the said storeroom as aforesaid was then and there endangered, then you will find the defendant guilty as charged in the information, and assess his punishment at imprisonment in the state penitentiary for any term not less than \_\_\_\_\_ years. Willfully means intentionally not accidentally. Feloniously means wickedly and against the admonitions of the law, unlawfully. Maliciously means a wrongful act intentionally done without just cause or excuse.<sup>2</sup>

§ 832. **Necessity of destruction by fire**§ 832(1). **Alabama**

You are instructed that the terms "set fire to" and "burn," as used in the indictment in this case are synonymous, and either term means that the house, or some part thereof, must be consumed by fire. But, if the surface of any plank or part of the latticework of said house was charred by the flames, this is a destruction or consumption of a part of said house, within the meaning of the law.<sup>3</sup>

§ 832(2). **Iowa**

The court instructs the jury that the building was burned if it was in some appreciable degree burned or consumed. The burning is sufficient as an element in said crime, if it shall appear that the woodwork or inflammable parts of the said building were by the fire to some extent consumed. In other words, if fire was communicated to the woodwork or other inflammable materials of which said building was constructed or composed to such an extent as that the same were in some measure destroyed, the fire being shown to have been so communicated as that, unless put out, the said building would probably have been, as to the inflammable parts thereof, wholly destroyed, then the proof made will be sufficient

<sup>2</sup> State v. Myer, 168 S. W. 717, 259 Mo. 306.

<sup>3</sup> Benbow v. State, 29 So. 553, 128 Ala. 1.

to support the charge made in the indictment. If, therefore, you find from the evidence before you that the fire which was discovered in the building had so far progressed as that the woodwork or inflammable material in the room in question was found to be on fire, and that such woodwork was in some degree charred or destroyed by such fire, and that such fire, unless put out, would have gone on to a probable destruction of said building, then you will be justified in finding in the affirmative of the first proposition submitted to you, viz. "that the building was in some appreciable degree consumed."<sup>4</sup>

**§ 832(3). Texas**

You are instructed that the explosion of a house by means of an explosive matter does not come within the definition of "arson," unless it results in setting the house on fire.<sup>5</sup>

**§ 833. Attempt to commit arson**

The court instructs the jury that, while in this case the prisoner is not indicted for the felony of burning a house in which human beings dwell, he is indicted for attempting to commit that felony, and the offense for which he is indicted bears much the same relation to the major offense of arson as the felony of assault with intent to commit murder bears to the felony of murder. Therefore, as the elements of the felony of murder are ingredients in the felony of assault with intent to murder, likewise the elements of the felony of arson are ingredients in the misdemeanor of attempted arson. There must be the willful act, which in the latter crime is the attempt unaccomplished, as distinguished from the act of accomplishment in the former crime. There must be the intent, which directs the act in either crime, and the malice which inspires the acts in both crimes.<sup>6</sup>

With respect to an act constituting an attempt to willfully and maliciously set on fire a dwelling house, whereby human life is imperiled, the court charges you that in order to convict the prisoner of the crime charged the burden rests upon the state to show to you beyond a reasonable doubt that the house attempted to be fired was a dwelling house in which there was at the time some human being, and that the prisoner did or omitted to do something whereby he exerted an effort to set fire to such a house so inhabited. It is not sufficient to show that by his act the building was

<sup>4</sup> State v. Spiegel, 83 N. W. 722, 111 Iowa, 701. The court says that this instruction was not prejudicial to defendant.

<sup>5</sup> Landers v. State, 47 S. W. 1008, 39 Tex. Cr. R. 671.

<sup>6</sup> State v. Lockwood (Del.) 74 A. 2, 1 Boyce, 28.

in danger of burning, for that might have been the result of accident, or neglect, or carelessness. It must be shown that the act or omission of the prisoner was the result of a willful or deliberate purpose, having for its object burning of the building. The character of the instrument employed in the attempt to burn is immaterial. If the attempt be willful, it matters not whether the method be by the direct application of a match or the indirect use of something which will ignite from its own nature.<sup>7</sup>

**§ 834. Intent and malice as elements of offense of attempted arson**

The court instructs the jury that the state must not only show some physical effort of the prisoner to accomplish the act of burning, but it must show the prisoner's intent, or the state of mind with which the act was done or contemplated. In respect to the element of intent required to be proven by the state, you are charged that, generally speaking, the law considers that an attempt to commit a crime is an act done with intent to commit that crime. When the attempt is established, the intent may be proved by direct evidence, as the admissions and confessions of the prisoner, or it may be proved by indirect or circumstantial evidence. It may be inferred from the conduct of the prisoner, from the willfulness of an attempt to burn, from the circumstances attending the attempt, from the means employed, from the hostility of the accused to the owner, and from threats and quarrels, as well as from the general rule of law that every man must be presumed to intend the natural and probable consequences of his own voluntary and willful act.<sup>8</sup>

With respect to malice, being the remaining element in the crime charged against the prisoner, the court says to you that the malice intended by the law signifies, not general malevolence, but rather the intent from which flows an unlawful act, committed without legal justification. An attempt to burn a house in which human beings dwell is a cruel act, and the law holds that malice of this kind is implied from every deliberate, cruel act committed by one person against another. The law considers that he who does a cruel act voluntarily does it maliciously. In the crime of attempted arson, as in the crime of arson, the law holds that when the act constituting the attempt, is proved to have been done, and

<sup>7</sup> State v. Lockwood (Del.) 74 A. 2, 1 Boyce, 28.

<sup>8</sup> State v. Lockwood (Del.) 74 A. 2, 1 Boyce, 28.



to have been done willfully, it is then inferred to have been done maliciously.<sup>9</sup>

**§ 835. Parties to offense—Conspiracy**

**§ 835(1). Illinois**

The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendants, or any of them, willfully and maliciously burned the building of ——— mentioned in the indictment, or willfully and maliciously caused it to be burned in manner and form as alleged in the said indictment, without the consent of the owner thereof, then the defendants, or such of them as to whom you have such belief, are guilty of arson, and you will find them or him guilty as charged; the court charging you in this connection that, although you may have such a belief as to one of the defendants, this will not authorize you to convict all of the defendants.<sup>10</sup>

The jury are instructed that, if you believe from the evidence, beyond a reasonable doubt, that the defendants, or any of them, together or with others, prior to the fire in question, entered into a conspiracy to commit the crime of arson, as charged in the indictment, and you further believe from the evidence, beyond a reasonable doubt, that thereafter said conspirators, or any of them, pursuant to said conspiracy and in furtherance thereof, set fire to and burned said building as charged in the indictment, then such defendants, if any, as entered into said conspiracy are guilty of the crime of arson.<sup>11</sup>

**§ 835(2). Missouri**

The court instructs the jury that if you believe from the evidence that the defendant, ———, at ——— county, state of ———, entered into a conspiracy, agreement, and common design with ———, ———, ———, ———, and ———, or any of them, to set fire to the dwelling house of ———, and that thereafter one of said persons who had entered into such conspiracy and agreement did, in prosecution thereof and according to said common design and while acting in concert with the defendant, ———, at any time within ——— years prior to the ——— day of ———, unlawfully, maliciously, and feloniously set fire to the dwelling house of said ———, in ———, and that there was in said dwelling house at the time a human being, although you may believe that the de-

<sup>9</sup> State v. Lockwood (Del.) 74 A. 2, 1 Boyce, 28.

<sup>10</sup> People v. Spira, 106 N. E. 241, 264 Ill. 243.

<sup>11</sup> People v. Harris, 105 N. E. 303, 263 Ill. 406.

defendant was not present at the time said house was set fire to, you should find the defendant guilty as charged in the information, and assess his punishment at imprisonment in the penitentiary for a term of not less than ——— years.<sup>12</sup>

### § 836. Ownership by prosecuting witness

#### § 836(1). Alabama

The jury are instructed that if the state fails to prove by evidence of title the ownership of the property fired as charged in the indictment you cannot find the defendant guilty.<sup>13</sup>

#### § 836(2). North Carolina

The court instructs the jury that if they should be satisfied from the evidence beyond a reasonable doubt that ———, the prosecutor, had rented the premises from ———, and in pursuance of the contract of lease he went into possession of the barn or a part of it by storing his corn therein, then the bill properly charges the property burnt as the property of the prosecutor, ———, and if they shall further be satisfied beyond a reasonable doubt that the defendant willfully set fire to and burned said house with the corn of the prosecutor in it, it is their duty to return a verdict of guilty.<sup>14</sup>

### § 837. Corroboration of confession—Proof of corpus delicti

The jury are instructed that, if the evidence be clear and decisive, satisfying your minds beyond a reasonable doubt that the storehouse mentioned in the evidence was willfully and maliciously burned, and if you believe from the evidence beyond a reasonable doubt that the defendant freely and voluntarily confessed that he so burned the storehouse, then such a confession, so corroborated, may, in your discretion, authorize the conviction of defendant.<sup>15</sup>

The jury are instructed that, if you believe from the evidence that the house mentioned in the evidence was a gin house, and that it was burned maliciously and burned in the manner as charged in the indictment, and you further find that defendant has confessed that he burned the gin house, then there is a sufficient corroboration of the confession to authorize you to convict the defendant. In this connection you are instructed that a conviction upon a confession will not be warranted, unless the corroboration, whatever it may be, is sufficient to convince you beyond a reasonable doubt of the guilt of accused.<sup>16</sup>

<sup>12</sup> State v. Bobbitt, 146 S. W. 799, 242 Mo. 273.

<sup>13</sup> Boles v. State, 46 Ala. 204. This instruction was given under a statute requiring an allegation of ownership.

<sup>14</sup> State v. Sprouse, 64 S. E. 900, 150 N. C. 860.

<sup>15</sup> Morgan v. State, 48 S. E. 238, 120 Ga. 499.

<sup>16</sup> Wimberly v. State, 31 S. E. 162, 105 Ga. 188.

## CHAPTER LX

## ASSAULT AND BATTERY

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### A. CRIMINAL LIABILITY

Assault with intent to murder or kill, see Homicide, subd. VII.

#### 1. *In General*

#### § 838. Definition of assault

##### § 838(1). Delaware

The court instructs the jury that an assault is an attempt, or offer, by violence, to do hurt or injury to another, with a present ability to carry the intention into effect.<sup>1</sup>

You are instructed that an assault is an unlawful attempt by violence to do an injury to the person of another with the means at hand of carrying the attempt into effect.<sup>2</sup>

You are instructed that an assault is an unlawful attempt with violence to do injury to the person of another, and a battery is the actual accomplishment of such attempt.<sup>3</sup>

##### § 838(2). Texas

You are instructed that the use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery or any threatening gesture, showing in itself or by words accompanying it an immediate intention coupled with an ability to commit a battery, is an assault.<sup>4</sup>

#### § 839. Present ability to do violence

##### § 839(1). Delaware

You are instructed that, if a person unlawfully fires a pistol at another while near enough to him for the bullet from the pistol to

<sup>1</sup> State v. Paxson, 99 A. 46, 6 Boyce, 249.

<sup>2</sup> State v. Naylor, 90 A. 880, 5 Boyce, 99.

<sup>3</sup> State v. Brittingham, 80 A. 242, 2 Boyce, 330.

<sup>4</sup> Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

do injury to him, should the bullet hit him, even though it does not hit him, that is an assault.<sup>5</sup>

**§ 839(2). Idaho**

The court instructs the jury that a mere threat or menace to do violence, without any overt attempt to do violence, is not an assault; that an apparent effort to do violence, without the existence of a present ability at the time to do the violence apparently attempted, would not be an assault; and that a gun is not a deadly weapon, within the meaning of the statute, unless it is loaded; consequently in this case, in order that you may find the defendant guilty, you must find beyond a reasonable doubt that he pointed and aimed a loaded gun at the complaining witness, within a distance at which the gun, if discharged, could have committed a violent injury upon the person of the complaining witness, and that the defendant unlawfully attempted to commit such injury by means of such gun.<sup>6</sup>

You are instructed that a loaded gun is one that has powder and a missile in the barrel thereof, so that if the hammer was cocked, and the trigger pulled, the gun would be discharged. The mere fact that the rifle held by the defendant had cartridges in the magazine does not make it a loaded rifle.<sup>7</sup>

**§ 839(3). Texas**

You are instructed that by the expression, "coupled with an ability to commit a battery," is meant that the person making the assault must at that time be in such position and within such distance of the person assaulted to enable him to commit a battery on such person by the means used.<sup>8</sup>

**§ 840. Same—Pointing unloaded gun**

The jury are instructed that a person with an unloaded gun does not, because of such possession, have the present ability to inflict an injury upon another many yards distant, however apparent and unlawful his attempt to do so might be.<sup>9</sup>

The jury are instructed that an assault cannot be committed by a person pointing in a threatening manner an unloaded gun at another, and this, too, regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear.<sup>10</sup>

<sup>5</sup> State v. Lichter, 102 A. 529, 7 Boyce, 119.

<sup>6</sup> State v. Yturaspe, 125 P. 802, 22 Idaho, 360.

<sup>7</sup> State v. Yturaspe, 125 P. 802, 22 Idaho, 360.

<sup>8</sup> Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

<sup>9</sup> People v. Sylva, 76 P. 814, 143 Cal. 62.

<sup>10</sup> People v. Sylva, 76 P. 814, 143 Cal. 62.

**§ 841. Intention to injure or harm prosecuting witness**

I instruct you that under the law of this state an assault is an intentional attempt by one person by force or violence to do an injury to the person of another, coupled with the present ability to carry that intention into effect. To constitute an assault there must be an intention or purpose by force or violence to do an injury to the person of another, and before you can find the defendant guilty in this case, you must first find from the evidence that there was an intention or purpose on the part of the defendant at the time when the gun was discharged to injure or harm the person of another; and if you find from the evidence that at the time the gun was discharged the defendant did not intend to shoot any one or to do any injury or harm to the person of any one, then you must find the defendant not guilty.<sup>11</sup>

**§ 842. Intent to do particular injury**

The court instructs the jury that the intent with which an assault is made need not be a specific purpose to do a particular injury, wantonness or mere recklessness being sufficient. To constitute an assault there must be a present ability to carry the unlawful intent into effect, such, at least, as to reasonably put the person against which it is directed in fear of injury, unless he retreat.<sup>12</sup>

**§ 843. Use of violence in fun**

You are instructed that violence used to the person does not amount to an assault or battery in the following cases: When the person using the violence used it in fun or play, or with no intent then and there to injure, for such violence in such event would not be unlawful, but the burden of showing innocence of intention upon the part of defendant rests upon the defendant; but, if you have a reasonable doubt as to whether defendant intended injury upon the party assailed, you will acquit the defendant.<sup>13</sup>

You are instructed that if defendant slapped the prosecuting witness, but was not mad or did not strike her in anger, you will acquit the defendant, although you may believe that her face was bruised from the lick.<sup>14</sup>

**§ 844. Necessity of actual personal contact**

The court instructs the jury that it is not essential that the person charged with making the assault should be within striking dis-

<sup>11</sup> State v. Cancelmo, 168 P. 721, 86 Or. 379.

<sup>12</sup> State v. Paxson (Del.) 99 A. 46, 6 Boyce, 249.

<sup>13</sup> Thompson v. State (Tex. Cr. App.) 89 S. W. 1081.

<sup>14</sup> Thompson v. State (Tex. Cr. App.) 89 S. W. 1081.



tance of the person assaulted. Indeed to constitute an assault there need be no actual contact of the person, if the physical force or violence put in motion is such as to create a reasonable apprehension of physical injury.<sup>15</sup>

**§ 845. Definition of battery**

**§ 845(1). Alabama**

You are instructed that any touching by one person of the person of another in rudeness or in anger is an assault and battery, and every assault and battery includes an assault.<sup>16</sup>

**§ 845(2). Delaware**

The court instructs the jury that an assault is an unlawful attempt to do violence to the person of another, and a battery is the unlawful commission of such violence.<sup>17</sup>

**§ 846. Matters constituting assault and battery in general**

The court instructs the jury that if one person unlawfully, and with force or violence strikes, seizes, holds or chokes another, any such act constitutes an assault and battery. If, therefore, you believe from the testimony, beyond a reasonable doubt, that the prisoner seized, choked or held the prosecuting witness as alleged, and that he was not justified in so doing under the law as declared in instruction No. ———, your verdict should be guilty. If you do not so believe, your verdict should be not guilty.<sup>18</sup>

**§ 847. Aggravated assault**

The court instructs the jury that if you believe, from the evidence, that the defendant drove his wagon against a buggy in which the prosecuting witness was riding, crushing a wheel of the buggy, and by the impact of the vehicles throwing the prosecuting witness out of the buggy, such act would constitute an assault upon her, if you further find that it was intentionally done, and if you further find that the prosecuting witness was a young female, then such assault would be an aggravated assault.<sup>19</sup>

The court instructs the jury that an assault becomes aggravated when the instrument or means used is such as inflicts disgrace upon the person assaulted as an assault or battery with a whip or cowhide; that it is not necessary that the instrument used should be a whip or cowhide, but any instrument that would inflict dis-

<sup>15</sup> State v. Paxson (Del.) 99 A. 46, 6 Boyce, 249.

<sup>16</sup> Jacobi v. State, 32 So. 158, 133 Ala. 1.

<sup>17</sup> State v. Wyatt, 89 A. 217, 4 Boyce, 473.

<sup>18</sup> State v. Summers, 96 A. 195, 6 Boyce, 13.

<sup>19</sup> Carmicle v. State, 172 S. W. 238, 75 Tex. Cr. R. 573.

grace, such as a stick and switches, would be an aggravated assault.<sup>20</sup>

You are instructed that an assault and battery becomes aggravated when a serious bodily injury is inflicted upon the person assaulted or when committed with a deadly weapon. A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury.<sup>21</sup>

You are instructed that if you find that defendant struck ——— with a stick or club with no intention to take his life, and that he was not justifiable on the ground of self-defense, and if you further find that such stick or club was then and there a deadly weapon, or that by means of such assault serious bodily injury was inflicted upon ———, then you may find defendant guilty of an aggravated assault and battery, and if you find him guilty you will assess his punishment at a fine not less than \$——— nor more than \$———, or by imprisonment in the county jail not less than ——— months nor more than ——— years, or by both such fine and imprisonment.<sup>22</sup>

The jury are instructed that an assault becomes aggravated when committed with premeditated design and by the use of means calculated to inflict great bodily injury.<sup>23</sup>

The jury are instructed that, before the defendant can be convicted of an aggravated assault and battery, you must believe from the evidence that serious bodily injury was inflicted; and in case of a reasonable doubt as to whether serious bodily injury was inflicted you will give the defendant the benefit of such doubt, and acquit him. What, in law, is meant to be serious bodily injury, is such an injury as is attended with danger.<sup>24</sup>

#### § 848. Same—What is deadly weapon

You are instructed that a deadly weapon is one likely to produce death or great bodily injury, as a knife, an ax, or a club.<sup>25</sup>

#### § 849. Assault on female or child as aggravated assault

You are instructed that if you believe from the evidence that the prosecuting witness, ———, invited the defendant to visit her, at the time of the alleged assault, and that the defendant went to see her in response to said invitation, and that said prosecuting witness by her conduct toward and with the defendant was calcu-

<sup>20</sup> Caples v. State, 155 S. W. 267, 99 Tex. Cr. R. 394.

<sup>21</sup> Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

<sup>22</sup> Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

<sup>23</sup> Grayson v. State (Tex. Cr. App.) 42 S. W. 293.

<sup>24</sup> Grayson v. State (Tex. Cr. App.) 42 S. W. 293.

<sup>25</sup> Clarey v. State, 85 N. W. 897, 61 Neb. 688.

lated to lead him to believe, and he did believe, that his visits and attentions to her were agreeable to the said prosecuting witness, and that he did not intend to do her any injury in person or to her feelings, without her consent, and if you have a reasonable doubt as to such facts, you will find the defendant not guilty.<sup>26</sup>

You are instructed that the use of any unlawful violence upon the person of another with intent to injure her, whatever be the nature or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing within itself or by words accompanying it an immediate intention, coupled with an ability to commit a battery, is an assault. An assault becomes aggravated when committed by an adult male upon the person of a female or child.<sup>27</sup>

The court instructs the jury that, to constitute the offense of aggravated assault, there must be the intention to do some unlawful violence, or to do some injury to the person, and if you find and believe from the evidence that all the violence used by the defendant on the said occasion was for the purpose of entering the house, and that the defendant was not entering the house for any unlawful purpose, and that in so doing, if he did, he used no more force than was necessary to do so, and had no intention to hurt or do any violence to the prosecuting witness, you should acquit the defendant.<sup>28</sup>

You are charged by the court that if you find and believe from the testimony that on or about the \_\_\_\_\_ day of \_\_\_\_\_, the defendant, \_\_\_\_\_, met the prosecutrix in a corn field some distance from the ends of the rows and near a tree, and you further find and believe from the testimony that said meeting was in pursuance of a previous understanding between the defendant and the said prosecutrix, and you further find that he took hold of her, and hugged her, and that he tried to pull up her clothes, and that he tried to get her down on the ground, and had her around the waist, and you further find that it was with and by her consent, he would not be guilty of an aggravated assault; or, if you have a reasonable doubt as to whether or not she objected to such conduct, he would be entitled to an acquittal.<sup>29</sup>

The jury are instructed that any indecent familiarity by an adult male with the person of a female against her will and without her consent constitutes an aggravated assault.<sup>30</sup>

<sup>26</sup> McGill v. State, 160 S. W. 353, 71 Tex. Cr. R. 443.

<sup>27</sup> Vivian v. State, 152 S. W. 895, 68 Tex. Cr. R. 358.

<sup>28</sup> Atkinson v. State, 138 S. W. 125, 62 Tex. Cr. R. 419.

<sup>29</sup> Saye v. State, 114 S. W. 804, 54 Tex. Cr. R. 430.

<sup>30</sup> Sample v. State, 108 S. W. 685,

The jury are instructed that if you believe the defendant put his arm on the back of the buggy seat, and thereby touched the prosecutrix, ———, or if you believe that he took hold of her and endeavored to embrace her, but did so with no intention of injuring her or her feelings, and had probable ground to believe, and did believe, that such touching or taking hold of her, if any, or such attempt to embrace her, if any, would not be objected to by her, or would not be offensive to her, or hurt her feelings, then he would not be guilty of any offense, and you will acquit. And in passing upon this issue, you will look to all the facts and circumstances in evidence, and the conduct of the parties, both before and after the commission of the alleged offense; and if you have a reasonable doubt of the defendant's guilt, or of his intent to injure the prosecuting witness you will find him not guilty.<sup>31</sup>

The jury are instructed that, if any male adult should use any unlawful violence upon the person of a female with intent to injure her, whatever be the means or degree of violence, he is deemed guilty, under the law, of an aggravated assault and battery.<sup>32</sup>

The jury are instructed that if you believe from the evidence that defendant took hold of the arm of the said ———, but did so with no intent to injure her or her feelings, and had probable ground to believe and did believe that such taking hold of her arm would not be objected to by her, the said ———, and would not be offensive to her or her feelings, then he would not be guilty of an offense, and you will acquit him.<sup>33</sup>

You are charged that if you believe from the evidence that the defendant did upon the person of ——— commit an assault, by making use of any violent or indecent familiarity towards or upon her, with intent to injure her, or that he indecently and violently fondled and handled her person, with intent to injure her, then you must find him guilty; and, on the other hand, if you do not so find and believe, you will acquit him.<sup>34</sup>

#### § 850. Prosecution for assault with intent to commit great bodily injury—Necessity of showing intent

##### § 850(1). Iowa

The court instructs the jury that great bodily injury is an injury to the person of a more grave and serious character than an

52 Tex. Cr. R. 505, 124 Am. St. Rep. 1103.

<sup>31</sup> Stripling v. State, 80 S. W. 376, 47 Tex. Cr. R. 117.

<sup>32</sup> Millard v. State (Tex. Cr. App.) 50 S. W. 273.

<sup>33</sup> Shields v. State, 44 S. W. 844, 39 Tex. Cr. R. 13.

<sup>34</sup> Hill v. State, 38 S. W. 987, 39 S. W. 666, 37 Tex. Cr. R. 279, 66 Am. St. Rep. 803.

ordinary battery, and the indictment charges that defendant intended to inflict such an injury on the boy ———. It is not only necessary for the state to prove that the defendant committed an assault, but it must go further and prove the intent with which he committed it, and that it was to inflict a grave and more serious injury than an ordinary battery or whipping. If the proof should show an assault and battery, but fail to show the ulterior intent charged, the conviction could only be for assault and battery.<sup>85</sup>

**§ 850(2). Michigan**

With reference to this subject I charge you that, to constitute the offense charged in the information, the defendant must have intended to do ——— great bodily harm—serious and permanent bodily injury—and he must have intended to do such serious and permanent bodily injury as was within the natural result of the means he employed, and his manner of using those means. But he need not have contemplated with mathematical precision or intended to do only the precise thing which actually followed his assault; as, if one rib was broken, and the eleventh, he need not necessarily have intended to break the eleventh rib, and that alone, nor need he have necessarily contemplated alone the breaking of the eleventh rib and the injury to the kidney, but he must have had in contemplation an injury of that general character, and an injury serious and permanent; otherwise he could not be said to have intended to have done great bodily harm, as is charged in this case.<sup>86</sup>

**§ 851. Liability for feloniously assaulting and disfiguring another**

The jury are instructed that if you believe and find from the evidence that the defendant, ———, in ——— county, and state of ———, within ——— years next before the ——— day of ———, did willfully and feloniously whip ——— with a whip, by which said ———, was wounded, or disfigured, then you will find the defendant guilty, as she is charged in the indictment, of wounding, or disfiguring, said ——— by said whipping, as you, from the evidence, shall believe her to have been so wounded or disfigured. And if you shall believe and find from the evidence, defendant, at said time and place, and upon such whipping, by her, of said ———, and in continuance by her of the punishment so inflicted upon said ——— by said whipping, did willfully and feloniously burn said ——— with a hot iron stove-lid lifter, by which said ——— was wounded or disfigured, then you will find the defendant

<sup>85</sup> State v. Gillett, 9 N. W. 362, 56 Iowa, 459.

<sup>86</sup> People v. Miller, 52 N. W. 65, 91 Mich. 639.

guilty, as she is charged in the indictment, of wounding or disfiguring said ——— by said burning, as from the evidence you shall believe and find her to have been so wounded or disfigured. If you find the defendant guilty of either wounding or disfiguring said ——— by either said whipping or burning, you will fix her punishment therefor at imprisonment in the penitentiary not less than ——— years nor more than ——— years, or at imprisonment in the county jail not less than ——— months, or at both a fine not less than ——— dollars, and imprisonment in county jail not less than ——— months, or at a fine of not less than ——— dollars.<sup>37</sup>

#### § 852. Reckless use of firearms

The jury are instructed that, if you believe from the evidence beyond a reasonable doubt that defendant negligently handled the gun that inflicted the wound, in disregard of the safety of others, then he would be guilty of assault and battery with a weapon.<sup>38</sup>

#### § 853. Liability of husband for assault on wife

You are instructed that a husband may commit an assault and battery upon his wife, notwithstanding the marriage relation.<sup>41</sup>

#### § 854. Same—Communication of disease

You are instructed that a wife, in confiding her person to her husband, does not consent to cruel treatment, or to infection with a loathsome disease. A husband, therefore, knowing that he has such a disease, and concealing the fact from his wife, by accepting her consent, and communicating the infection to her, inflicts on her physical abuse and injury, resulting in great bodily harm; and he becomes, notwithstanding his marital rights, guilty of an assault, and, indeed, a completed battery.<sup>42</sup>

You are instructed that if the accused knew he was infected with syphilis, and his infection was unknown to his wife, the intent to communicate the disease to her by having sexual intercourse with her may be inferred from the actual results.<sup>43</sup>

The court instructs the jury that if the jury should find from the evidence that the accused, knowing that he was infected with a venereal disease, and, without informing his wife of the fact, had sexual intercourse with her after such knowledge had been commu-

<sup>37</sup> State v. Nieuhaus, 117 S. W. 73, 217 Mo. 332.

<sup>38</sup> Crenshaw v. State, 45 So. 631, 153 Ala. 5.

<sup>41</sup> State v. Lankford (Del.) 102 A. 63, 6 Boyce, 594.

<sup>42</sup> State v. Lankford (Del.) 102 A. 63, 6 Boyce, 594.

<sup>43</sup> State v. Lankford (Del.) 102 A. 63, 6 Boyce, 594.

nicated to him, and thereby infected her with the disease, their verdict should be guilty.<sup>44</sup>

The court instructs the jury that if the jury should find that the accused, during the period he had sexual relations with his wife, did not know that he was infected with a venereal disease, and that he did not communicate with his wife after being informed that he was infected, their verdict should be not guilty.<sup>45</sup>

## 2. *Defenses*

### § 855. Right of self-defense

#### § 855(1). Delaware

We instruct you that no one has the right to strike or assault another unless he is at the time in danger of suffering bodily harm at the hands of the other. Mere words or threats, however offensive, will never justify even a slight assault, neither will a slight assault justify a person in using more force or violence than is necessary to protect the person from bodily harm. And, moreover, if one is assaulted and can safely withdraw and thereby avoid danger, it is his duty to do so. He has no right in self-defense to strike back unless there is no other way of avoiding danger to his person.<sup>46</sup>

The court instructs the jury that the defendant admits that he struck R. He also admits that M. did not strike or attempt to strike him, and yet he, the defendant, endeavored to shake him, and that R. then struck him on the arm. If you believe this then we say that defendant had no right to strike back unless that was the only way he could avoid injury to his person. If he was in such a position that he could avoid such danger by withdrawing or stepping back, it was his duty to do so, rather than retaliate for a slight blow on the arm, if you believe there was such a blow.<sup>47</sup>

You are instructed that where one is assaulted, or thinks he is about to be assaulted, it is his first duty to get out of the way or retreat, if he can; if he cannot reasonably do that, he may use just so much force as is necessary to stay the act of violence against him or to protect his life or his person from injury. If he use more force than is necessary for that purpose, then he becomes the aggressor and is himself guilty of an unlawful assault.<sup>48</sup>

<sup>44</sup> State v. Lankford (Del.) 102 A. 63, 6 Boyce, 594.

<sup>45</sup> State v. Lankford (Del.) 102 A. 63, 6 Boyce, 594.

<sup>46</sup> State v. Roe (Gen. Sess.) 103 A. 16, 7 Boyce, 95.

<sup>47</sup> State v. Roe (Gen. Sess.) 103 A. 16, 7 Boyce, 95.

<sup>48</sup> State v. Brittingham, 80 A. 242, 2 Boyce, 330.



## § 855(2). Oregon

The jury are instructed that in this case the defendant seeks to justify his acts in the affray under consideration by the plea that he acted in necessary self-defense. I instruct you that a person has a right to protect his life or his person from great bodily harm, and that he has a right to meet force with force in order to repel an attack upon him, and to use such force as appears reasonably necessary to protect his life or his person from bodily harm, and he may even go to the extent in repelling an attack upon him of using a dangerous weapon, and to the extent of taking his assailant's life, if the same is necessary, or apparently necessary, to save his own life, or his person from great bodily harm. The danger to himself in fact need not be real, but only apparent, if the assailed at the time honestly believed and had reason to believe that his life was in danger, or that he was in danger of bodily harm.<sup>49</sup>

## § 855(3). Texas

You are charged that, when a person is unlawfully assailed, he has the right to use force against force and to defend himself by the use of every means in his power to defend himself against such assault. In this connection you are charged that the witness ———, in making an attack upon the defendant with a buggy whip, made an unlawful assault upon him, and that he had a right to defend himself from such attack, and if you believe from the evidence that the defendant in striking the said ——— with a whip acted in his own necessary defense against such attack upon him, and that he did not use greater force than under the circumstances appeared to him to be necessary to cause the said ——— to desist from the attack on him, then you will acquit the defendant. And in this connection you are further charged that a person assailed is not bound to retreat but may stand his ground and protect himself against an unlawful attack made upon his person by another.<sup>50</sup>

The jury are instructed that, if defendant believed that he was in personal danger, or in danger of serious bodily injury, and assaulted ———, so believing, viewing the facts from the standpoint of defendant, or if the jury have a reasonable doubt as to whether such was the belief of defendant, they should find him not guilty.<sup>51</sup>

<sup>49</sup> State v. Selby, 144 P. 657, 73 Or. 378.

<sup>50</sup> Yates v. State, 162 S. W. 499, 72 Tex. Cr. R. 279.

<sup>51</sup> Marsden v. State, 110 S. W. 897, 53 Tex. Cr. R. 548.



## § 855(4). Virginia

The jury are instructed that if you believe from the evidence that the defendant was lawfully cutting off the water of ———, and that, whilst so doing, he was assaulted by said ———, and that said defendant reasonably apprehended that said ——— would do him bodily harm, then you are instructed that the defendant had the right to repel such assault by all the force he deemed necessary, and that he was not compelled to retreat from said ———, but might, in his turn, become the assailant, inflicting bodily wounds until his person was out of danger.<sup>52</sup>

## § 856. Same—Apprehension of bodily harm

## § 856(1). North Carolina

The court instructs the jury that, if you find from the evidence that defendant B. was himself without fault, and you further find from the evidence that the prosecuting witness, ———, went to the home of ——— for the purpose of arresting the defendants for a misdemeanor previously committed, and that he did not have at that time in his possession a warrant for the arrest of the defendants, and you further find that the witness ———, after going to the house, intentionally and purposely pointed his pistol at the defendant B., and that defendant B., under these circumstances, apprehended and had reasonable grounds to apprehend either that he was in danger of great bodily harm, or in danger of the loss of his life, you will then find that he had a legal right to use such force as was necessary, or apparently necessary, to repel the assault of ——— and protect himself, and the necessity of doing so was real or apparent. This is to be determined by the jury viewing all the facts and circumstances as they reasonably appeared to defendant B. at the time the shot was fired.<sup>53</sup>

## § 856(2). Texas

The court instructs the jury that a reasonable apprehension of bodily harm will excuse a party in using all necessary force to protect her person, and it is not necessary that there should be actual danger, provided she acted upon a reasonable apprehension of danger as it appeared to her from her standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of wounding her assailant. If from the evidence you believe the defendant struck the said ———, but further believe that at

<sup>52</sup> Jackson v. Commonwealth, 30 S. E. 452, 96 Va. 107.

<sup>53</sup> State v. Bridges, 101 S. E. 29, 178 N. C. 733.

the time of so doing she had made an attack on her, or was making or about to make an attack on her, which from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and disposition of ——— caused her to have a reasonable expectation of fear of bodily injury, and that, acting under such reasonable expectation or fear, the defendant struck ———, then you should acquit her; and if ——— was armed at the time she was struck and was making such attack on defendant, and if the weapon used by her and the manner of its use were such as were reasonably calculated to produce bodily harm, then the law presumes that she intended to inflict bodily injury upon the defendant. In other words, if you believe ——— was making, had made, or was about to make an attack on defendant, then you are instructed defendant had the legal right to strike back in her own defense and to use all necessary force to repel the attack upon her, and, if you so believe, you will acquit her, or, if upon this point you have a reasonable doubt, you will give her the benefit of such doubt and acquit her. And in this connection you are further instructed that she would have the same right to defend her person against an attack made or about to be made without any weapon as she would against such attack with a weapon, except that the degree of force which she would be authorized to use would depend upon the character of attack made or about to be made, and the whole matter must be judged of from defendant's standpoint. <sup>54</sup>

You are charged that defendant had the right to defend his person against a threatened unlawful attack upon his person or his property by ———, if any such attack was made or threatened by ———, and that it was not necessary that the danger was real, if it had the appearance, from defendant's standpoint, of being a real danger, and taking into consideration all the circumstances of the transaction, if it reasonably appeared to defendant that he was in danger, defendant had the right to use such force, and do such acts, and such only, as were necessary to defend himself against the threatened unlawful attack. <sup>55</sup>

**§ 857. Same—Aggression of prosecuting witness provoked by defendant's insulting words**

The court charges the jury, for the defendant, that insulting words do not constitute an assault, and if the jury believe from the evidence beyond a reasonable doubt that the prosecuting wit-

<sup>54</sup> Russell v. State, 158 S. W. 546,  
71 Tex. Cr. R. 86.

<sup>55</sup> Pace v. State (Cr. App.) 79 S. W.  
531.

ness, ———, struck the defendant the first blow, and afterwards defendant defended himself with no more force than was necessary to ward off the attack, as he had a legal right to do, then the jury must find the defendant not guilty. <sup>56</sup>

**§ 858. Same—Withdrawal by defendant after provoking difficulty**

The court instructs the jury that there is no law to justify the proposition that a man may be the assailant, the aggressor, and bring on a fight, and then claim exemption from the consequences thereof, on the ground of self-defense; he cannot so act and then shield himself on the assumption that he was defending himself; and you are instructed that, if you believe from all of the evidence beyond a reasonable doubt the defendant herein was the aggressor, that he provoked the difficulty and made the assault testified to in this case, that before he can avail himself of self-defense it must appear that he withdrew from the assault in good faith and clearly announced a desire for peace; and you are instructed that the burden of showing that he did retreat and announce a desire for peace after the trouble began is upon him, and he must prove such defense by a preponderance of the evidence, and that the jury should consider all of the evidence introduced by the state and the defendant in ascertaining whether there is such preponderance. <sup>57</sup>

**§ 859. Mutual combat**

The jury are instructed that if you believe from the evidence, beyond a reasonable doubt, that defendant and ——— met together and quarreled, bandying opprobrious or insulting words, and fought willingly or by mutual consent, it is immaterial which of them commenced the quarrel; and the defendant cannot, under this state of facts, if you believe such beyond a reasonable doubt, set up the plea of self-defense. <sup>58</sup>

**§ 860. Right of defense as against a woman**

You are charged that a person has the same right to use force reasonably necessary to defend himself against an unlawful assault made by a woman as though the assault were being made by a male. <sup>59</sup>

<sup>56</sup> Wicker v. State, 65 So. 885, 107 Miss. 690.

<sup>57</sup> State v. Flanagan, 86 S. E. 890, 76 W. Va. 783, Ann. Cas. 1917D, 305.

<sup>58</sup> Johnson v. State, 34 So. 209, 136 Ala. 76.

<sup>59</sup> Yates v. State, 162 S. W. 499, 72 Tex. Cr. R. 279.

**§ 861. Right to resist attempt by husband to eject defendant from wife's premises**

The court instructs the jury that it is the claim of the prosecution in this case that the defendant was a trespasser upon the premises where the assault is alleged to have taken place. Defendant claims that he was on the premises at the invitation of Mrs. ———, the wife of the complaining witness, and that Mrs. ——— was at that time the owner of said premises, and that, at that time, and for several weeks prior thereto, the complaining witness, ———, had abandoned said premises as a home and was making his home elsewhere because of family differences; that the said Mrs. ——— was in fear of her husband and called defendant to come upon said premises for protection. If you find these facts to be true, then defendant was not a trespasser and was rightfully on said premises and had a right to resist any attempt on the part of the husband to remove him from said premises, provided that he did not use excessive force. <sup>60</sup>

The court instructs the jury that the wife's dwelling house is that of the husband only while he makes it such in fact, and when he has abandoned it, and it is no longer his abode, it then becomes the right of his wife to invite persons to the premises, and the husband has no right to eject such persons therefrom. If, therefore, in the present case, you find that Mrs. ——— was the owner of the premises on which the alleged assault occurred, and that the husband had abandoned said premises as a home, and that it was no longer his abode, the said husband had no right to eject the defendant from said premises. <sup>61</sup>

**§ 862. Defending against charivari party**

The court instructs the jury that, assuming that these people were in the highway or in the yard conducting a charivari and that they came inside the gate and were in the yard, unless the defendant believed they were about to enter the house, force an entrance into the house, he had no right to shoot the rifle at any person in the party. The charivari in the roadway, or the charivari conducted in the yard, if no assault was made on the house, amounted to a mere trespass, and the defendant would not have a right to use the gun to prevent a continuance of the trespass until he had warned these people to leave. Now, gentlemen of the jury, did they receive any such warning? That will be a question of fact for you to determine from the evidence in the case. No person is entitled

<sup>60</sup> People v. Upton, 135 N. W. 108, 169 Mich. 81.

<sup>61</sup> People v. Upton, 135 N. W. 108, 169 Mich. 81.

to use a deadly weapon in preventing a trespass which is not of a most serious and aggravated nature, without warning the other party to desist. So much for the question of trespass, simply the trespass upon the property.<sup>62</sup>

Now, gentlemen, coming back again to the question of warning; the respondent testified that he gave warning by firing two shots. It will be for you to say whether or not he honestly and fairly believed that those two shots amounted to a warning to these people. If he in good faith believed that he had already warned them, and had given them time enough after the warning to disperse before firing designedly, then, in so far as the warning is concerned, he gave them the warning.<sup>63</sup>

The court instructs the jury that with regard to the claim of the defendant that he feared a forcible entry into the house and an assault upon either himself or his wife, or both of them, he is to be judged by the circumstances and surroundings as they appeared to him there at that time; and you are to take into consideration the excitement and turmoil and the whole situation. If he believed honestly, in good faith and on reasonable ground, that the charivari party, or members of the party, or any one of that party, intended to forcibly enter the house and therein make an assault upon his wife, he had a right to take such means as to him under the circumstances appeared reasonably necessary to prevent the act. So you see, gentlemen, that in determining whether or not the respondent fired the shot in the lawful exercise of his right of self-defense in behalf of himself or his wife, or both of them, you must settle that from the evidence—the question, first, did he in good faith and upon reasonable grounds believe that the party, or some of the party, were about to forcibly enter the house, and, having entered the house, to make an assault upon him or his wife, or both. Did he in good faith believe that? If he did in good faith believe that, the next question for you to take up and determine from the evidence in this case will be this, whether or not, under all the circumstances and surroundings as they appeared to him on that occasion, the means which he used to prevent what he feared was reasonable. If so, then gentlemen of the jury, your verdict here must be not guilty. But if he feared the entry and assault upon himself or his wife, and if you find that the means which he used, under all the circumstances and surroundings, in view of the danger to himself, or indignity to himself or his wife, which was rea-

<sup>62</sup> People v. Warner, 167 N. W. 878, 201 Mich. 547.

<sup>63</sup> People v. Warner, 167 N. W. 878, 201 Mich. 547.

sonably to be apprehended from the threatened or expected assault; if you find that the means which he used to prevent what he feared were unreasonable and excessive—then he would be guilty of an assault with a dangerous weapon. That the weapon used was dangerous is conceded in the case. <sup>64</sup>

**§ 863. Assault committed in resisting illegal arrest**

I instruct you also that it is a crime under the laws of this state for any one to sell or furnish to an Indian intoxicating liquors, and I instruct you that, when a peace officer, such as a constable, hears that an Indian has intoxicating liquors, and is breaking the peace, that it is the duty of such peace officer to endeavor to stop such violations of the law, and, while a peace officer may not, without a warrant, break into buildings, unless the crime is being committed at that particular time, yet, after it has been done, and after he has so entered, and after the person has been taken into the custody of the officer, the person so taken into custody has no right to assault the officer, and, if he does so assault him, he is guilty of a crime. <sup>65</sup>

**§ 864. Resisting excessive use of force in making arrest**

The court instructs the jury that, if a public officer uses more violence than is necessary to secure the arrest of an offender, he is liable in a civil action for damages, and would himself be liable to indictment for assault and battery. He must not act in a brutal manner or use more force than is reasonably necessary; and should he do so, the person arrested may in self defense use so much force as is necessary on his part to repel it, but not more than is necessary. But if the attack be from motives of revenge and not in self defense upon a public officer lawfully attempting his arrest, the person so offending, would be guilty of assault and battery. <sup>66</sup>

**§ 865. Resistance to illegal levy of execution**

The court instructs the jury that the purported execution which the constable, ———, had is and was void. The fact, if it is a fact, that ——— thought the writ valid is immaterial, and would give no greater rights to said ——— under the circumstances. <sup>67</sup>

The court instructs the jury that, when the constable, ———, attempted to seize and levy upon defendant's mule under the said

<sup>64</sup> People v. Warner, 167 N. W. 878, 201 Mich. 547.

<sup>65</sup> State v. Mox Mox, 152 P. 802, 28 Idaho, 176.

<sup>66</sup> State v. Wyatt (Del.) 89 A. 217, 4 Boyce, 473.

<sup>67</sup> Lassiter v. State, 163 S. W. 710, 73 Tex. Cr. R. 35.

void execution, the defendant had the right to arm himself with a shotgun and go to where ——— was and to forbid the said ——— taking said mule, and the fact that defendant so armed himself with said shotgun should not be taken as a circumstance against him in this case. <sup>68</sup>

**§ 866. Assault on one wronging, or attempting to wrong, relative of defendant**

The court instructs the jury that before ———, the witness who was beaten, could be punished for wrongdoing towards the daughter of the defendant, you must find, from the evidence, that that was the object of his visit to her; and if seduction or adultery had taken place before the alleged assault and the alleged assault was given for revenge, and not to prevent it, it would not be justifiable. <sup>69</sup>

**§ 867. Defense to prosecution for shooting at another not in own defense**

The court instructs the jury that if the assault made upon defendant, if you find one was made, did not amount to a felony, but was an assault less than a felony, such as an assault and battery, then he would not have the right to shoot at another, either as a defense for the offense of assault with intent to murder, if you find that element is in it, or as a defense for the offense of shooting at another not in his own defense. If an assault was made upon him, although it was a bare assault, and did not amount to a felony, it would reduce the offense, if one has been committed by the defendant, from assault with intent to murder to shooting at another; but it would not justify him in using a deadly weapon—shooting a pistol. If you find that he shot after an assault had been made upon him, and that assault amounted to a felony, then he would have the right to shoot, and he would be guilty of nothing. If you find that the assault made upon him was less than a felony—assault and battery—then that would reduce the offense, if he is otherwise guilty of one, from assault with intent to murder to shooting at another; but it would not justify shooting at another if it was a bare assault. If you find, however, that the assault made upon him amounted to a felony, or that the surroundings were such as to create apprehension in his mind, as a reasonably courageous man, and not of a coward, that his life was in danger, or that a felony was about to be committed upon him,

<sup>68</sup> Lassiter v. State, 163 S. W. 710, 73 Tex. Cr. R. 35.

<sup>69</sup> Jordan v. State, 81 S. E. 359, 14 Ga. App. 429.



then he would not be guilty either of assault with intent to murder or of shooting at another not in his own defense.<sup>70</sup>

**§ 868. Shooting in defense of third person**

The court instructs the jury that, although you may believe from the evidence beyond a reasonable doubt that either ——— or ——— shot and wounded ———, yet if you further believe from the evidence that the one so shooting him (if either one of them did shoot him) at the time and in the act of doing so had reasonable grounds to believe, and in good faith did believe, that the said ——— was then and there about to inflict upon his person, or the person of either or both of the others, some great bodily harm, then he had the right to use such means at his command as were necessary, or appeared to him to be necessary, to avert the impending, or to him apparently impending, danger to himself or either of the others, and if, in so doing, the one so shooting used no force greater or means other than were to him apparently necessary for that purpose, you should find the defendants not guilty.<sup>71</sup>

**§ 869. Right to use force in ejecting trespasser**

The court instructs the jury that a mere entry or trespass upon the lands or private way of another will not justify or excuse resort to the use of a deadly weapon, or the use of any more force than is reasonably necessary to drive the intruder off.<sup>72</sup>

You are instructed that, when one is a trespasser on another's land, the person owning the land is justified in ejecting the trespasser, but he must do it in a proper and reasonable way, and is only justified in using what force is reasonably necessary in order to remove the person from his land.<sup>73</sup>

**§ 870. Assault by one surgeon on another arising out of conflicting claims as to right to operate on patient**

The jury are instructed that if you find that Dr. O. first made an unjustifiable assault upon the defendant, or that the defendant had grounds to believe, and did honestly believe, that Dr. O. was about to do him personal injury, then the defendant had a right to use such violence as was necessary to protect himself from personal injury, but if he did what was unnecessary, or did more than was necessary in order to defend himself, he became and was guilty of assault and battery; and in this connection I in-

<sup>70</sup> Greenwood v. State, 72 S. E. 432, 9 Ga. App. 876.

<sup>71</sup> Thomas v. Commonwealth, 143 S. W. 409, 146 Ky. 790.

<sup>72</sup> State v. Paxson (Del.) 99 A. 46, 6 Boyce, 249.

<sup>73</sup> State v. Brittingham (Del.) 80 A. 242, 2 Boyce, 330.



struct you that no mere words, no matter how irritating or insulting, will justify an assault and battery. In regard to defendant's claim that what he did was lawful as a necessary protection of the injured man, I instruct you that if you find it to be a fact that Dr. O.'s presence in the operating room and his conduct therein before the assault was dangerous to the injured man, or if the defendant had good reason to believe, and did in good faith believe, such to be the case, he had no right to begin by assaulting Dr. O.; but he had the right to request, and he should have requested him, under such circumstances, to leave the room. Then, if Dr. O. refused, he should have gently laid his hand upon him, and not proceeded with greater force than might have been made necessary by resistance. And, in deciding as to what degree of force he was justified or would be justified in using in overcoming such resistance, you must take into consideration all the circumstances of the case, including the physical appearance of the two men, and anything else that will throw light upon that, or bring your minds to a just realization of the facts as they existed. If the defendant did not request Dr. O. to leave the room, but assaulted him in the first instance, he did what was not necessary for the protection of the injured man, and was guilty of assault and battery.<sup>74</sup>

**§ 871. Provocation—Opprobrious or abusive words**

The court charges the jury that the jury may look to the fact, if it be a fact, that ——— used abusive or insulting language to defendant at or near the time of the difficulty, and such language may be taken in mitigation or justification of the offense, as the jury may determine.<sup>75</sup>

**§ 872. Right to punish child in exercise of discipline**

See, also, post, § 906.

**§ 872(1). Iowa**

You are instructed that, if the boy, ———, was a member of the defendant's family, and he had taken him to care for and bring up, he would have the right to administer such wholesome and moderate correction as parents usually inflict for the discipline and correctional good of their children, and for such moderate correction or corporal punishment he could not be convicted of any offense, not even of assault, or assault and battery. But if the punishment, if you find that the boy was punished, went clearly be-

<sup>74</sup> *People v. Reycraft*, 120 N. W. 993, 156 Mich. 451.

<sup>75</sup> *Rogers v. State*, 23 So. 82, 117 Ala. 192.

yond the degree of moderation, and was unreasonably severe and cruel, he would be guilty, at least, of assault and battery.<sup>76</sup>

§ 872(2). **Texas**

The jury are instructed that, if you find from the evidence that the defendant did chastise ———, but that at the time the defendant was a school teacher, and said ——— was his pupil, and that the chastisement was administered to him by defendant because said ——— had engaged in a fight at school with another pupil, or had used improper and unbecoming language, or had in any other way violated the rules and regulations of the school; and that such chastisement was inflicted by the defendant upon said ——— for the purpose of correcting him, and in good faith and without any intention on the part of the defendant to injure said ———, and without any passion, spite or ill will towards said ———; then you will find the defendant not guilty, even though you should find from the evidence that the chastisement administered was more severe than was actually necessary.<sup>77</sup>

### 3. *Pleading and Evidence*

§ 873. **Pleading and proof**

The court instructs the jury that the burden is upon the state to prove the charge it makes against the defendant; so, in this case, the state charges that defendant assaulted and beat ——— with a knife. It is therefore the duty of the state to prove to your satisfaction, and beyond a reasonable doubt, that the defendant did assault and beat ——— with a knife, and, if the state has failed to do this, you should acquit the defendant.<sup>78</sup>

The court instructs the jury that, although you may believe from the evidence that the defendant struck ———, yet if you have a reasonable doubt as to whether or not he struck him with a knife, you should find the defendant not guilty.<sup>79</sup>

§ 874. **Presumptions and burden of proof**

§ 874(1). **Missouri**

The court instructs the jury that the law presumes that a person intends the natural and probable consequences of his acts, and if you believe from the evidence in the case that defendant assaulted ——— in a manner likely to cause death or great bodily

<sup>76</sup> State v. Gillett, 9 N. W. 362, '56 Iowa, 459.

<sup>77</sup> Dowlen v. State, 14 Tex. App. 61.

<sup>78</sup> Wilson v. State, 60 So. 983, 7 Ala. App. 66.

<sup>79</sup> Wilson v. State, 60 So. 983, 7 Ala. App. 66.

harm, the law presumes that he intended to kill him or do him some great bodily harm.<sup>80</sup>

**§ 874(2). Texas**

You are instructed that, if the defendant caused the door to come into contact with the person of the prosecuting witness, unless you find from the evidence that such contact caused her physical pain the intent of defendant to injure should not be presumed and the burden of proving an intent to injure would be upon the state, and if you should find from the evidence that she was not caused physical pain you should acquit defendant, unless the state shows beyond a reasonable doubt that defendant intended and endeavored to inflict upon her such physical pain.<sup>81</sup>

**§ 875. Presumption of malice or intent**

The jury are instructed that, in order to constitute an assault and battery, it is necessary that the violence used should have been done with the purpose and intention of inflicting an injury; but, when an injury is caused, the law presumes that it was inflicted with the intent to injure, which presumption of law may be rebutted or contradicted, by person inflicting the injury showing that his intention was innocent, and that his purpose was not unlawful, which innocent intention and purpose may be shown by the acts, conduct, manner and declarations of the person inflicting the injury, made at the time when such injury was inflicted.<sup>82</sup>

**§ 876. Burden of proof as to self-defense**

**§ 876(1). Alabama**

The court instructs the jury that, before the burden is cast upon the state to show that he was the aggressor, defendant must reasonably satisfy the jury of his inability to have safely retreated, and of the other elements of self-defense.<sup>84</sup>

The court instructs the jury that, if defendant failed to prove that he acted in self-defense, then defendant should be convicted, provided you believe beyond all reasonable doubt that defendant assaulted and beat \_\_\_\_\_.<sup>85</sup>

**§ 876(2). Minnesota**

You are instructed that no burden of proof rested upon the defendant to prove that he acted in self-defense. The burden of

<sup>80</sup> State v. Webb, 182 S. W. 975, 206 Mo. 672.

<sup>81</sup> Atkinson v. State, 138 S. W. 125, 62 Tex. Cr. R. 419.

<sup>82</sup> Dowlen v. State, 14 Tex. App. 61.

<sup>84</sup> Blankenship v. State, 65 So. 860, 11 Ala. App. 125.

<sup>85</sup> Blankenship v. State, 65 So. 860, 11 Ala. App. 125.

proof is upon the prosecution to satisfy or convince you beyond a reasonable doubt that the act of defendant was not self-defense.<sup>86</sup>

**§ 877. Reputation of defendant as peaceable citizen**

The jury are instructed that there has been testimony offered in this case upon the question of the reputation of the defendant as a quiet, peaceable, and law-abiding citizen. The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt, or that he would commit such a crime. If, however, you believe from all of the evidence beyond a reasonable doubt that the defendant committed the crime in question as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your minds that the defendant previous to the crime in question had borne a good reputation as a quiet, peaceable, and law-abiding citizen; also even though you should find from the evidence that the defendant's reputation as a quiet, peaceable, and law-abiding citizen is bad, you should not find him guilty unless you are satisfied of his guilt from the evidence before you beyond a reasonable doubt.<sup>87</sup>

**§ 878. Sufficiency of evidence of intent**

**§ 878(1). Iowa**

The court instructs the jury that the intent with which an action is done is an act or emotion of the mind, seldom if ever capable of direct and positive proof, but is to be arrived at by such just and reasonable deduction or inferences, from the acts and facts proved, as the guarded judgment of a candid and cautious man would draw ordinarily therefrom. The law warrants the presumption or inference that a person intends the results or consequences to follow an act which he intentionally commits which ordinarily do follow such acts. If a person makes an assault on another and inflicts on him an injury of a more serious character than an ordinary battery, the presumption is warranted that he intends to inflict a great bodily injury, if there is no evidence tending to show that he intended a less injury. If you find that defendant committed the assault charged, you will determine his intent in so doing by the surrounding circumstances, and all the evidence in the case before you which tends to show this intent.<sup>88</sup>

<sup>86</sup> State v. McGrath, 188 N. W. 810, 119 Minn. 321.

<sup>87</sup> State v. Selby, 144 P. 657, 73 Or. 378.

<sup>88</sup> State v. Gillett, 9 N. W. 362, 56 Iowa, 459.

## § 878(2). Oregon

I instruct you that if, after a consideration of the evidence and the instructions of the court, you believe beyond a reasonable doubt that the defendant committed the acts charged in the indictment, no specific intent need be proved other than such as may be embraced in the act of making an assault with a dangerous weapon.<sup>89</sup>

## B. CIVIL LIABILITY

1. *Liability in General*

## § 879. Elements of cause of action

## § 879(1). Kentucky

You are instructed that if you believe from the evidence that on or about the ——— day of ———, the defendant, ———, not in his necessary; or to him apparent necessary, self-defense, as defined in instruction No. ———, assaulted, beat, or bruised plaintiff, and thereby injured him, you will find for plaintiff.<sup>90</sup>

## § 879(2). Missouri

The court instructs the jury that if they find from the evidence that on ———, the defendant, in the city of ———, at the residence of plaintiff on ——— avenue, did there willfully, intentionally, and maliciously pull and jerk the plaintiff and violently strike him on the nose with his fist, and that thereby plaintiff sustained physical injuries mentioned in the evidence, and that plaintiff did not strike or injure the defendant, or attempt to strike or injure the defendant, or threaten to strike or injure the defendant, and that such acts of defendant were not done in protecting himself, then the plaintiff is entitled to recover.<sup>91</sup>

## § 879(3). South Dakota

The jury are instructed that if the evidence fails to show by a fair preponderance thereof that this assault, if any was committed, was unlawful, or fails to show any force or violence was used by the defendant upon the plaintiff, then the plaintiff is not entitled to recover anything.<sup>92</sup>

## § 880. What constitutes assault

## § 880(1). Indiana

You are instructed that an "assault" is the act of intentionally applying force to the person of another directly or indirectly or

<sup>89</sup> State v. Selby, 144 P. 657, 73 Or. 378.

<sup>90</sup> Renfro v. Barlow, 115 S. W. 225, 131 Ky. 312.

<sup>91</sup> Gleske v. Redemeyer (App.) 224 S. W. 92.

<sup>92</sup> Kerley v. Germscheid, 106 N. W. 136, 20 S. D. 363.

attempting or threatening by any act or gesture to apply such force to the person of another, if the person making the threat causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose.<sup>93</sup>

**§ 880(2). Minnesota**

The court instructs the jury that by an assault is understood in law a wrongful threat to do bodily violence to another, and with the present ability of the one who threatens to carry such threat into effect.<sup>94</sup>

**§ 881. What constitutes battery**

You are instructed that a "battery" is the touching of a person in a rude and insolent manner against the will of the person touched, and a battery always includes an assault. The least touching of another in a rude and insolent manner is a battery, for the law cannot draw the line between the different degrees of violence and prohibits the first and lowest state of it.<sup>95</sup>

**§ 882. What constitutes assault and battery**

**§ 882(1). Georgia**

The jury are instructed that any placing of the hands upon the person of another without legal justification is an assault and battery.<sup>96</sup>

**§ 882(2). Texas**

The court instructs the jury that the use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault. When an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind.<sup>97</sup>

<sup>93</sup> *McGlone v. Hauger*, 104 N. E. 116, 56 Ind. App. 243.

<sup>94</sup> *Cressy v. Republic Creosoting Co.*, 122 N. W. 484, 108 Minn. 349. This instruction is correct as far as it goes, and in absence of a request for a qualifying statement as to the

necessity of an actual intent to carry threat into effect.

<sup>95</sup> *McGlone v. Hauger*, 104 N. E. 116, 56 Ind. App. 243.

<sup>96</sup> *Hammond v. Hightower*, 9 S. E. 1101, 82 Ga. 290.

<sup>97</sup> *Perkins Bros. Co. v. Anderson* (Civ. App.) 155 S. W. 556.

## § 882(3). Washington

The court instructs the jury that, if you believe the testimony of the plaintiff that defendant shook his fist in front of her face angrily and unlawfully, when he was in such proximity to her, as that he could, or might have, struck her, also near enough to produce a feeling on her part that she might be struck, that would be an assault. Then, of course, if he did strike her, that would be an assault and battery. She may recover in case you only find assault, or in case you find assault and battery, if you find it was made unlawfully and under the circumstances I have mentioned.<sup>98</sup>

## § 883. Malice

The court instructs the jury that plaintiff claims that the defendant assaulted him maliciously. The law infers malice where an act is done without legal excuse, and where in itself it amounts to an unwarranted assault upon another. An act done with legal excuse is without malice.<sup>99</sup>

## § 884. Necessity of proof of injury

You are instructed that, in order to recover in trespass for assault and battery, it is generally necessary for the plaintiff to prove to the jury's satisfaction, by a preponderance of the evidence, that the alleged wrongful assault and battery was committed upon him by the defendant. But, as the defendant has admitted in the present case that he committed the alleged assault and battery, the plaintiff will be entitled, without further evidence, to recover a verdict for at least a nominal sum of six cents, or the like, although he may not have made proof of any actual injury, as it must be presumed in such case that he has sustained some damage.<sup>1</sup>

## § 885. Causing plaintiff's team to run away

The court instructs the jury that if you believe from the evidence that, while the plaintiff was driving on the highway, the defendant struck one of the plaintiff's horses in a spirit of malice, wantonness, or recklessness, and that, by reason of such act, the plaintiff was injured, defendant is guilty of an assault upon the plaintiff.<sup>2</sup>

The court instructs the jury that if defendant whipped up his horses to great speed and yelled loudly and passed plaintiff and

<sup>98</sup> Howell v. Winters, 108 P. 1077, 58 Wash. 436. The court holds this is substantially correct.

<sup>99</sup> Johnson v. Ish, 133 N. W. 201, 90 Neb. 173.

<sup>1</sup> Armstrong v. Rhoades (Del.) 53 A. 435, 4 Pennewill, 151.

<sup>2</sup> Lambrecht v. Schreyer, 152 N. W. 645, 129 Minn. 271, L. R. A. 1915E, 812.



his team and vehicle, and if such acts were done "recklessly" and in such manner and so near to plaintiff as to be likely to produce injury, and such acts caused plaintiff's team to run away and caused injury to plaintiff, then, even though defendant did not in fact strike plaintiff's horse, his act would amount in law to an assault.<sup>3</sup>

**§ 886. Indecent assault**

The jury are instructed that, if the jury believe and find from the evidence that on ——— the defendant went to the home of plaintiff in the town of ——— and then and there requested said plaintiff to have sexual intercourse with him, and then and there, in a rude and insolent manner, and with force took hold of plaintiff, and hugged her and kissed her, and felt her breasts, and attempted to raise her clothing, during all of which time said defendant implored plaintiff to yield to his solicitations and have sexual intercourse, all of which was against the will of said plaintiff, then your verdict will be for the plaintiff.<sup>4</sup>

**§ 887. Entering bedroom of female with intent to assault her**

You are instructed that if you find from the preponderance of the evidence that the defendant, without the invitation or consent of the plaintiff, entered the bedroom of the plaintiff in the nighttime on ———, and after the plaintiff had retired for the night, and that defendant was in such a state of undress that he was clothed only in a shirt, and that plaintiff told defendant to leave the room, and defendant did not do so, and that defendant then attempted to throw her on the bed, and that plaintiff then leaped through an open window and left the room, then you shall find for the plaintiff.<sup>5</sup>

You are instructed that, if you find from a preponderance of the evidence that defendant went into plaintiff's bedroom on or about the ——— day of ———, in the nighttime after plaintiff had retired for the night, and that before going into plaintiff's room defendant removed his pants, shoes, and stockings, and that defendant went into plaintiff's bedroom without the consent of plaintiff and against her will, with intent to assault her, and that plaintiff ordered defendant to leave said room, and that defendant did not do so and did not offer any explanation for his presence in said room, and while defendant was in said room plaintiff became

<sup>3</sup> *Lambrecht v. Schreyer*, 152 N. W. 645, 129 Minn. 271, L. R. A. 1915E, 812.

<sup>4</sup> *Timmons v. Kenrick*, 102 N. E. 52, 53 Ind. App. 490.

<sup>5</sup> *McGlone v. Hauger*, 104 N. E. 116, 56 Ind. App. 243.



frightened and went over the foot of her bed and attempted to get out the door of said room, and that defendant was between plaintiff and the door, and that plaintiff then went out of said room through a window and went half a mile to the house of defendant's daughter, where she stayed all night, and as a result of the foregoing facts she suffered physical and mental pain, then you shall find for plaintiff, if you also find from a preponderance of the evidence that the plaintiff believed and had reasonable grounds to believe that defendant intended to use force upon her then and there.<sup>6</sup>

**§ 888. Liability for aiding and abetting**

**§ 888(1). Alabama**

The court charges the jury that if defendant aided, abetted, or encouraged D. in entering into or continuing an unlawful assault on plaintiff, then he would be responsible for whatever D. did in the furtherance of such assault, notwithstanding that he may not have explicitly encouraged, aided, or abetted any one particular act of defendant D.<sup>7</sup>

**§ 888(2). Indiana**

The jury are instructed that the defendant S. is not liable for the wrongful conduct of the defendant C. unless he (S.) was giving aid, assistance, or in some way encouraging the defendant C. in the wrongful conduct. If you find that the defendant S. was called by the defendant C., who was acting as town marshal, to go along with him for that purpose, and without any purpose to do anything other than that which was necessary to arrest the plaintiff, and that while they were so engaged in such arrest, or attempt to recapture the plaintiff after he had fled, if he did flee, the defendant C. shot the plaintiff, and that such shooting was necessary, still the defendant S. would not be liable for damages resulting from such shooting unless the said defendant S. in some way aided, abetted, or encouraged the defendant C. to shoot the plaintiff; and you should, on such facts, find for the defendant S.<sup>8</sup>

**§ 889. Proximate cause**

You are instructed that an act is the proximate cause of an injury either when it is the direct cause thereof, or when the injury is the natural and probable consequence of the act, and when, in

<sup>6</sup> *McGlone v. Hauger*, 104 N. E. 116, 56 Ind. App. 243.

<sup>7</sup> *Abney v. Mize*, 46 So. 230, 155 Ala. 391.

<sup>8</sup> *Stuck v. Yates*, 66 N. E. 177, 30 Ind. App. 441.

the exercise of ordinary care, an ordinarily prudent person would have foreseen that such consequences would likely be produced thereby.<sup>9</sup>

## 2. *Defenses*

### § 890. *Abusive language*

Effect of abusive or insulting words as justifying assault on passenger by employé of carrier, see post, § 1735.

#### § 890(1). *Alabama*

The court charges you, gentlemen of the jury, that opprobrious words and abusive language, used by the plaintiff at and about the time of the alleged assault, may be considered by you only in mitigation of punitive damages, and the plaintiff is entitled to recover actual damages in the way of compensation for his physical suffering and inconvenience and mental suffering, in case you find the assault and battery was committed, whatever may have been the words used by the plaintiff.<sup>10</sup>

#### § 890(2). *Mississippi*

The jury are instructed that, if you believe from the evidence that, just before the defendant struck the plaintiff, the latter used insulting words to defendant of and concerning defendant's wife, and that these insulting words were the cause of the defendant striking plaintiff, you will take this fact into consideration in arriving at your verdict, and if you believe from the evidence that these insulting words spoken by plaintiff, if they were spoken, were a sufficient cause for the defendant to strike plaintiff, then you will find for defendant.<sup>11</sup>

### § 891. *Right of self-defense in general*

#### § 891(1). *Delaware*

You are instructed that, whenever a person is assaulted by another, he has the right to defend himself, and may use sufficient force to repel the assault in order to protect himself from bodily harm, and when necessary to protect himself from bodily harm at the hands of an assailant, the person assaulted may use necessary force in repelling the assault even before the assailant actually commits a battery upon him. But the resistance must be no more than is necessary to accomplish this. If it be greater than is required for such purpose it becomes in law excessive and without

<sup>9</sup> *Drum v. Miller*, 47 S. E. 421, 135 N. C. 204, 65 L. R. A. 890, 102 Am. St. Rep. 528.

<sup>10</sup> *Mitchell v. Gambill*, 37 So. 290, 140 Ala. 316.

<sup>11</sup> *Choate v. Pierce*, 88 So. 627. This instruction is authorized under the terms of a statute.

excuse or justification, making the party a wrongdoer from the beginning. Nor can a person when assaulted follow up his assailant and attack him when in the act of retiring or retreating from the scene of the affray; such a course would not be in self-defense or justifiable on any ground.<sup>13</sup>

**§ 891(2). Kentucky**

You are instructed that, if you believe from the evidence that, at the time defendant assaulted the plaintiff, the defendant in good faith believed, and had reasonable grounds to believe, that the defendant was then and there in danger of bodily harm about to be inflicted upon him by the plaintiff, and that the defendant used no more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect himself from injury at the hands of plaintiff, you will find for the defendant, unless you believe that defendant brought on the difficulty by first striking plaintiff or assaulting him with a lap ring, in which event, you cannot find for defendant on the ground of self-defense.<sup>13</sup>

**§ 891(3). Nebraska**

The court instructs the jury that, if you believe from the evidence that plaintiff began the affray and was the aggressor, then you are instructed that the defendant had a right to defend himself from such assault, and he would have the right to use that amount of force which was reasonably and apparently necessary in making his defense. And if you believe from the evidence that the defendant was so acting in self-defense from a real and honest conviction of apparent danger, or what would seem apparent danger to a reasonable man, you will return a verdict for the defendant, unless you further believe from the evidence that the defendant unlawfully used a degree of force and violence upon the plaintiff that was not reasonably and apparently necessary under the facts and circumstances then and there surrounding the defendant.<sup>14</sup>

**§ 891(4). North Carolina**

The court instructs the jury that, if you shall find from the evidence that the defendant did not bring about the trouble, that he was at his home and was remonstrating with the plaintiff and directing him to go away, and while in this conversation between them one word brought on another, the defendant being in his

<sup>13</sup> Marker v. Hanratty, 97 A. 904, 6 Boyce, 217.

<sup>14</sup> Renfro v. Barlow, 115 S. W. 225, 181 Ky. 312.

<sup>14</sup> Morris v. Miller, 119 N. W. 458, 83 Neb. 218, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047.

porch and the plaintiff on the sidewalk, and the plaintiff told the defendant to shoot, and took out his pistol and fired while the defendant was sitting with his children, so as to cause the defendant to reasonably believe that he or his children's lives were in immediate danger when he fired to protect himself, or them, or both, from death or bodily harm, it would be a matter of self-defense.<sup>15</sup>

**§ 891(5). Vermont**

You are instructed that the question here is whether at the time this blow was struck (referring to the blow defendant admitted having struck the plaintiff) an assault was being made upon the defendant; whether the plaintiff here was so related to the defendant there at that time and place that an assault was being made upon the defendant here by the plaintiff, the plaintiff standing in such a relation to the defendant, his body so situated, his arms or hands so situated, and his general attitude and appearance being such that at the time the blow was struck and the injury done, there was an assault being committed on the part of the plaintiff here toward the defendant. Now, was there such an assault being committed at that time and place?

Now assuming that the plaintiff here did make an assault such as defendant here claims he did make, did it appear to the defendant at the time, under whatever circumstances, that unless he struck this plaintiff he was in danger of receiving great bodily harm at his hands? If that is so, then he had a right to protect himself and to act seasonably in order to make his defense effectual; he was not bound to wait until an assault had actually been made upon him before he undertook to protect himself. You will keep the principles in mind if you find the plaintiff here actually made an assault upon the defendant here at the time of the injury complained of.<sup>16</sup>

**§ 892. Right of self-defense of defendant provoking attack**

The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any willful act of his, or where he voluntarily and of his

<sup>15</sup> *Lewis v. Fountain*, 84 S. E. 278, 168 N. C. 277.

<sup>16</sup> *Russ v. Good*, 102 A. 481, 92 Vt. 202.

own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is any one justified in using more force than is reasonably necessary to get rid of his assailant; but if he does not bring on the difficulty, nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe. Now, if you believe from the evidence in this case that the defendant voluntarily sought or invited the difficulty in which plaintiff was injured, if you believe from the evidence that he was injured, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for him upon the ground of self-defense. In determining who provoked or commenced the difficulty or made the first assault, you should take into consideration all the facts and circumstances in evidence before you.<sup>17</sup>

**§ 893. Apprehension of injury as basis of right of self-defense**

**§ 893(1). Arkansas**

You are instructed that an assault is an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another; and if you find from a preponderance of the evidence that, at the time defendant struck plaintiff, plaintiff was committing an assault upon him, the defendant was justified in using such force as appeared to him reasonably necessary, acting as a prudent person would under similar circumstances, to resist the assault of plaintiff, and to prevent any renewal of such assault, if such renewal could be reasonably apprehended.<sup>18</sup>

You are instructed that if you find from a preponderance of the evidence that, at the time defendant struck plaintiff, plaintiff was attempting to strike defendant, or if it reasonably appeared to defendant, viewed from his standpoint alone, by words or acts of plaintiff, that plaintiff was about to make an unlawful attack upon him, in that event defendant had a right to use whatever means was necessary to protect himself from serious bodily injury; and this is the case although it subsequently appeared that defendant used more force than was actually necessary to protect himself from serious bodily harm.<sup>19</sup>

<sup>17</sup> *Morris v. Miller*, 119 N. W. 458, 83 Neb. 218, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047.

<sup>18</sup> *Downey v. Duff*, 152 S. W. 1010, 106 Ark. 4.

<sup>19</sup> *Downey v. Duff*, 152 S. W. 1010, 106 Ark. 4.

## § 893(2). North Carolina

The court instructs the jury that if you find that the defendant fired the shots towards the house through a reasonable apprehension that he was in danger of serious bodily harm from ———, or if he fired the shots, believing that a felony was about to be committed, then the defendant would not be guilty of committing a trespass as charged in the complaint, and it would be the duty of the jury to answer the issue as to trespass, "No."<sup>20</sup>

The court instructs the jury that, if you find that defendant fired the shots toward the house under a reasonable apprehension that he was about to suffer serious bodily harm himself, or that a felony was about to be committed, then he would have had a right to so fire the shots, and he would not be guilty of assault or trespass, as charged in the complaint, and it would be the duty of the jury to answer the issue as to assault and trespass, "No."<sup>21</sup>

The court instructs the jury that, if you find that the plaintiff fired the shots in the air above the heads of the crowd for the purpose of protecting his home and frightening the crowd away, and protecting himself from serious danger, and the said defendant fired the shots in the direction of the plaintiff, in a reckless manner, without having any reasonable apprehension that he or anybody else was about to suffer from the plaintiff, then you should answer the issue as to unlawful assault, "Yes."<sup>22</sup>

## § 893(3). Texas

The jury are instructed that violence to the person does not amount to an assault and battery when it is inflicted in self-defense, against unlawful violence offered to the person; but only that degree of force must be used which is reasonably necessary to repel the threatened violence. The danger of violence to the person, in order to justify an assault and battery by any one, need not be real, but may be apparent only, provided he acted on a reasonable apprehension of danger of violence, and the circumstances must be viewed from the standpoint of the person acting thereon at the time.<sup>23</sup>

## § 893(4). Vermont

The court charges the jury that, in deciding whether the defendant reasonably apprehended danger from the plaintiff, they may

<sup>20</sup> Saunders v. Gilbert, 72 S. E. 610, 156 N. C. 463, 38 L. R. A. (N. S.) 404.

<sup>21</sup> Saunders v. Gilbert, 72 S. E. 610, 156 N. C. 463, 38 L. R. A. (N. S.) 404.

<sup>22</sup> Saunders v. Gilbert, 72 S. E. 610, 156 N. C. 463, 38 L. R. A. (N. S.) 404.

<sup>23</sup> Sumner v. Kinney (Civ. App.) 136 S. W. 1192.

take into account the size of the two men, and the comparative ability of one to use force upon the other.<sup>24</sup>

**§ 894. Aggression by prosecuting witness provoked by insulting words of defendant**

The court instructs the jury that words do not justify an assault, and neither the plaintiff nor the conductor in this case had the right to strike the other because of any words that were used by either. It appears in this case that the plaintiff either struck or attempted to strike the conductor, ———, and I instruct you that the law of the case is for the defendant, and you should so find unless you believe from the evidence that the conductor used more force than was reasonably necessary, or to him apparently reasonably necessary, to repel the assault on him by the plaintiff, or to defend himself from assault by the plaintiff; but if you believe from the evidence in the case that the conductor used more force than was reasonably necessary, or to him apparently reasonably necessary, to ward off and defend himself from the assault of the plaintiff, then the law of the case is for the plaintiff and you should so find.<sup>25</sup>

**§ 895. Effect of agreement to fight**

You are instructed that, if you believe from the evidence that plaintiff and defendant voluntarily and by agreement entered into a fight, still I charge you that such agreement, if made, was unlawful, for the reason that such agreement, if made, would be in violation of the laws of the state and void, and such agreement, if made, would not be any defense to this action.<sup>26</sup>

**§ 896. Assault committed in defending relatives**

You are instructed that, if you believe from the evidence that at the time the defendant assaulted and beat plaintiff the defendant in good faith believed, and had reasonable grounds to believe, that either his son ——— or ——— was then and there in danger of bodily harm about to be inflicted upon him by plaintiff, and that the defendant used no more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect either of his said sons from injury at the hands of the plaintiff, you will find for the defendant.<sup>27</sup>

<sup>24</sup> Russ v. Good, 97 A. 987, 90 Vt. 236.

<sup>25</sup> Louisville Ry. Co. v. Frick, 165 S. W. 649, 158 Ky. 450.

<sup>26</sup> Morris v. Miller, 119 N. W. 458,

83 Neb. 218, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047.

<sup>27</sup> Downs v. Jackson (Ky.) 128 S. W. 339.



**§ 897. Defending property from destruction**

You are instructed that it is conceded that plaintiff and defendant were the owners in common of an undivided lot of turkey eggs. Under those circumstances, the plaintiff had no right to destroy any of them without defendant's consent. And if, acting under reasonable apprehension that she was about to break some of the eggs, he proceeded in good faith to prevent her from doing so, and used no more force than reasonably appeared to be necessary for that purpose, he was justified in so doing, and is not liable therefor. On the other hand, if he intentionally used more than was necessary, or did not act in good faith, but, actuated by some other motive, he intentionally inflicted physical violence on the plaintiff without her consent, then he acted unlawfully, and is liable in damages therefor.<sup>28</sup>

**§ 898. Defending or asserting rightful possession of property**

**§ 898(1). Iowa**

The court instructs the jury that, if you find from the testimony that the plaintiff gave her consent that the defendant and the witness M. enter the house, and she thereafter told them they might remove the stove, and you further find that they did in good faith move said stove from its position in the room, take down the pipe, and carry certain portions of the stove out of the house and into the street with her full knowledge and consent, then, in such case, the defendant and said M. had the right to remove said stove from the house where plaintiff was living and to take the same away, even though you further find that the plaintiff objected to their removing the main part of the stove after part had been conveyed into the street. But you are further instructed that the defendant had no right to use any other or greater force in removing said stove than was necessary, acting as a reasonable and prudent man, to remove the same. Nor was the defendant justified in using such force, as against the plaintiff, as to cause her any serious injury; but if she obstructed his work in removing said stove, after having consented to its removal as hereinbefore stated, then the defendant had the right to use such force as was necessary to remove said stove, as long as he committed no injury to the plaintiff.<sup>29</sup>

You are further instructed that, according to the terms of the contract of purchase, the witness M., or any one acting for him

<sup>28</sup> Kellar v. Lewis, 89 N. W. 1102, 116 Iowa, 369. This is correct as far as it goes.

<sup>29</sup> Biggs v. Seufferlein, 145 N. W. 507, 164 Iowa, 241, L. R. A. 1915F, 673.



and under his direction, upon default in payment according to the terms of contract, had the right to take possession of said stove wherever the same might be found, in a peaceable manner, and if you find from the testimony that the plaintiff surrendered said stove into the possession of said M. and this defendant, and they took possession thereof with the full knowledge and approval of the plaintiff, then and in that case they had a right to retain possession thereof and to remove the same, if they could and did so remove it without personal injury to the plaintiff.<sup>30</sup>

You are further instructed that if the plaintiff gave her full consent that said stove be removed, and surrendered the same willingly into the possession of said defendant, and said M., then and in such case, they were not required to stop or desist in removing the stove simply because plaintiff told them she had changed her mind or told them that they could not remove the same, if you find from the testimony that she did so tell them.<sup>31</sup>

**§ 898(2). Michigan**

The jury are instructed that if the plums, which are the property in question in this case, belonged to the defendant, and the plaintiff was attempting to remove them without consent or lawful authority from the defendant, and they belonged or were under the control of defendant, he had a right to prevent her from so doing. But in the case suggested—that is, should you find that the plaintiff had no legal right to the plums, and that the defendant was seeking to retake only what belonged to him—he would only have had a right to use sufficient force to overcome the force used by plaintiff in taking away the plums. Defendant would have no right to use more force than was reasonably necessary, under all the circumstances, to retake them; and, should you find that he did use more force than was reasonably necessary, he would be liable for such damages as were occasioned by such excessive use of force.<sup>32</sup>

**§ 899. Use of force in ejecting trespasser from defendant's premises**

You are instructed that a man may use reasonable and necessary force to eject a trespasser who intrudes upon his premises against his known commands, but he cannot use wanton or unnec-

<sup>30</sup> Biggs v. Seufferlein, 145 N. W. 507, 164 Iowa, 241, L. R. A. 1915F, 673.

<sup>32</sup> Hamilton v. Barker, 75 N. W.

<sup>31</sup> Biggs v. Seufferlein, 145 N. W. 133, 116 Mich. 684.

ecessary violence in so doing, or he becomes liable to respond in damages for an injury which he may thereby inflict.<sup>33</sup>

**§ 900. Right to use force in ejecting plaintiff from public place, such as inn**

The court instructs the jury that if a person, in being lawfully ejected from a tavern, resists, so much additional force may be employed as may be necessary to overcome the resistance, and if the person being ejected turns his resistance into an attack, he becomes the assailant and the one so attacked may thereafter defend himself by the use of sufficient force to repel the attack and protect himself from injury and bodily harm; and if, in the exercise of this right, he does not resort to force greater than is required to protect himself, and injury results to the person thus become the assailant, the law affords him no remedy and withholds from him a right of recovery. If you should conclude from the evidence that the alleged personal injuries of the plaintiff were not occasioned by an unlawful assault of the defendant's servant, but were occasioned either by the act of the defendant's servant in a proper defense of himself, as a result of the plaintiff's resistance to a proper degree of force applied in lawfully expelling him from the room, or otherwise by the carelessness or misadventure of the plaintiff himself, your verdict should be for the defendant.<sup>34</sup>

The court instructs the jury that, in order to warrant the forcible removal of a person from a barroom by the proprietor or his servant, there must first be some lawful reason or excuse to prompt and justify the removal. Being present by invitation or permission extended to the public by reason of the character of the place for which a license is granted, a person must have done something or threatened to do something by which the invitation or permission is withdrawn and by his unlawful presence, he becomes a trespasser. If he becomes disorderly, or threatens a breach of the peace, he is in law a trespasser and the proprietor or his servant may lawfully put him out. But in removing a disorderly person from a tavern, being a public place, it is the duty of the proprietor or his servant first to order the person to go out, and, if he refuses, he may then remove him, but in doing so he may use only such force as is necessary for the purpose. Therefore if you find that the plaintiff was forcibly removed from the barroom of the defendant by her servant, without any unlawful act having first been

<sup>33</sup> *Palmer v. Smith*, 132 N. W. 614, 147 Wis. 70. The plaintiff was a member of a charivari party.

<sup>34</sup> *Le Fevre v. Crossan* (Del.) 84 A. 128, 3 Boyce, 379.

committed or threatened by the plaintiff, the defendant then through her servant committed a trespass and your verdict should be for the plaintiff.<sup>85</sup>

**§ 901. Use of excessive force in ejecting defendant from plaintiff's premises—Right of defendant to resist**

The court instructs the jury that the defendant claims in her answer herein that the plaintiff at the time of the alleged controversy was a licensed physician, and as such licensed physician, was maintaining a public office in ———, and that at said time she went to said office on a business errand. You are instructed that one who is a physician and maintains a public office, as such, thereby invites the public to said office for the purpose of consultation and rendering medical services to those who may request it; and if the defendant in a peaceable, quiet, and orderly manner entered said office on a business errand with the plaintiff herein, she had a right so to do, and to remain therein for a reasonable length of time in order to transact such business, providing that during all of said time she was acting in a quiet, peaceable, and orderly manner, but if at any time she became abusive in her language or manner toward the plaintiff or any of the occupants therein, then and in such a case the plaintiff would have a right to request her to depart from said office, and, defendant failing to do so within a reasonable length of time after being so requested, the plaintiff would have a right to use such force as was reasonably necessary in ejecting said defendant from said office; and, if plaintiff did use more force than was reasonably necessary in ejecting defendant from said office at said time, the defendant would have the right to use such force in resisting such excessive force on the part of the plaintiff and protecting herself against harm and injury therefrom as appeared to her at the time, acting in good faith, to be reasonably necessary, and in such a case the defendant would not be liable for injury resulting to plaintiff from the force used by the defendant. However, in such case, if the defendant wantonly, willfully and maliciously used more force than was necessary in resisting such excessive force or assault, she would be liable to plaintiff for damages resulting therefrom.<sup>86</sup>

**§ 902. Use of excessive force in making arrest**

The court instructs the jury that, if you believe from the evidence that the defendant, in making the arrest of plaintiff, as-

<sup>85</sup> *Le Fevre v. Crossan* (Del.) 84 A. 128, 3 Boyce, 379.

<sup>86</sup> *McCulloch v. Goodrich*, 181 P. 556, 105 Kan. 1, 6 A. L. R. 386.

saulted, beat, and bruised plaintiff, when the same was not necessary, or did not reasonably appear to said defendant to be necessary, to effect said arrest, or to protect himself from an assault or attempted assault on him by the plaintiff, or if you believe from the evidence that, after having the plaintiff in custody, the defendant did beat and bruise plaintiff, when the same was not necessary, or did not reasonably appear to said defendant to be necessary, to protect himself from assault or attempted assault by said plaintiff, or to retain said plaintiff in custody, you will find for plaintiff such sum in damages as you shall believe from the evidence will reasonably and fairly compensate the plaintiff for any mental or physical suffering sustained by him as a direct result of such unnecessary beating and bruising, if any, not to exceed the amount stated in the petition, \$——, as compensatory damages.<sup>87</sup>

**§ 903. Same—Use of pistol in attempt to arrest one charged merely with a misdemeanor**

The jury are instructed that if the jury find from the evidence that the plaintiff had violated the town ordinance against loud and profane swearing on the streets, and that the defendant had attempted to arrest him, and that plaintiff got loose and was running from defendant, and while so running defendant had shot at him with a pistol, then, in law, that would be an assault, and they should respond "Yes" to the first issue.<sup>88</sup>

**§ 904. Right of officer to use force to restrain disorderly conduct by prisoner in his custody**

The jury are instructed that if you believe from the evidence that plaintiff, while under arrest by defendant as sheriff, and while in defendant's custody, became violent and used loud, vulgar, profane and abusive language, so as to disturb defendant and others in the vicinity, and refused to desist when requested so to do, it was the duty of defendant, as an officer, to enforce order and prevent the continuance of plaintiff's disturbance and disorderly conduct, and to use reasonable and sufficient force to accomplish such purpose.<sup>89</sup>

<sup>87</sup> *Romans v. McGinnis*, 160 S. W. 928, 158 Ky. 205.

<sup>88</sup> *Sossamon v. Cruse*, 45 S. E. 757, 133 N. C. 470.

<sup>89</sup> *McNally v. Arnold*, 103 N. W. 361, 127 Iowa, 437.

**§ 905. Use of excessive force in resisting assault****§ 905(1). Indiana**

The jury are instructed that a person, in repelling an assault, has no right to use greater force than under the circumstances he believes to be reasonably necessary for self-protection, and if he does he will be liable for the excessive force used.<sup>40</sup>

**§ 905(2). Kansas**

The court instructs the jury that, if you believe from the evidence that the plaintiff was in the first instance the aggressor and made an assault upon the defendant, the defendant would have the right to use such force in resisting such assault and protecting himself against harm and injury therefrom as appeared to him at the time acting in good faith to be reasonably necessary, and in such case the defendant would not be liable for an injury resulting to the plaintiff from the force used by the defendant in such resistance. However, in such case, if the defendant wantonly, willfully, and maliciously used more force than was necessary to resist such assault, he would be liable to the plaintiff for damages resulting therefrom.<sup>41</sup>

**§ 905(3). Michigan**

The court instructs the jury that it is proper for you also to consider, if you find that the plaintiff made the first attack, that the defendant, being required to act at once, in the excitement and heat of an affray, could not be expected to exercise that nice discretion and accurate judgment which a jury by a careful sifting of the testimony of all the witnesses, aided by the arguments of counsel and the charge of the court, would be able to do; and therefore his conclusion, though he acted honestly and in good faith, might not be perfectly correct and just. Therefore this is the law, that if the defendant did use more force than is actually necessary for self-protection, if you find that he sincerely believed at the time that he was using only so much force as was necessary for his own defense, and if you also find that he acted honestly and in good faith, in coming to that conclusion, and if you find also from the evidence that such a belief was a reasonable belief on his part, under the circumstances that surrounded him at the time, and as the situation appeared to him, then he would not be guilty of an assault by reason of the use of such excessive force.<sup>42</sup>

<sup>40</sup> *Reichers v. Dammeler*, 90 N. E. 644, 45 Ind. App. 208.

<sup>41</sup> *Eckerd v. Weve*, 118 P. 870, 85 Kan. 752, 38 L. R. A. (N. S.) 516.

<sup>42</sup> *Kent v. Cole*, 48 N. W. 168, 84 Mich. 579.

**§ 906. Assault in exercise of parental discipline**

See, also, ante, § 872.

**§ 906(1). Missouri**

The court instructs the jury that, if you believe from the evidence that the grandfather of the infant plaintiff, with whom she had lived after the death of her parents, permitted her to go and live with the defendant at the request or solicitation of the defendant, merely to serve the defendant and her sick husband, and that the grandfather did not give the plaintiff to the defendant, and that the defendant promised the grandfather that the infant plaintiff would be returned to him whenever requested by him, and that later the grandfather requested the defendant to let him have the infant plaintiff, and that the defendant refused to do so, but kept her against the grandfather's consent, then you will return a verdict for plaintiff.<sup>43</sup>

**§ 906(2). Nebraska**

You are instructed that one possessed of the duty of rearing a child has a right to give it moderate correction and punishment, in a reasonable manner, for the child's benefit, for its education and discipline. This would be for offenses on the child's part, such as disobedience, or where the child is guilty of something bad or immoral in its nature. Whipping or punishment, however, when administered to an extent greater than is reasonably necessary under the circumstances, would amount to assault; and, when so administered, one would be responsible for any damages arising therefrom as its proximate result.<sup>44</sup>

**§ 907. Right of teacher to punish pupil**

You are instructed that if you believe the evidence, you should find that the defendant was a school-teacher, and that plaintiff was his pupil, and was reciting his lesson at the time of his alleged injury. A teacher has the authority to inflict upon his pupil such punishment as, in his judgment, may be necessary for the purpose of correction; and unless such punishment shall seriously endanger the life, limb, or health of the pupil, or shall disfigure him, or cause some permanent injury to him, or was inflicted not in the honest discharge of his duty as a teacher, but under the pretext of duty to gratify his malice, then the teacher would not be responsi-

<sup>43</sup> *Dix v. Martin*, 157 S. W. 133, 171 Mo. App. 266. Under the facts set out in the instruction, the relation between the defendant and the

plaintiff was that of master and servant.

<sup>44</sup> *Clasen v. Pruhs*, 95 N. W. 640, 69 Neb. 278, 5 Ann. Cas. 112.

ble for the injury to the child; or, if the injury was not the proximate cause of the punishment, the teacher would not be responsible therefor.<sup>45</sup>

### 3. *Pleading and Evidence*

#### § 908. Proof of averments as to time

You are instructed that it is not essential to the maintenance of this action that the evidence shall show that the acts complained of were committed on ———. If the evidence satisfies you that the acts were committed at or about that time, and if they were the very acts described in the complaint, then it does not defeat the plaintiff's action if the date alleged in the complaint is not the precise date on which the alleged acts were actually committed, and if the specified date is a mistake.<sup>46</sup>

#### § 909. Presumptions and burden of proof

##### § 909(1). Indiana

The jury are instructed that every one is presumed to intend the natural and probable consequences of his own wrongful acts. So in this case, if you believe from the evidence that ——— tipped up the sewing machine while the plaintiff was sitting on it, and thereby threw plaintiff off and down to the floor, injuring her, then the said ——— is presumed to have intended the consequences of his acts.<sup>47</sup>

##### § 909(2). Texas

The jury are instructed that, when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention.<sup>48</sup>

#### § 910. Burden of proof as to self-defense

The court instructs the jury that the defendant having admitted that he fired his pistol at the plaintiff and shot him, it devolves upon him to satisfy you from the evidence, not beyond a reasonable doubt, but to satisfy you by the greater weight of the evidence, that he did the shooting in his necessary self-defense; and, if he has done so, the plaintiff would not be entitled to recover. If he

<sup>45</sup> Drum v. Miller, 47 S. E. 421, 135 N. C. 204, 65 L. R. A. 890, 102 Am. St. Rep. 528.

<sup>46</sup> Bruske v. Neugent, 93 N. W. 454, 116 Wis. 488.

<sup>47</sup> Singer Sewing Mach. Co. v. Phipps, 94 N. E. 793, 49 Ind. App. 116.

<sup>48</sup> Sumner v. Kinney (Civ. App.) 136 S. W. 1192.



fails to do so, the plaintiff will be entitled to recover such damages as he received by reason of the wound.<sup>49</sup>

**§ 911. Evidence considered on issues**

You are instructed that if you find, from a preponderance of the evidence, that on and prior to the \_\_\_\_\_ day of \_\_\_\_\_, plaintiff had been working for the defendant, and that she occupied a bedroom adjacent to the bedroom occupied by the defendant, and that there was a door connecting the two rooms which was west of the foot of the bed which was then occupied by the plaintiff, and that said door opened back to the west, and that the defendant on the night of said \_\_\_\_\_ day of \_\_\_\_\_ entered said bedroom while the plaintiff was in bed and advanced to a point about two feet west of the center of the foot of said bed, and that he called the plaintiff's name, and she ordered him to leave the room, and that he stood at the foot of said bed or remained in said room, and made no offer to depart therefrom until he had seen her escape from said room through a window, then in such event you have a right to take these things into consideration together with all the other evidence in the case for the purpose of determining whether or not the defendant did actually upon said occasion intend to commit an assault or an assault and battery upon said plaintiff.<sup>50</sup>

**4. Damages**

**§ 912. In general**

**§ 912(1). Arkansas**

The court instructs the jury that the evidence is undisputed as to the fact that the defendant committed an assault and battery upon the plaintiff, and no complete justification therefor has been shown; therefore your verdict should be for the plaintiff in such amount as you may find from a preponderance of the evidence as actual or compensatory damages suffered by him, under the other instructions herein given. The question of exemplary or punitive damages is submitted to you under the other instructions herein.<sup>51</sup>

**§ 912(2). Delaware**

The court instructs the jury that, if you find for the plaintiff, you may find for him in such a sum as will reasonably compensate him for the injuries which alone may be found to have been in-

<sup>49</sup> Lewis v. Fountain, 84 S. E. 278, 168 N. C. 277.

<sup>50</sup> McGlone v. Hanger, 104 N. E. 116, 56 Ind. App. 248.

<sup>51</sup> Robertson v. Slak, 171 S. W. 880, 115 Ark. 461.



flicted by the defendant's servant, and not for any aggravation thereof that may be found to have been made by the plaintiff himself, having regard in your estimate, to the plaintiff's suffering or loss, in the past and in the future, if his injuries be permanent, his impaired ability to labor, if any, loss of time and actual expenses incurred by reason thereof.<sup>53</sup>

You are instructed that, where compensatory damages are claimed, as in this suit, if the plaintiff satisfactorily proves by a preponderance of the evidence that he has suffered actual damage by reason of the defendant's wrongful and unlawful assault and battery, then your verdict must be for the plaintiff, and for such adequate sum as will reasonably compensate him for the alleged injuries and outlays shown by the evidence to have been received or expended by him, having regard to the suffering and loss that he may hereafter sustain by reason of said injuries, as well as to that already sustained by him, and including therein, if proven, his pain and suffering of mind and body, loss of bodily and mental powers, inability to perform ordinary labor, and incapacity to earn money in the past or in the future, and adequate compensation for actual nursing and medical expenses and loss of time, which are the immediate and necessary consequences of the injuries sustained by him.<sup>54</sup>

§ 912(3). Iowa

The jury are instructed that two kinds of damages may be allowed, if you find for plaintiff under the other instructions given you. If plaintiff is entitled to recover at all, he may be allowed such actual damages as will fully compensate him for medical attention and for the mental and physical pain and humiliation inflicted upon him. If you find the assault to have been malicious and wanton, exemplary damages may be awarded; but no exemplary damages can be given unless actual damages are found.<sup>54</sup>

You are instructed that such compensatory damages embrace the reasonable expenses, if any, incurred for medical treatment necessary by reason of such alleged injuries; the reasonable value of the loss of time, if any, by plaintiff from inability to labor, occasioned by reason of such alleged injuries; and such sum as will fairly compensate plaintiff for physical pain, if any, suffered by him resulting from the alleged injuries.<sup>55</sup>

<sup>53</sup> *Le Fevre v. Crossan*, 84 A. 128, 3 Boyce, 379.

<sup>54</sup> *Armstrong v. Rhoades*, 53 A. 435, 4 Pennewill, 151.

<sup>54</sup> *Fleming v. Loughren*, 115 N. W. 506, 139 Iowa, 517.

<sup>55</sup> *Martin v. Murphy*, 52 N. W. 662, 85 Iowa, 669.

You are instructed that if, in the light of the foregoing instructions, and under the testimony, you find for plaintiff, you will next determine the amount of damages, if any, which you will allow him by reason of the injuries shown by the evidence.<sup>56</sup>

§ 912(4). *Kentucky*

The court instructs the jury that, if you find for the plaintiff, you will award to him such sum in damages as you believe from the evidence will reasonably and fairly compensate him for his pain and suffering, mental and physical, if any, resulting to him directly from the unnecessary striking of him defined in instruction No. ———, by the conductor, not to exceed the sum of \$———. <sup>57</sup>

The court instructs the jury, if you find for the plaintiff, you will award him such sum as you believe from the evidence will compensate him for the mental or physical pain or suffering, one or both, if any, endured by him as the direct and proximate result of his injury; and, in addition to actual damages, if you find from the evidence that the assault was willful, malicious, and without justification, you may, in your discretion, award him punitive damages, not exceeding in all, however, the sum of \$———, the amount claimed in the petition.<sup>58</sup>

You are instructed that, if you find for the plaintiff, you may award him such sum by way of compensatory damages, not exceeding the sum of \$———, as you may believe from the evidence will compensate him for any physical or mental suffering which he endured as the necessary result of his injury, if any.<sup>59</sup>

§ 912(5). *Maryland*

The jury are instructed that, if the jury find for the plaintiffs, they should award such damages as will, under all the circumstances of the case, compensate for the injury to the person and feelings suffered by ——— by reason of the unlawful act of the defendant, if they shall find that defendant assaulted and struck her; and if they further find that the female plaintiff was treated with reckless violence and indignity, then they may award such further damages as they may think proper, from all the evidence, to punish such conduct, and deter the defendant from like conduct in the future.<sup>61</sup>

<sup>56</sup> *Martin v. Murphy*, 52 N. W. 662, 85 Iowa, 669.

<sup>57</sup> *Louisville Ry. Co. v. Frick*, 165 S. W. 649, 158 Ky. 450.

<sup>58</sup> *Shields' Adm'rs v. Rowland*, 151 S. W. 408, 151 Ky. 136.

<sup>59</sup> *Downs v. Jackson*, 128 S. W. 339; *Renfro v. Barlow*, 115 S. W. 225, 131 Ky. 312.

<sup>61</sup> *Thillman v. Neal*, 42 Atl. 242, 88 Md. 525.

§ 912(6). **Minnesota**

The jury are instructed that you are at liberty to take into consideration the injuries, so far as they have been shown by the evidence; the pain and suffering endured by the injured party; his loss of time, if loss of time has been proven,—and award such damages as you may think proper and right in view of all the circumstances proven on the trial of this case. If you find that the injuries were inflicted willfully and maliciously, then you are not limited to mere compensation for the actual damages sustained, but may give such further sum by way of exemplary damages as an example to others, to deter them from offending in a like manner.<sup>62</sup>

§ 912(7). **Missouri**

The jury are instructed that, if you find for the plaintiff, you will give him such damages, not exceeding \$——, as the jury may find from the evidence will be a fair pecuniary compensation to him for said injuries; and in determining the amount of the same the jury should take into consideration the nature, character, and extent of said injuries, the physical pain, if any, and mental anguish, if any, suffered by him and directly caused by said injuries, also the amount, if any, shown by the evidence to have been expended by plaintiff for necessary medical attention in treating said injuries to the reasonable value thereof and not exceeding —— dollars; and the jury may, if from all the evidence they think it proper, award further damages by way of punishment for such wrongful acts, if the jury find from the evidence such acts were committed, such as the jury may believe will be fit punishment to defendant for such acts, if any, not exceeding \$——, but the total verdict cannot exceed \$——. By the term “maliciously” is not meant spite or ill will, but the intentional doing of a wrongful act without just cause or excuse.<sup>63</sup>

§ 912(8). **Nebraska**

The court instructs the jury that, if you find the injury to be permanent, then in fixing the amount of damages, you should take into consideration the nature and extent of the injury in all its fair and reasonable consequences, including the impairment of his faculties of generation, if any you shall find, and include future, as well as past and present, disability, physical pain and suffering.<sup>64</sup>

<sup>62</sup> Gorstz v. Pinske, 85 N. W. 215, 82 Minn. 456, 83 Am. St. Rep. 441.

<sup>63</sup> Gleske v. Redemeyer (App.) 224 S. W. 92.

<sup>64</sup> Morfeld v. Weldner, 154 N. W. 860, 99 Neb. 49.

You are instructed that, if from the evidence and instructions in the case you find for the plaintiff, you will then allow the plaintiff damages in such sum as you believe, from all the evidence in the case, will actually compensate her for the injuries sustained by her, if any. You will take into consideration the nature, location, and extent of the injury. You will allow plaintiff the fair and reasonable amount of necessary medical services for which plaintiff may have become obligated, if any, and for her loss of time from her occupation, if any. You will also allow plaintiff damages for her mental and physical suffering, if any such has been proved. Mental suffering and physical pain are incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of the particular case. You cannot allow damages by way of punishment. That is for the criminal law, and not for the jury in a civil case. The damages, if any allowed, must be compensatory only.<sup>65</sup>

You are instructed that you should take into consideration the pain and suffering, bodily and mentally, endured by the plaintiff; also, any permanent internal injury, if any such has been shown by the evidence, such pain or injury being caused by the wrongful act of the defendant.<sup>66</sup>

**§ 912(9). Texas**

The jury are instructed that, if you find for the plaintiff under the instructions heretofore given, you will allow such damages as seem to you to be right and proper under all of the facts and circumstances in evidence. In estimating the damages, you have a right to consider bodily and mental pain, if any, endured by the plaintiff, loss of time, if any, caused by such assault, if any, and his diminished capacity for labor, if any, resulting directly from defendant's wrongful acts, if the evidence shows these circumstances to exist. You may also take into consideration the surgical bills, if any, which the plaintiff has incurred. It was not necessary that the amount of damages resulting from personal injuries should be proved by witnesses, but it is to be determined by you from your general knowledge and experience. The damages above spoken of are known as "actual damages."<sup>67</sup>

<sup>65</sup> *Kast v. Link*, 132 N. W. 717, 90 Neb. 25.

<sup>66</sup> *Barr v. Post*, 77 N. W. 123, 56 Neb. 698.

<sup>67</sup> *Knittel v. Schmidt*, 40 S. W. 507, 16 Tex. Civ. App. 7.

§ 912(10). **Wyoming**

You are instructed, in estimating the damages which accrue from an assault and battery, it is not necessary that any specific sum should have been named or stated in the evidence. Actual damages are those which flow directly and naturally from the act complained of, and such damages, if any, which you find from the evidence, and allowed by you, shall not exceed \$——, the amount claimed in the petition.<sup>68</sup>

§ 913. **Compensation for physical pain**

You are instructed that, while there is no testimony before you placing an estimate in dollars and cents as to the amount of damages, if any, sustained by plaintiff by reason of his alleged physical pain, it is your duty to, in the light of the evidence, determine, in the exercise of a fair discretion, what sum, if any, he is entitled to for such pain, and will reasonably compensate him for physical pain which he suffered by reason of his injuries, if you believe that he suffered physical pain.<sup>69</sup>

§ 914. **Mitigation of damages—Use of insulting words by plaintiff**

Effect of insulting words of passenger as reducing liability of carrier for assault on him, see post, § 1742.

§ 914(1). **California**

The jury are instructed that in this case, if you believe from the evidence, that the defendant committed the assault alleged in the plaintiff's complaint, you cannot consider any alleged provocation in reduction of the actual damages accruing to plaintiff from his pain, physical injuries, loss of time, and moneys expended, or any other element of actual damage, but only in reduction of, or as a set-off against, the exemplary damages, if you should award exemplary damages.<sup>70</sup>

§ 914(2). **Delaware**

In the case now before you the defendant has pleaded the general issue not guilty, but has not presented any special plea or defense of justification. Under said plea of not guilty the defendant has sought to show by evidence, for the purpose of mitigating or reducing any actual damages proved in this case, that the alleged assault and battery was committed in the heat of blood and under

<sup>68</sup> Williams v. Campbell, 133 P. 1071, 22 Wyo. 1.

<sup>69</sup> Martin v. Murphy, 52 N. W. 662, 85 Iowa, 669.

<sup>70</sup> Tropelowitz v. Seigler (App.) 198 P. 649.

the immediate provocation of the alleged insulting epithets and opprobrious language of the plaintiff, which the defendant has endeavored to prove by his testimony in this case. Although it is true that no words merely, whether spoken, written, or printed, however insulting or opprobrious they may be, will justify an assault and battery, or an assault even, yet it has been established by the courts of this state and elsewhere that such words may be given in evidence under the general issue in mitigation of exemplary or punitive damages.<sup>71</sup>

We therefore instruct you that, although you shall find from the preponderance of the evidence that the alleged assault and battery was committed by the defendant under the immediate influence of the passionate anger and indignation wrongfully provoked by the opprobrious language or insulting epithets of the plaintiff, yet you must, nevertheless, not consider said words or provocation in determining your verdict, as any ground for mitigating or reducing any actual or compensatory damages which you may find, upon consideration of all the evidence, that the plaintiff is entitled to recover from the defendant.<sup>72</sup>

**§ 914(3). Maine**

The court instructs the jury that if the defendant, by selling or giving to the plaintiff intoxicating liquors and getting him drunk, put him in a condition so that he would be insulting or might be insulting, so that in his drunken condition he would be likely to make the talk he did make, and if the defendant caused the condition which made the plaintiff talk as the defendant says he did, then the defendant cannot make complaint of the condition which he caused himself.<sup>73</sup>

**§ 914(4). Missouri**

The jury are instructed that no words, however insulting or aggravating they may be, will justify an assault, and such insulting or aggravating words cannot be considered by the jury for the purpose of mitigating or reducing the amount of actual damages.<sup>74</sup>

**§ 915. Same—Abuse of defendant's horse**

You are instructed that any provocation calculated to heat the blood or arouse the passion of a reasonable man, if offered at the

<sup>71</sup> *Armstrong v. Rhoades*, 53 A. 435, 4 Pennewill, 151.

<sup>72</sup> *Armstrong v. Rhoades*, 53 A. 435, 4 Pennewill, 151.

<sup>73</sup> *Robichaud v. Maheux*, 72 A. 334, 104 Me. 524.

<sup>74</sup> *Burley v. Menefee*, 108 S. W. 120, 129 Mo. App. 518.

time of an assault or so recently as to become a part of the *res gestæ*, is admissible in evidence, and must be considered in mitigation of damages; and if you find and believe from the testimony the defendant in this case was laboring under passion induced by the acts of plaintiff in the abuse of defendant's horse, if any abuse, then such acts of plaintiff must be considered in mitigation of the damages to such extent as in your judgment you think fair under the circumstances.<sup>75</sup>

You are instructed that if the treatment by plaintiff of defendant's horse was such as was reasonably calculated to provoke a personal assault upon him by defendant, and if said plaintiff willfully and negligently abused and maltreated defendant's horse in such a manner as might reasonably be calculated to provoke an assault, such provocation may be considered by the jury in this suit in mitigation of damages, and such an amount as damages may be returned by you as in your opinion all the facts proven in the case warrant.<sup>76</sup>

#### § 916. Duty of plaintiff to mitigate consequences of assault

The court instructs the jury that, if you find in this case that the injuries to plaintiff's thumb complained of by him in this action, were inflicted by defendant in the fight testified to by the witnesses, but that the injury thereto was afterwards aggravated by the carelessness and neglect of the plaintiff to properly care for and treat the same or to have the same properly treated or attended to, defendant cannot be held liable in this action for any damages or injuries thereto, caused by, or resulting from, such carelessness and neglect on the part of the plaintiff.<sup>77</sup>

#### § 917. Exemplary damages

##### § 917(1). Iowa

You are instructed that if you find from the evidence that defendant struck and beat plaintiff in a rude, violent, and angry manner, or otherwise injured him, as alleged in said petition, and that the alleged wrongful acts of defendant were not done in self-defense or the taking of his property, as explained above, and that such alleged beating, striking, and injuring of plaintiff was done in an ignominious manner before plaintiff's wife and children, and with intent to injure his person, and for the purpose of gratifying a

<sup>75</sup> *Leachman v. Cohen* (Tex. Civ. App.) 91 S. W. 809.

<sup>76</sup> *Leachman v. Cohen* (Tex. Civ. App.) 91 S. W. 809.

<sup>77</sup> *Patterson v. Blattl*, 157 N. W.

717, 133 Minn. 23, L. R. A. 1916E, 896, Ann. Cas. 1918D, 63. This instruction is approved as correct in the abstract, although not applicable to the circumstances of the case.



malicious purpose, then you may allow plaintiff, in addition to compensatory damages, exemplary damages in such an amount as in your discretion you deem necessary and proper to restrain defendant and others from the commission of like acts in the future; but in no event will verdict exceed ——— dollars.<sup>78</sup>

**§ 917(2). Kentucky**

You are instructed that if you believe that defendant, not in the necessary, or to him apparent necessary, defense of either of his sons, ——— or ———, assaulted and beat plaintiff, and further believe that defendant wantonly and maliciously assaulted and beat plaintiff, you may in your discretion, in addition to compensatory damages, award plaintiff punitive damages, not exceeding in all, however, the sum of \$———. <sup>79</sup>

You are instructed that if you believe that defendant, not in his necessary, or to him apparent necessary, self-defense, assaulted, bruised, or injured plaintiff, and further believe that defendant wantonly and maliciously assaulted, bruised, or injured plaintiff, you may, in addition to compensatory damages, award plaintiff punitive damages, not exceeding in all the sum of \$———. If, however, you believe from the evidence that plaintiff gave to the defendant such provocation to assault and bruise plaintiff as would cause an ordinarily prudent man under like or similar circumstances so to assault and bruise the plaintiff, and that such provocation, if any, did prompt defendant to assault plaintiff, you may consider such provocation, if any, in mitigation of the punitive damages, if any, which you may find for plaintiff. <sup>80</sup>

**§ 917(3). South Dakota**

The court instructs the jury that, if they find by a preponderance of the evidence that defendant was actuated by hatred or ill will toward the plaintiff, and that the assault, if any, was malicious, you may also award the plaintiff such damages as under the evidence you think are proper by way of punishment to him for the assault. The jury, however, are instructed that the law is that exemplary damages or punitive damages should not be allowed or given in this case unless you find by a preponderance of the evidence not only that the defendant struck the plaintiff, but also that he acted maliciously in so doing. <sup>81</sup>

The jury are instructed that by "malice" or "malicious" is meant

<sup>78</sup> *Martin v. Murphy*, 52 N. W. 662, 85 Iowa, 669.

<sup>79</sup> *Downs v. Jackson*, 128 S. W. 339.

<sup>80</sup> *Renfro v. Barlow*, 115 S. W. 225, 131 Ky. 312.

<sup>81</sup> *Leggett v. Dinneen*, 167 N. W. 235, 40 S. D. 336.



a wish or desire to vex, annoy, or harass another. So it will be for you to determine whether or not, if the assault and battery was committed, it was malicious. If the evidence fails to show by a fair preponderance thereof that it was malicious, then you should not give the plaintiff any exemplary damages. If it does show, however, by a fair preponderance, that it was malicious, then the plaintiff is entitled to exemplary damages such as you deem proper under all the circumstances. You cannot find exemplary damages, however, unless you find the plaintiff has suffered some actual damages. If you find he suffered actual damages, then you may find for him in exemplary damages, if you find that the assault was malicious.<sup>82</sup>

**§ 917(4). Texas**

The jury are instructed that if malice has been shown by the evidence, or may be reasonably inferred from the conduct of the defendant as shown in evidence, you may, in your discretion, give exemplary damages, by way of punishment to the defendant, and for the purpose of setting a wholesome example to others.<sup>83</sup>

**§ 917(5). Virginia**

The court instructs the jury that whenever an assault is of a grievous or wanton nature, manifesting a willful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary damages; and, whilst the existence of malice may be shown in aggravation of such damages, its absence does not defeat the right to their recovery.<sup>84</sup>

The court instructs the jury that, though they may believe that the defendant had probable cause which justified him in charging the plaintiff with larceny of his property, and in prosecuting him therefor, yet if the defendant made a premeditated, willful, or malicious assault upon the plaintiff, then the jury may award the plaintiff punitive damages.<sup>85</sup>

**§ 917(6). Wisconsin**

The jury are instructed that you may award exemplary damages by way of punishment to defendant, if you find that the assault and battery was inflicted under circumstances of aggravation and cruelty, with vindictiveness or malice.<sup>86</sup>

<sup>82</sup> Kerley v. Germischeld, 106 N. W. 136, 20 S. D. 363.

<sup>83</sup> Knittel v. Schmidt, 40 S. W. 507, 16 Tex. Civ. App. 7.

<sup>84</sup> Bannister v. Mitchell, 104 S. E. 800, 127 Va. 800.

<sup>85</sup> Turk v. Martin, 97 S. E. 351, 124 Va. 103.

<sup>86</sup> Lamb v. Stone, 70 N. W. 72, 95 Wis. 254.

§ 917(7). **Wyoming**

The jury are instructed that, in addition to any actual damages (if you find that there were any), you may award exemplary damages to the plaintiff, in case you should find that the wrongful acts, if any, by the defendant causing such actual damages were committed in a wanton, willful, or reckless manner, or in case you find such acts were committed wantonly, recklessly, and without due regard to the rights of the plaintiff, or if you find that wrongful acts of the defendant causing such damages were from any bad motive or so recklessly done as to imply a disregard for the obligations and rights of the plaintiff.<sup>87</sup>

§ 918. **Same—Use of unnecessary force in resisting attack**

The court instructs the jury that if you further believe from the evidence that the conductor used more force than was reasonably necessary, or to him apparently reasonably necessary, to ward off or defend himself from the assault of the plaintiff, and if you further believe that in doing so he acted in a willful, wanton, and oppressive manner, then you may, or may not, in your discretion, in addition to the compensatory damages before referred to, award the plaintiff such sum by way of exemplary or punitive damages as you believe from the evidence will be just and reasonable for the unnecessary force, if any, used by the conductor, ———, on the plaintiff, but in no event shall your finding, if any, in both compensatory and exemplary damages exceed the sum of \$———, the amount claimed in the petition.<sup>88</sup>

§ 919. **Form of verdict**

The court instructs the jury that if the jury, under the evidence and instructions of the court, find for the plaintiff for both actual and punitive damages, they should state in their verdict separately the amount awarded for the actual damages and the amount awarded as punitive damages, and assess the total in one sum.<sup>89</sup>

<sup>87</sup> *Williams v. Campbell*, 133 P. 1071, 22 Wyo. 1.

<sup>88</sup> *Louisville Ry. Co. v. Frick*, 165 S. W. 649, 158 Ky. 450.

<sup>89</sup> *Gleske v. Redemeyer* (Mo. App.) 224 S. W. 92.

## CHAPTER LXI

## ASSIGNMENTS

§ 920. Requisites of assignment.

§ 921. Validity of oral assignment.

§ 920. Requisites of assignment

The jury are instructed that the point is made that this bill of sale did not, in terms, assign this contract. It may be true that there is not a word in the bill of sale which accurately and legally describes this executory contract; but it is so obvious, upon the face of the paper, that there was a manifest intent to sell the whole business, as well as the whole property of the concern, that I shall hold as a matter of law, and so instruct you, that this bill of sale was intended to, and did in fact, transfer this contract in question from the former firm to the newly formed corporation; and, if it were not so, still it is true the new corporation took the contract, and claimed it from that time forward as its own, without objection from the former firm. It must have been without objection on their part, because every member of the former firm was a member of the new corporation; and I therefore charge you, as a matter of law, and dispose of this question once for all, that this contract was, so far as it was competent for the parties to do so, assigned by the firm who made it to the corporation who succeeded that firm.<sup>1</sup>

§ 921. Validity of oral assignment

You are instructed that a contract in writing may be sold or assigned by parol—that is, by oral agreement and understanding between the parties; and in this case you are instructed that H. had a right to sell and assign the contract entered into on the \_\_\_\_\_ day of \_\_\_\_\_, between plaintiff and H., which contract is attached to plaintiff's petition and introduced in evidence, to the defendant, and if you find from the evidence in this case that on or about the \_\_\_\_\_ day of \_\_\_\_\_, the said H. sold by oral agreement said contract to the defendant, and that said defendant accepted said contract and took possession of the pipe lines and connected with the well referred to in said contract on the \_\_\_\_\_ land, and operated said well and sold to its customers said gas,

<sup>1</sup> Shadbolt & Boyd Iron Co. v. Topliff, 55 N. W. 854, 85 Wis. 518.

and thereafter the defendant corporation made settlement with said ——— for ——— per cent. of the gross receipts of gas as provided in said contract, then in that event, although the contract was not assigned in writing by H. to the defendant, yet as a matter of law it becomes the contract of the said defendant as fully as if it had been assigned by H. to the defendant.<sup>2</sup>

<sup>2</sup> Laurel Oil & Gas Co. v. Anthony, 162 P. 203, 62 Okl. 94.

## CHAPTER LXII

## ASSIGNMENT FOR BENEFIT OF CREDITORS

- § 922. Validity—Intention of assignor.
- 923. Assent of creditors.
- 924. Avoidance for fraud.
- 925. Same—Intent to force creditors to compromise.
- 926. Same—Taking possession by assignee before filing inventory or bond.
- 927. Same—Effect of subsequent fraudulent acts.
- 928. Knowledge of assignee of fraudulent intent of assignor.
- 929. Presumption and burden of proof as to good faith.
  - 929(1). Minnesota.
  - 929(2). North Carolina.
- 930. Sufficiency of evidence of fraud.
- 931. Submission to jury of question of intent to abandon assignment.
- 932. Valuation of assets.

See, also, Bankruptcy; Compromise and Settlement; Insolvency.

## § 922. Validity—Intention of assignor

You are instructed that, as to the assignment under which the plaintiff claims in this case, there is but a single question for you to pass upon, viz.: What was ——'s intent and purpose in making it? The intent with which plaintiff received the assignment is immaterial.<sup>1</sup>

## § 923. Assent of creditors

You are instructed that it is only necessary that creditors should give such assent to the provisions of the assignment as will recognize and affirm the acceptance and possession of the property by the assignee, as made and held for their benefit and in their behalf, in accordance with the terms of the assignment. If —— went in and informed these creditors of the facts, and made a fair statement to them of the facts, exhibiting to them this deed of trust, if they wanted to see it, and they so conducted themselves towards him, in what they said and did, that he, as a reasonable man, understood them to assent, and acted in good faith upon that understanding, then, for the purpose of this case, they must be taken to have assented.<sup>2</sup>

## § 924. Avoidance for fraud

The court instructs the jury that an assignment is not fraudulent because it may or even must operate to obstruct or delay creditors; for every assignment, with however good faith, must so

<sup>1</sup> Bennett v. Ellison, 23 Minn. 242.

<sup>2</sup> Nutter v. King, 25 N. E. 617, 152 Mass. 355.

operate. The jury must find that the intention of the act was to defraud creditors, and not to devote the property assigned to the payment of debts.<sup>4</sup>

The court instructs the jury that the only subject of inquiry for the jury (so far as the question of fraud is concerned) is the intent with which the assignment was made, and acts wholly independent of the fact of assignment cannot be considered.<sup>5</sup>

**§ 925. Same—Intent to force creditors to compromise**

You are instructed that, if the real object or intent of ——— in making this assignment was not the one expressed on its face, but to induce, persuade, or force creditors to agree and consent to a compromise which he was then attempting to make with his creditors, at ——— cents on the dollar, then, and in such case, the assignment was fraudulent and void as to creditors.<sup>6</sup>

The jury are instructed, if the jury find ——— made the assignment with the intent and for the purpose of effecting a compromise with his creditors, or for the purpose of facilitating one already commenced, then the assignment is void, and you must return a verdict for the defendant.<sup>7</sup>

You are instructed that plaintiff, under this assignment, does not stand in the position of a purchaser for valuable consideration; and the fact (if such be the case) that he had no knowledge that it was ———'s intention, in making the assignment, to effect a compromise with his creditors cannot cure the effect of such intention on ———'s part. If such intention existed on ———'s part, at the time he executed the assignment, it is void, no matter whether plaintiff knew ———'s intention or not, and your verdict should be for the defendant.<sup>8</sup>

**§ 926. Same—Taking possession by assignee before filing inventory or bond**

The court instructs you that, although there is a clause in the deed of assignment offered in evidence in this case which prohibits the assignee from taking charge or control of the property assigned until he had filed his inventory and bond as the law provides, yet if you believe from the evidence in this case that, at the time the assignor delivered the deed of assignment to the assignee, he and the assignor entered into an agreement or understanding by which the assignee was to take possession of the assigned prop-

<sup>4</sup> *Guerin v. Hunt*, 8 Minn. 477 (Gil 427).

<sup>5</sup> *Guerin v. Hunt*, 8 Minn. 477 (Gil 427).

<sup>6</sup> *Bennett v. Ellison*, 23 Minn. 242.

<sup>7</sup> *Bennett v. Ellison*, 23 Minn. 242.

<sup>8</sup> *Bennett v. Ellison*, 23 Minn. 242.

erty before he filed his inventory and bond, and that the assignee, in pursuance of such understanding, did take charge of said property, either by himself or agent, before he filed his inventory and bond, that such acts would render the assignment fraudulent and void in law, and you should find for the plaintiff or attaching creditor. And in determining whether or not there was such an agreement or understanding between the assignor and the assignee, you have a right to take into consideration all the facts and circumstances surrounding the case; and if you believe from the evidence, and all the circumstances surrounding the case, that there was such an understanding, you will find for the plaintiff or attaching creditors.<sup>9</sup>

**§ 927. Same—Effect of subsequent fraudulent acts**

The court instructs the jury that the deed of assignment offered in evidence in the case is valid on its face, and vested the legal title to the property in controversy in this suit in the assignee named therein, and the interpleader herein, unless some fraud resulting in law from an agreement expressly proved, or implied from the circumstances, on the part of the assignor, prior to or contemporaneous with the execution of the deed, known to and participated in by the assignee, invalidated it. If, therefore, the assignment in question was free from fraud, at the time of its execution and delivery, no subsequent agreement between the assignor and assignee to disregard it, and no subsequent fraudulent acts on their part with respect to the assigned property, will invalidate it.<sup>10</sup>

**§ 928. Knowledge of assignee of fraudulent intent of assignor**

You are instructed that, if ——— executed the assignment with such fraudulent intent, it would be void as to creditors, even although plaintiff, the assignee, had no notice or knowledge of such fraudulent intent at or prior to the time he accepted the assignment.<sup>11</sup>

**§ 929. Presumption and burden of proof as to good faith**

**§ 929(1). Minnesota**

The court instructs the jury that, the deed of assignment being in due form and regular on its face, fraud will not be presumed with reference to it, but the burden of proof is on the defendant to show it fraudulent. The presumption is that the deed was made in good faith and that it is untainted with fraud.<sup>12</sup>

<sup>9</sup> Badgett v. Johnson-Fife Hat Co., 38 S. W. 667, 1 Ind. T. 133.

<sup>10</sup> Badgett v. Johnson-Fife Hat Co., 38 S. W. 667, 1 Ind. T. 133.

<sup>11</sup> Bennett v. Ellison, 23 Minn. 242.

<sup>12</sup> Guerin v. Hunt, 8 Minn. 477 (Gil. 427).

**§ 929(2). North Carolina**

The jury are instructed that the law presumes the assignment of ——— to be honest, and imposes on the plaintiffs the burden of proving the fraud they allege, by a preponderance of evidence, and, unless the alleged fraud be so proven, the jury must find the issue in the negative; that as the defendants went into possession of the property under the deed of assignment to them, and were in possession thereof at the time of the bringing of this action, the law presumes their possession to be rightful, and it is therefore necessary for the plaintiffs who allege fraud to show it by a preponderance of evidence, and this extends to proving the alleged want of consideration.<sup>13</sup>

**§ 930. Sufficiency of evidence of fraud**

The court instructs you that fraud may be proven by circumstances, and, in determining what constitutes fraud, you have a right to consider all the evidence and circumstances in the case, and from them determine the question of fraud.<sup>14</sup>

**§ 931. Submission to jury of question of intent to abandon assignment**

You are instructed that if the jury shall find, from the evidence, that after the alleged assignment to P., and after the levy of the W. execution by Deputy Sheriff A., and possession taken by him, the debtor ——— confessed a judgment in favor of P. & D. for the amount of their claim, including also the claim of ———, the other preferred creditor, and that P. thereupon caused execution to be issued, and directed a levy upon the assigned property to be made by A., and that the said judgment was so confessed, and execution was so levied, with the intent to abandon said assignment, then the levy under the W. execution acquired a priority of lien over the goods in question, and the jury should find for the defendant.<sup>15</sup>

**§ 932. Valuation of assets**

You are instructed that, in determining the value of the property and assets of the respondent on the ——— day of ———, you are required to fix such value at a fair valuation. This does not mean what the property would bring at a forced or auction sale. A fair valuation of the real estate is such sum as the property would reasonably have sold for to a purchaser desiring to buy, and the owner wishing to sell. A fair value of the merchandise, implements,

<sup>13</sup> *Hodges v. Lassiter*, 2 S. E. 923, 98 N. C. 851.

<sup>14</sup> *Badgett v. Johnson-Fife Hat Co.*, 38 S. W. 667, 1 Ind. T. 133.

<sup>15</sup> *Wilson v. Pearson*, 20 Ill. 81.



and other personal property is the sum that could have been fairly realized from the sale of such property in bulk, or in parcels, in the usual and ordinary way of selling such classes of property for cash in this market. A fair valuation of the notes and accounts is the net sum that, in your judgment, from all the evidence before you, could have been, with reasonable diligence, realized from the collection of such notes and accounts, within a reasonable time after ———, and not the amounts as shown by their face, unless their face value was in fact their fair value.<sup>16</sup>

<sup>16</sup> Plymouth Cordage Co. v. Smith, 90 P. 418, 18 Okl. 249, 11 Ann. Cas. 445.

## CHAPTER LXIII

## ASSUMPSIT

## § 933. Right of action in general.

933(1). Illinois.

933(2). Indiana.

## 934. Remedy for false representation of authority to act as agent—Assumpsit or action for deceit.

## 935. Right to recover on the common counts, where express contract exists between the parties.

935(1). Alabama.

935(2). Florida.

935(3). Indiana.

## 936. Recovery on common counts, where full performance prevented by defendant.

## § 933. Right of action in general

## § 933(1). Illinois

The court instructs the jury that if they believe from the evidence that the plaintiff, at the request of the defendant, performed the services and did the work and labor for the defendant in and about the purchase of ice, and also in and about the construction of an icehouse at ———, or ———, in ———, as claimed by him, and that in addition thereto the said plaintiff filled the said icehouse, or partly filled the same, and also certain barges of defendant, with ice, at the request of the defendant, and that such filling with ice was done by the said plaintiff for the defendant under a contract with the defendant that the said defendant should pay said plaintiff ——— cents per ton for all the ice so put in said icehouse and said barges by said plaintiff, then the said plaintiff would be entitled, in addition to his compensation for services, work, and labor in the purchase of ice, as aforesaid, and in the construction of the said icehouse, to whatever amount the amount of ice so filled in the said icehouse and said barges, by said plaintiff, would amount to at ——— cents per ton, so far as the same may be shown by the evidence, deducting whatever the jury shall believe from the evidence has been paid to the said plaintiff; unless the jury shall believe from the evidence that the said plaintiff has been fully paid for his said services, work, and labor, and the filling, or part filling, of the said icehouse and barges, or has accepted from the defendant a certain sum of money in full satisfaction and discharge of all of the said claims and demands of the plaintiff.<sup>1</sup>

<sup>1</sup> Anheuser-Busch Brewing Co. v. Hutmacher, 21 N. E. 626, 127 Ill. 652, 4 L. R. A. 575.

The jury are instructed that, if you believe from the evidence that the defendant proposed to give ——— dollars to relieve the township from draft and to discharge his sons therefrom, and that plaintiff, on the faith of that promise, expended time and money for the purpose of so relieving the township, and thereby succeeded, and relieved the township and the sons of defendant from the draft you should find for the plaintiff.<sup>3</sup>

**§ 933(2). Indiana**

You are instructed that if you find from the evidence that there was no special contract between the parties, and that the plaintiff performed work, then the plaintiff would be entitled to recover the reasonable value of the work done, if he did work, and it was of any value.<sup>3</sup>

**§ 934. Remedy for false representation of authority to act as agent—Assumpsit or action for deceit**

The jury are instructed that, if the defendant represented himself as an agent of the ——— and authorized to contract for them, and did so contract with plaintiffs, and was not so authorized, he might be liable in another form of action to the plaintiffs, but not in this action, for any damage resulting to the plaintiffs from such false representation of authority.<sup>4</sup>

**§ 935. Right to recover on the common counts, where express contract exists between the parties**

**§ 935(1). Alabama**

The court charges the jury that if the evidence reasonably satisfies them that there was an express contract between plaintiff and defendant for the construction of the house, then he is not entitled to recover under the common counts for money due on account, and for merchandise, goods and chattels sold, and for work and labor done, or upon any one of them, except what may be due, if anything, for the extra work done and extra material furnished by him, unless the evidence also reasonably satisfies the jury that he complied with the terms of the contract, or that defendant accepted the house as constructed. The burden of proving one of these two facts rests upon the plaintiff, and unless he has done so to the reasonable satisfaction of the jury, they must find for the defendant, except as to plaintiff's claim for extra work done and extra material furnished.<sup>5</sup>

<sup>3</sup> Wilson v. McClure, 50 Ill. 366.

<sup>3</sup> Gastlin v. Weeks, 28 N. E. 331, 2 Ind. App. 222.

<sup>4</sup> Noyes v. Loring, 55 Me. 408.

<sup>5</sup> Aarnes v. Windham, 34 So. 816, 137 Ala. 513.

The court charges the jury that, except as to his claim for extra work done and extra material furnished, plaintiff is not entitled to recover upon any one of the common counts for money due on account, and for merchandise, goods and chattels sold, and for work and labor done, unless the evidence reasonably satisfies their minds, either that he complied with the undertakings of the contract on his part, or that defendant accepted the house as constructed. The burden of proving one of these facts to the reasonable satisfaction of the jury is upon plaintiff. If the evidence does not so satisfy their minds that he complied with his part of the contract, but they find that defendant nevertheless accepted the house as constructed, then he is entitled to recover for work done and for the material furnished in the construction of the house, outside such extra work and extra material, only their actual value, less payments thereon made him, and interest on such excess from the time the same became due.<sup>6</sup>

**§ 935(2). Florida**

The court charges you that the plaintiff is entitled to recover in this action for all of the lumber delivered to the defendant at the contract price between the time delivery commenced up until the ——— day ———, and also for such other articles of merchandise as plaintiff may have delivered to the defendant, as well as for whatever amounts the plaintiff may have paid out, such as paying a watchman to watch the lumber and similar items, less such amounts as have been paid according to the testimony. Your verdict should be accordingly.<sup>7</sup>

**§ 935(3). Indiana**

You are instructed that, if you find from the evidence that there was work done by the plaintiff for the defendants, then it will be for you to determine from the evidence whether or not there was any special agreement made between the plaintiff and defendants as to the manner in which the work should be done, and the price to be paid therefor.<sup>8</sup>

You are instructed that if you find from the evidence that there was such a contract, and that the plaintiff did perform a portion of the work according to the terms and in the manner provided in the contract, if there was a contract, and that defendants did not perform their part of such contract, if there was one, and that plaintiff

<sup>6</sup> *Aarnes v. Windham*, 34 So. 816, 137 Ala. 513.

<sup>7</sup> *Whittington v. Stanton*, 58 So. 489, 63 Fla. 811. The action was on

the common counts, and it was claimed that the contract was under seal.

<sup>8</sup> *Gastlin v. Weeks*, 28 N. E. 331, 2 Ind. App. 222.

thereupon quit work, he would be entitled to be paid for the work he did do at the price agreed upon in the contract if there was such contract.<sup>9</sup>

You are instructed that, if you find from the evidence that there was a special contract that plaintiff was to grade the whole tract of land described in the complaint for the price of \$—— per acre, that plaintiff did grade a portion of the tract, that he failed of his own fault to grade the whole tract, then he would be entitled to recover the said price per acre for what he did grade, and would be liable to defendants for any sum in excess of said price per acre, if any, which they may have been compelled to pay to complete the grades according to the terms of the contract, if there was one.<sup>10</sup>

**§ 936. Recovery on common counts, where full performance prevented by defendant**

You are instructed that, if you find from the evidence that a portion of the work incidental to the ventilating system was to be done by the defendant corporation, then there was an implied contract on the part of the defendant to perform its share of such work in such manner as to enable the plaintiff to complete his share of the work in the manner agreed upon. And if you find that the defendant failed to perform in a workmanlike manner its share of the work, and such failure prevented plaintiff from completing the work, then your verdict should be in favor of plaintiff and against defendant. If the ventilating apparatus failed to ventilate the building because of careless or unskillful installation by the employees of the defendant of the wiring system, or the failure to house, or the careless or unskillful housing, by the employees of the defendant of any of the motors which constituted part of such ventilating system, then the defendant, and not the plaintiff, is answerable for such failure.<sup>11</sup>

<sup>9</sup> Gastlin v. Weeks, 28 N. E. 331, 2 Ind. App. 222.

<sup>10</sup> Gastlin v. Weeks, 28 N. E. 331, 2 Ind. App. 222.

<sup>11</sup> Murray v. California Conserving Co. (Cal. App.) 193 P. 959.

## CHAPTER LXIV

## ATTACHMENT

- § 937. Grounds for attachment.
  - 937(1). Alabama.
  - 937(2). Missouri.
- 938. Same—Fraud in contracting debt.
- 939. Same—Fraudulent disposition of property.
  - 939(1). Indiana.
  - 939(2). Texas.
- 940. Same—Conveyance to creditor for purpose of hindering or delaying other creditors.
- 941. Same—Nonresidence.
- 942. Same—Leaving state.
- 943. Burden of proof with respect to grounds of attachment.
- 944. Property subject to attachment.
- 945. Claims by third persons.
- 946. Expenses of caring for attached property—Liability of sheriff.
- 947. Method of securing release of attachment.
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  - 948(1). Alabama.
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- 949. Damages for wrongful attachment.
  - 949(1). Alabama.
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  - 949(3). Missouri.
  - 949(4). Montana.
- 950. Same—Exemplary damages.

See, also, Garnishment.

### § 937. Grounds for attachment

#### § 937(1). Alabama

The court charges the jury that even the temporary absence of a debtor from the state, though he does not inform his creditors, does not authorize an inference prejudicial to his integrity, nor authorize an attachment against him or his property.<sup>1</sup>

#### § 937(2). Missouri

The jury are instructed that the only question for them to determine on this trial is whether or not, on ———, when the attachment issued, the defendant was about to remove its property or effects out of this state with the intent to hinder or delay its creditors. The burden of proof is upon the plaintiff to show by the greater weight of evidence, not only that defendant was about to remove his property or effects out of this state, but plaintiff must go further and show that such removal was to be made with the

<sup>1</sup> W. F. Vandiver & Co. v. Waller, 39 So. 136, 143 Ala. 411.

intention, on the part of the defendant, by such removal to hinder or delay its creditors, and if you find that such wrongful intention is not proved by the greater weight of evidence, then your verdict should be for defendant. You are further instructed that there is no evidence of fraud in the case.<sup>2</sup>

The court instructs the jury that in order to sustain the attachment herein, the law imposes on plaintiffs the burden of proving by the greater weight and preponderance of the evidence that the plaintiffs owned the wheat they charged to have been embezzled at the time of such embezzlement, and that defendants took and appropriated the same to their own use against the will and without the consent of plaintiffs, and with the intention of depriving plaintiffs of their own property; and it would not be sufficient to authorize a finding in this case for plaintiffs for them to prove that defendants had bought wheat with the checks issued by plaintiffs and lost the same.<sup>3</sup>

#### § 938. Same—Fraud in contracting debt

You are instructed that the third ground of attachment is that the debt sued for was fraudulently contracted by the defendant; and this branch of the case also merits your careful attention. Speaking generally, a debt may be said to have been fraudulently contracted for two reasons: First, when a debtor has induced his creditor to sell him goods and extend to him credit by means of false representations as to his financial condition, or as to his means and ability of paying for the same; and, secondly, when a debtor has bought goods or property of any kind on credit with a preconceived intention of getting the possession of the articles bought, and disposing of them, and not paying for the same at any time.<sup>4</sup>

The court instructs you, that there is no evidence in this case that will warrant you in finding that the debt sued for was fraudulently contracted in the mode first above pointed out; that is to say, because of fraudulent representations made when the goods in question were bought. There is no evidence, in my judgment, to substantiate any such charge. But the court submits this question for your consideration as one that fairly arises under the evidence in the case, viz., whether, when defendant bought the bill of goods sued for in this case of the plaintiffs, he intended to pay for the goods. If you believe from all the evidences and circum-

<sup>2</sup> *Simmons Hardware Co. v. Fighting the Flames Co.*, 115 S. W. 467, 135 Mo. App. 266.

<sup>3</sup> *R. C. Stone Milling Co. v. Mc-*

*Williams*, 98 S. W. 828, 121 Mo. App. 319.

<sup>4</sup> *Strauss v. Abrahams* (C. C. E. D. Missouri) 32 F. 810.

stances in the case that, when defendant bought the bill in question of these plaintiffs, he did not intend to pay for the goods at any time thereafter, but did intend to get the goods into his possession, and sell them, and pocket the proceeds, or sell them to ———, and not to pay the plaintiffs at any time, then you may find that the debt sued for was fraudulently contracted, and you may sustain the attachment on that ground; that is, on the third ground above stated. But unless the proof satisfies you that plaintiffs' bill was purchased by the defendant with the intent last stated, that is, with an intent never to pay for them, you ought to find that the third ground of attachment has not been sustained.<sup>5</sup>

**§ 939. Same—Fraudulent disposition of property**

**§ 939(1). Indiana**

The jury are instructed that a person, being in debt or failing circumstances, has a right to prefer one creditor or class of creditors over another creditor or creditors, and the fact that he conveys property, either by a mortgage or a deed, to one creditor or class of creditors, and does not convey any property to certain other creditors, is not fraudulent, and that fact of itself will not sustain or justify the issuing of a writ of attachment; and, if you find from the evidence that the defendant did so transfer his property, then your finding should be for the defendant on this branch of the case relating to the attachment.<sup>6</sup>

**§ 939(2). Texas**

In this connection you are instructed that a sale of this property, or mortgage of this property, or any portion thereof, not more than enough to reasonably pay or secure said debt to a creditor, to secure or satisfy a bona fide debt to such creditor, or a sale of the property for the purpose of satisfying a bona fide debt owed by plaintiff, if any, would not constitute disposing of property with intent to defraud his creditors, as every debtor has the right, under the laws of the state of ———, to prefer one creditor over another.<sup>7</sup>

**§ 940. Same—Conveyance to creditor for purpose of hindering or delaying other creditors**

You are instructed that, on the other hand, if you believe from the evidence that the whole or a part of the debt claimed to be due from the defendant to D., which figured as the consideration in

<sup>5</sup> *Strauss v. Abrahams* (C. C. E. D. Missouri) 32 F. 310.

<sup>6</sup> *Island Coal Co. v. Rehling*, 53 N. E. 777, 22 Ind. App. 305.

<sup>7</sup> *Williams v. Kane* (Civ. App.) 55 S. W. 974.



the sale of the stock, was fictitious, and was known to be fictitious, that is, was not legally owing to D. at the time of the sale, then the conveyance was for that reason fraudulent, and you should so find. Or if you believe that the sale and conveyance of the stock at ——— was contrived by defendant and D. together, or that it was contrived by defendant alone, for the purpose of hindering and delaying or defrauding defendant's other creditors in the collection of their debts, or to put the property out of the reach of his other creditors, then the sale and conveyance was fraudulent, and you should so find, even though you may believe that at the time of the sale defendant was indebted to D. In other words, gentlemen, a conveyance of property that is made by a debtor for the purpose, and with the intent, of hindering or delaying some of his creditors, is fraudulent, so far as the debtor is concerned, and will authorize an attachment against him, even though the debtor, by means of such conveyance, thereby pays some other creditor whom he justly owes.<sup>8</sup>

**§ 941. Same—Nonresidence**

The court instructs the jury for plaintiff that if they believe from the evidence that at the time of the suing out the attachment in this cause defendant was out of the state of ———, and intended and did remain out of the state for an indefinite and uncertain period, then defendant is a nonresident within the meaning of the law, although the jury may believe from the evidence that the defendant occasionally visited the state of ———, or intended at some uncertain time in the future to return to ——— and to live there permanently.<sup>9</sup>

**§ 942. Same—Leaving state**

The jury are instructed that, if you find from the evidence that after the execution of the conveyances and mortgages which were introduced in evidence in the case, executed on the ——— day of ———, the defendant left the state of I. and went to the state of M., and returned on the ——— day of ———, and without making any public announcement as to where he was going and when he would return, this fact, standing alone, would not sustain the charge of fraud, nor justify the writ of attachment in this case.<sup>10</sup>

<sup>8</sup> *Strauss v. Abrahams* (C. C. E. D. Missouri) 32 F. 310.

<sup>9</sup> *Imperial Cotton Oil Co. v. Allen*, 35 So. 216, 83 Miss. 27.

<sup>10</sup> *Island Coal Co. v. Rehling*, 53 N. E. 777, 22 Ind. App. 305.

**§ 943. Burden of proof with respect to grounds of attachment**

The jury are instructed that, when one person charges another with having perpetrated, or with an intent to perpetrate, a fraud, the law requires the person by whom the charge is made to substantiate the same by adequate proof. It accordingly follows that the burden of proof in this case is on the plaintiffs; and unless they have proven some one or more of the grounds of attachment stated in the affidavit, by a preponderance of evidence, you must find against them, and in favor of the defendant. It is not necessary that the plaintiffs should prove all the grounds of attachment stated in the affidavit to entitle them to a verdict, but they must prove some one or more of the three grounds to warrant a verdict in their favor.<sup>11</sup>

**§ 944. Property subject to attachment**

The jury are instructed that, when you come to determine whether or not ——— retained actual possession of the property attached after the sale by him to plaintiff, if any such sale you find there was, the law is that, to retain actual possession of property after a sale, so as to make the property subject to the debts of the seller, in the absence of a recorded instrument of sale, the possession of the seller must be actual of the same character and kind as the seller had before the sale.<sup>12</sup>

**§ 945. Claims by third persons**

The jury are instructed that if you find and believe from the evidence that on ——— the defendant was indebted to the interpleader, ———, in the sum of and as evidenced by the note for \$——— offered in evidence, and that the chattel mortgage offered in evidence was executed by said defendant and wife, and delivered to said interpleader and accepted by him, for the sole purpose of securing said note for \$———, then your verdict will be for the interpleader, ———.<sup>13</sup>

**§ 946. Expenses of caring for attached property—Liability of sheriff**

The jury are instructed that, even if you believe from a preponderance of the evidence that the plaintiff was in the employ of the owner, trustee, or receiver of the attached property during a part or all of the time he was in charge of such property as keeper, such employment does not preclude his right to recover from the

<sup>11</sup> *Strauss v. Abrahams* (C. C. E. D. Missouri) 32 F. 310.

<sup>12</sup> *Leader v. Farmers' Loan & Trust Co.* 122 N. W. 833, 144 Iowa, 180.

<sup>13</sup> *Lafferty v. Hilliker*, 81 S. W. 910, 109 Mo. App. 56.

defendant the reasonable value of his services to the defendant as keeper, not exceeding ——— per day.<sup>14</sup>

**§ 947. Method of securing release of attachment**

You are instructed that, when an officer takes possession of property under a writ of attachment, the property so attached may be released either by a dismissal of the action or by a discharge of the attachment in the records of the court out of which the writ issued, or the same may be released orally by the statement of the sheriff, and the sheriff has authority to release attached property by the agreement of the parties to the suit out of which the attachment issued, or the sheriff has authority to release property attached, upon the instruction or request from the attorney of the person or party causing the property to be attached.<sup>15</sup>

**§ 948. Liability for wrongful attachment.**

Liability for wrongful distress, see post, § 8287.

Liability of sheriff for wrongful attachment, see post, § 4801.

**§ 948(1). Alabama**

The jury are instructed that, if you find from the evidence that the plaintiff was not about to remove permanently from the state and that he did not intend to give up his residence in this state and take up a residence in another state, then, although the defendant honestly believed that the plaintiff was about to remove permanently from the state and had probable cause for such belief, still he would be liable to the plaintiff, if there was no other cause for attachment.<sup>16</sup>

**§ 948(2). Texas**

The jury are instructed that, if you believe from the evidence that the grounds set out in the affidavit for attachment were not true, plaintiff would be entitled to the actual damages which the proof shows he may have sustained by the attachment. The affidavit recites that the plaintiff had disposed of his property for the purpose of defrauding his creditors, and if you believe from the evidence that the plaintiff, at and before suing out the attachment, had disposed of his property with the intent to defraud his creditors, or if you find that plaintiff had disposed of his property, and the natural effect of such disposition was to withdraw and place the property of plaintiff beyond the reach of his creditors, then you will find for the defendant.<sup>17</sup>

<sup>14</sup> *Daly v. Kelley*, 187 P. 1022, 57 Mont. 806.

<sup>15</sup> *Southwestern Broom & Warehouse Co. v. City Nat. Bank*, 153 P. 204, 52 Okl. 422.

<sup>16</sup> *Troy v. Rogers*, 20 So. 999, 113 Ala. 131.

<sup>17</sup> *Blum v. Strong*, 6 S. W. 167, 71 Tex. 321.

The jury are instructed that you will inquire into the truth or falsity of the affidavit made for attachment, and if it be true that at the time such affidavit was made the defendants were about to convert their property, or part thereof, into money for the purpose of placing it beyond the reach of their creditors, then the defendants are not entitled to any actual damages against the plaintiffs and the sureties on their attachment bond; but if you should believe from the evidence that the defendants were not about to convert their property, or a part thereof, into money for the purpose of placing it beyond the reach of their creditors, then such attachment was wrongfully sued out, and you will find for defendants.<sup>18</sup>

### § 949. Damages for wrongful attachment

#### § 949(1). Alabama

The court charges the jury that if they believe from the evidence that plaintiff was not about to fraudulently dispose of his property, and that no ground existed for the issuance of the attachment, then defendants would be liable for all actual damages that the evidence shows you the plaintiff has suffered.<sup>19</sup>

The court charges the jury that the elements of actual damages, as claimed in this case, are damages to the goods, attorney's fee in attachment suit and in contest of exemptions, and in loss of credit and business, and they must look to the evidence for the amount of these damages.<sup>20</sup>

#### § 949(2). Michigan

You are instructed that in no event can you find damages in this case in favor of the defendant for more than \$———. In other words, you cannot, as in an ordinary action where there is an offset in assumpsit, give judgment for the balance which you find in excess is due to the defendant, or in case of what we call recoupment, but you can only take into consideration the damages up to the amount of the present claim of the plaintiff in this case \$———, and you have nothing to do with the balance. And your verdict in that case would be no cause for action, if you should so find.<sup>21</sup>

If you are satisfied, gentlemen of the jury, from the preponderance of evidence in this case, that the defendant is entitled to recover damages because of this attachment having been improperly issued and levied upon his property, then I give you as a

<sup>18</sup> Blum v. Davis, 56 Tex. 423.

<sup>19</sup> W. F. Vandiver & Co. v. Waller,  
39 So. 136, 143 Ala. 411.

<sup>20</sup> W. F. Vandiver & Co. v. Waller,

39 So. 136, 143 Ala. 411.

<sup>21</sup> Brown v. Spiegel, 133 N. W. 618,  
167 Mich. 645.

measure of damages, as follows: The defendant is to be allowed his actual damages arising from such attachment, and for that reason I have already said to you that I withdraw from your consideration any alleged loss on account of his being unable to sell this real estate. It is too uncertain, in view of all the testimony in the case—in view of the fact that you cannot compel any man to carry out a trade in real estate unless you have it in writing, and there is no evidence here of any of those alleged arrangements being in writing, so that defendant could not compel the other parties to have carried them out. He is entitled to recover actual damages to the potatoes levied upon under the attachment, and, as you have heard, he claims ——— bushels were a total loss, at ——— cents per bushel, and also for the depreciation of the ——— bushels at ——— cents a bushel, according to his evidence. Of course it devolves upon him to establish the damage, if you are satisfied he is entitled to recover, by a preponderance of evidence, as well as the other facts necessary to his recovery. If you find the facts claimed established by him by a preponderance of the evidence under the instructions I have already given you, then I instruct he is to be awarded such actual damages as you find he has suffered in that regard, as a direct and proximate result of such levy under said attachment.<sup>22</sup>

I instruct you that the defendant is only entitled, in case he is entitled to recover, to such damages as is shown by the evidence to have proceeded directly from the levy of such attachment, but not such as may have arisen from the acts of the defendant himself. If you find that the defendant placed these potatoes in question in storage with the purpose of retaining them for a very much advantageous market, or for a rise in price, and was not prevented by reason of the attachment from disposing of them at a time when he could have disposed of them to the best advantage, then he is not entitled to offset that claim.<sup>23</sup>

**§ 949(3). Missouri**

The court instructs you, the jury, that if you find for the relator, ———, trustee, under the evidence and instructions of the court, you should then assess his damages at such sum as you believe, from the evidence, was the reasonable market value, on ———, in the city of ———, of the goods seized under the attachment in question and covered by the indemnifying bond read in evidence, and to which value so found allow interest at the rate

<sup>22</sup> Brown v. Spiegel, 133 N. W. 618, 167 Mich. 645.

<sup>23</sup> Brown v. Spiegel, 133 N. W. 618, 167 Mich. 645.

of ——— per cent. per annum from ———, to the date of your verdict. In other words, the reasonable market value of said goods in ——— on ———, with interest thereon at the rate of ——— per cent. per annum from that date to the day of your verdict, is the damage relator is entitled to recover, if you find in his favor.<sup>24</sup>

**§ 949(4). Montana**

The court instructs the jury that if they believe from the evidence that the defendants in instituting the action and suing out the attachment and levying on the property mentioned and described in the complaint, or in holding the same after demand, were not moved to so do by malicious or oppressive motives, then all that the plaintiff can recover in this action is such damage as you may believe from all the evidence in the case will compensate plaintiff for the loss that he sustained, which is the reasonable market value of the property taken and such actual expense as you may believe the plaintiff to have incurred in pursuing and trying to regain possession of the property up to the time of the institution of this action.<sup>25</sup>

**§ 950. Same—Exemplary damages**

The court charges the jury that if they believe from the evidence that the suing out of the attachment was wrongful, as has been defined by the court, and that the attachment was issued without probable cause, punitive as well as actual damages can be recovered, though the attachment is sued out by an agent, if the principal, with full knowledge, ratified the act of the agent.<sup>26</sup>

<sup>24</sup> State ex rel. Grimm v. Manhattan Rubber Mfg. Co., 50 S. W. 321, 149 Mo. 181.

<sup>25</sup> Shandy v. McDonald, 100 P. 203, 88 Mont. 393.

<sup>26</sup> W. F. Vandiver & Co. v. Waller. 89 So. 136, 143 Ala. 411.

**CHAPTER LXV****ATTORNEY AND CLIENT****A. WHEN RELATION EXISTS**

- § 951. Employment on behalf of undisclosed principal.
- 952. Estoppel to deny existence of relation.

**B. INCIDENTS OF RELATION**

- 953. Effect on client of representations of attorney.
- 954. Power to compromise claims.
- 955. Power to compromise litigation.
  - 955(1). Indiana.
  - 955(2). New York.
- 956. Ratification of unauthorized compromise.
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**C. LIABILITY OF ATTORNEY TO CLIENT.**

- 957. Liability for giving improper advice.
- 958. Liability for failure to defend suit.
- 959. Duty of attorney as to moneys collected for client.
- 960. Liability for interest on moneys collected.

**D. LIABILITY OF CLIENT FOR BREACH OF CONTRACT**

- 961. Validity of contract of retainer.
- 962. Revocation of retainer.
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**E. COMPENSATION AND LIEN OF ATTORNEY**

- 965. Contract of employment as basis of claim.
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- 966. Performance of contract by attorney.
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     982(1). California.  
     982(2). Colorado.  
 983. Presumption from delay in bringing suit.

### A. WHEN RELATION EXISTS

#### § 951. Employment on behalf of undisclosed principal

You are instructed that if you find from the evidence in this case that the defendants, as attorneys, were employed by ——— to assist him in negotiating a purchase of the land named in the complaint, and to look up and pass upon the title thereto, and that at the time the defendants were so employed, and performed the work of looking up the title to said land, they had no knowledge or information that said ——— was acting as the agent of the plaintiff, then I instruct you that the relation of attorney and client did not exist as between the plaintiff and these defendants, or either of them, in connection with such employment, and your verdict should be for the defendants.<sup>1</sup>

#### § 952. Estoppel to deny existence of relation

The jury are instructed that, the defendant having received and receipted for the money due upon the judgment recovered in the suit instituted by the plaintiff the defendant is estopped to deny that the relation of attorney and client existed between himself and the plaintiff, that by so doing he ratified the act of the plaintiff in bringing suit and prosecuting it in the name of defendant, and the latter is liable to pay for those services what they are reasonably worth.<sup>2</sup>

### B. INCIDENTS OF RELATION

#### § 953. Effect on client of representations of attorney

You are instructed that, if the jury find from the evidence that ——— was the attorney or agent for the plaintiffs in these cases, then and in that event the plaintiffs will be bound by all the state-

<sup>1</sup> Currey v. Butcher, 61 P. 631, 37 Or. 380.

<sup>2</sup> Lindner v. Hine, 48 N. W. 43, 84 Mich. 511.



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  - 965(3). Missouri.
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### A. WHEN RELATION EXISTS

#### § 951. Employment on behalf of undisclosed principal

You are instructed that if you find from the evidence in this case that the defendants, as attorneys, were employed by ——— to assist him in negotiating a purchase of the land named in the complaint, and to look up and pass upon the title thereto, and that at the time the defendants were so employed, and performed the work of looking up the title to said land, they had no knowledge or information that said ——— was acting as the agent of the plaintiff, then I instruct you that the relation of attorney and client did not exist as between the plaintiff and these defendants, or either of them, in connection with such employment, and your verdict should be for the defendants.<sup>1</sup>

#### § 952. Estoppel to deny existence of relation

The jury are instructed that, the defendant having received and receipted for the money due upon the judgment recovered in the suit instituted by the plaintiff the defendant is estopped to deny that the relation of attorney and client existed between himself and the plaintiff, that by so doing he ratified the act of the plaintiff in bringing suit and prosecuting it in the name of defendant, and the latter is liable to pay for those services what they are reasonably worth.<sup>2</sup>

### B. INCIDENTS OF RELATION

#### § 953. Effect on client of representations of attorney

You are instructed that, if the jury find from the evidence that ——— was the attorney or agent for the plaintiffs in these cases, then and in that event the plaintiffs will be bound by all the state-

<sup>1</sup> Currey v. Butcher, 61 P. 631, 37 Or. 380.

<sup>2</sup> Lindner v. Hine, 48 N. W. 43, 84 Mich. 511.

ments made by said ——— at the time that said B., signed said obligations.<sup>3</sup>

**§ 954. Power to compromise claims**

You are instructed that an attorney having a claim for collection, in the absence of special authority, could not accept as payment a less amount than the whole sum due.<sup>4</sup>

You are instructed that, if such attorneys were employed by plaintiff to prosecute the claim sued upon, and she gave them full authority to act according to their best judgment, and to settle and compromise the claim for a less sum than that stated in the policy, she would be bound by any settlement made by them.<sup>5</sup>

**§ 955. Power to compromise litigation**

**§ 955(1). Indiana**

In regard to the compromise effected by plaintiff with ———, I instruct you as follows: It is the duty of an attorney, when practicable, and as promptly as practicable, to advise his client of all the material facts and legal bearings which may affect his client's interest in a pending litigation, and he should not undertake, without having done so, or without authority from his client, to compromise such litigation, and if he does, he will be held to his client for damages, if any, resulting to him thereby. But if there is such an emergency as requires the attorney to act promptly and before he can advise with his client, and the attorney, acting in good faith, with reasonable care and skill, compromises such litigation, he will not be held liable to his client, although it may turn out afterwards that the compromise was not the best that could have been made, or that the client would have fared better without any compromise at all. Applying these legal principles to the present case, it will be for you to say whether the defendant is entitled to anything, and, if so, how much, on account of the compromise with ———.<sup>6</sup>

**§ 955(2). New York**

The jury are instructed that Mr. ———, the attorney of record of the plaintiff, had no power to compromise the judgment obtained by plaintiff, or to release the defendant without payment, unless authority so to do was expressly conferred by the plaintiff.<sup>7</sup>

<sup>3</sup> Beal-Doyle Dry Goods Co. v. Barton, 97 S. W. 58, 80 Ark. 326.

<sup>4</sup> Martin v. Capital Ins. Co., 52 N. W. 534, 85 Iowa, 643.

<sup>5</sup> Martin v. Capital Ins. Co., 52 N. W. 534, 85 Iowa, 643.

<sup>6</sup> Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63.

<sup>7</sup> Mandeville v. Reynolds, 68 N. Y. 528.

**§ 956. Ratification of unauthorized compromise****§ 956(1). Missouri**

The jury are instructed that, if you believe from the evidence that plaintiff, on and after the \_\_\_\_\_ day of \_\_\_\_\_, held a cause of action against defendant for loss of services and society of his wife, \_\_\_\_\_, and the expense of medical services, nursing and medicines, all caused by an injury to said wife, on one of defendant's cars, in the city of \_\_\_\_\_, on or about the \_\_\_\_\_ day of \_\_\_\_\_; that on or about the \_\_\_\_\_ day of \_\_\_\_\_ plaintiff executed the written power of attorney, shown in evidence, whereby he employed one S. to assert and collect such claim against defendant, and such power of attorney was shown to the defendant before the payment of the sum of \$\_\_\_\_\_, hereinafter mentioned; that on the \_\_\_\_\_ day of \_\_\_\_\_, defendant and said S. compromised all claims theretofore held by plaintiff against defendant for and in consideration of the cash sum of \$\_\_\_\_\_ then and there paid by defendant to said S. as attorney of plaintiff, receiving in return for such payment the written release of said date read in evidence; that on said day said S. remitted his check for \$\_\_\_\_\_, being three-fourths of the sum so received by him, to the plaintiff, and retained one-fourth of said \$\_\_\_\_\_ as his compensation by virtue of said written power of attorney; that plaintiff received said check of \$\_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, and on said day cashed the same, and commingled the proceeds thereof with his own funds, and so kept them commingled until immediately prior to the institution of this suit, to wit, about the \_\_\_\_\_ day of \_\_\_\_\_, without protest or notice of disaffirmance to defendant; that said S. has now left the city of \_\_\_\_\_; that his present whereabouts are unknown, and that he left no property or assets in this state or city; and that plaintiff, upon being informed of such settlement by his attorney, did not repudiate or disavow such action of his attorney within a reasonable time, then you will be justified in inferring that by his failure to so disaffirm plaintiff has ratified such act of the attorney, and is now bound thereby.<sup>8</sup>

**§ 956(2). Nebraska**

The jury are instructed that, if you believe from the evidence that Mr. \_\_\_\_\_, as attorney for the plaintiff, settled and compromised the claim mentioned in the evidence, which plaintiff held against \_\_\_\_\_, and that the money received by said attorney as a result of such settlement was paid to plaintiff, and that the latter never made any objection to the settlement until almost a

<sup>8</sup> Babcock v. United Rys. Co., 138 S. W. 53, 158 Mo. App. 275.

month after he had received the money, and that he never returned or offered to return it, then you will be warranted in inferring that plaintiff ratified the act of the attorney in making such settlement.<sup>9</sup>

### C. LIABILITY OF ATTORNEY TO CLIENT

#### § 957. Liability for giving improper advice

The jury are instructed that if you believe from the evidence that Mr. ——— paid the sum of money mentioned in the evidence, and signed the release given in evidence, for the purpose of relieving his son-in-law from prosecution, and also to relieve himself from worry and trouble, and not by reason of any advice given him by defendant, the plaintiff cannot recover in this action.<sup>10</sup>

#### § 958. Liability for failure to defend suit

The jury are instructed that you must be satisfied that the defendant was employed to defend the suit mentioned in the evidence, and that he was informed what the defense was, before you can hold him answerable for failure to make the defense.<sup>11</sup>

#### § 959. Duty of attorney as to moneys collected for client

In regard to the ——— land, I instruct you that it is the duty of the attorney, as soon as he reasonably can, after collecting money for his client, to report the fact to such client, to keep such collections unmixed with his own money, and, within a reasonable time after such collection, to remit the amount collected, less his fees, to his client, unless he receives instructions to the contrary. He has a right, however, to apply such collection, not only upon the fees due him for making the same, but also upon whatever fees may then be due him for professional services from such client, and therefore he is not bound to remit anything, if such client is indebted to him, for fees due him for such professional services, in an amount greater than the amount of such collection.<sup>12</sup>

#### § 960. Liability for interest on moneys collected

The court instructs the jury that the defendant is entitled to receive interest on any money collected by the said plaintiff for the said defendant, and if they believe from the evidence that the said plaintiff has received any amounts due the defendant from other parties, and has not paid the same over to the said defendant, then the said defendant is entitled to interest upon said amounts, when-

<sup>9</sup> Fenimore v. White, 111 N. W. 204, 78 Neb. 520.

<sup>10</sup> Cochrane v. Little, 18 A. 698, 71 Md. 323.

<sup>11</sup> Grayson v. Wilkinson, 5 Smedes & M. (Miss.) 268.

<sup>12</sup> The Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63.

ever they believe that said defendant is entitled to recover the principal accounts upon which such interest is claimed.<sup>13</sup>

#### D. LIABILITY OF CLIENT FOR BREACH OF CONTRACT

##### § 961. Validity of contract of retainer

You are instructed that attorneys, in dealing with their clients, are required to exercise the highest order of good faith and to disclose to them all information in their possession as to the material facts of the case which would or might influence the client in entering into or refusing to execute the contract.<sup>14</sup>

##### § 962. Revocation of retainer

You are instructed that, if the jury believe from the evidence that the defendant contracted with the plaintiff, as an attorney at law, to pay him ——— per cent. of her interest in the estate of ———, in case he should establish her right thereto, and recover same for her, and, by power of attorney, constituted and appointed plaintiff her agent and attorney to procure such interest, and also agreed to pay him \$——— for his services in making search for defendant and proving her identity and establishing her to be an heir of deceased, and also promised to reimburse plaintiff for all sums expended by him in finding her and all sums expended in her interest, and if the jury further believe from the evidence that the plaintiff did make such search, locate and develop defendant to be the daughter and heir of the deceased, and entitled to share in her estate, and if then the plaintiff while he was taking all necessary steps in her behalf towards a recovery of her interest in said estate was prevented by defendant from doing so by revoking his employment as such attorney, then plaintiff is entitled to a verdict in his favor for all sums expended by him and which she agreed to repay, and also the sum of \$——— for his services in making search for defendant and showing her to be an heir of deceased, and is also entitled to recover damages for a breach of his contract of employment in any sum which the jury may feel warranted from the evidence in awarding to him, not exceeding \$———. And in arriving at such verdict the jury may take into consideration the value of the estate of deceased, as it may have been proven in evidence.<sup>15</sup>

<sup>13</sup> *Carpenter v. Smithey*, 88 S. E. 321, 118 Va. 533.

<sup>15</sup> *Well v. Fineran*, 93 S. W. 568, 78 Ark. 87.

<sup>14</sup> *Well v. Fineran*, 93 S. W. 568, 78 Ark. 87.

You are instructed that, if you find from a preponderance of the evidence that defendant did enter into a contract with plaintiff to pay him the sums of money expended by him in finding her, and a \$—— fee for his services in that connection, and the further sum of —— per cent. of any share of her mother's estate which he might recover for her, and if you further find that said contract was made in good faith, and not procured by fraud, misrepresentation, or concealment of material facts on the part of the plaintiff, and that afterwards the defendant revoked the power of attorney executed by her to plaintiff, then it is for you to say whether such revocation was intended by her and understood by him as dismissing him from the case, and denying him the right to proceed and carry out his part of the contract; if you should find that it was so intended and so understood by both parties, then you should find for plaintiff such sum in damages as you believe he is entitled to recover under the other instructions given herein.<sup>16</sup>

#### § 963. Burden of proof

You are instructed that the burden is on the plaintiff to show by a preponderance of the evidence that the defendant entered into the contract with him on which this action is based and for the breach of which he asks for damages.<sup>17</sup>

You are instructed that, if you find that the agreement about which plaintiff testified was voluntarily entered into by the defendant, then the burden of showing that her consent to the same was procured by misrepresentation or concealment of material facts amounting to a fraud is upon the defendant.<sup>18</sup>

#### § 964. Damages

The court instructs the jury, if they believe from the evidence that the plaintiff is entitled to recover, the measure of damages is the amount of money he would have received had he been allowed to complete the performance of his contract, less the value of such services as he would have been required to render, and also deducting any expense which he would have been compelled to incur in carrying out the contract on his part.<sup>19</sup>

<sup>16</sup> Weil v. Fineran, 93 S. W. 568, 78 Ark. 87.

<sup>17</sup> Weil v. Fineran, 93 S. W. 568, 78 Ark. 87.

<sup>18</sup> Weil v. Fineran, 93 S. W. 568, 78 Ark. 87.

<sup>19</sup> Weil v. Fineran, 93 S. W. 568, 78 Ark. 87.



## E. COMPENSATION AND LIEN OF ATTORNEY

## § 965. Contract of employment as basis of claim

## § 965(1). Alabama

You are instructed that, if you believe from the evidence that both G.-and the land company were interested in the property involved in the litigation of G. v. B., and that G. individually employed plaintiffs to press an interpretation of the contract involved in said suit favorable to the interest of said G. and said land company, and that plaintiffs were not at the same time employed by said land company in said cause, then this was G.'s individual act,—G.'s individual contract,—and the land company would not be liable to plaintiffs therefor.<sup>20</sup>

You are instructed that, however valuable the services of plaintiffs, for which this suit is instituted, may have been to the land company, yet plaintiffs cannot recover of said land company unless they were employed by it in the suit in which such services were rendered. The law is that when ——— was employed as attorney, and entered upon his employment, in the case of G. v. B., his duty was a vigilant prosecution of the rights of G. in the litigation.<sup>21</sup>

## § 965(2). Indiana

You are instructed that, if some of the defendants employed the plaintiff by a contract, express or implied, and some of them did not employ the plaintiff by a contract, express or implied, and did not afterwards accept or enjoy the fruits and benefits of his services, if such services were rendered by the plaintiff, then, as to such defendants who did not so employ the plaintiff, and who did not accept and enjoy the fruits of such services, the jury should find for such defendants, even although the plaintiff should be entitled to recover against others.<sup>22</sup>

You are instructed that, although the jury may not be satisfied that some of the defendants united with the other defendants in the employment of the plaintiff in the first instance, yet, if the jury should find that such, with knowledge that the plaintiff had effected a compromise of the suits against them and others, accepted, acted upon, and enjoyed the fruits of such compromise, they must be held liable with the others for whatever fee, if any, may be due the plaintiff.<sup>23</sup>

<sup>20</sup> Humes v. Decatur Land Improvement & Furnace Co., 13 So. 368, 98 Ala. 461.

<sup>21</sup> Humes v. Decatur Land Im-

provement & Furnace Co., 13 So. 368, 98 Ala. 461.

<sup>22</sup> Hauss v. Niblack, 80 Ind. 407.

<sup>23</sup> Hauss v. Niblack, 80 Ind. 407.



## § 965(3). Missouri

The jury are instructed that, if you believe from the evidence that defendant did not employ plaintiff as a lawyer to perform the alleged services in question, then plaintiff cannot recover, and your verdict must be for defendant.<sup>24</sup>

## § 966. Performance of contract by attorney

You are instructed that, in order to entitle the plaintiffs to recover in this action, they must have completely performed the services agreed by them to be performed; and, if you find from the evidence the plaintiffs failed in any substantial particular to perform their contract of employment, your verdict should be for the defendants. They must have completely performed the services. Of course, whenever people settle the litigation, then there is nothing to perform. There was nothing to do after this matter was settled by the agreement of ———. That ended the whole litigation.<sup>25</sup>

You are instructed that, if the plaintiffs did conduct all the litigation that was conducted for the purpose of accomplishing the end contemplated by the parties, then they are entitled to recover. If they failed to conduct, that is, to appear in and argue and present any cases that were presented or conducted or argued, then they have failed in their contract. It was not necessary that either ——— or ——— should appear personally; but they were to conduct, either by themselves, or persons employed by them, whatever litigation was necessary. Now if they did, by themselves, or by other persons employed by them, conduct, appear in, and argue all the litigation that was conducted, argued, or tried, then they have fulfilled their contract. That is the matter to be determined, not whether the litigation was settled, not whether the parties came to an agreement, but did these gentlemen fulfill their obligations? And you will determine that by what they did.<sup>26</sup>

## § 967. Beneficial character of services of attorney

The jury are instructed that the mere fact, if it be a fact, that the litigation between defendant and ——— did not result to such advantage to defendant as he may have hoped it might, does not preclude the right of plaintiff to recover in this action. If defendant employed plaintiff to prosecute that suit, and if plaintiff honestly and faithfully discharged his duties in that behalf, he is en-

<sup>24</sup> Warder v. Seltz, 57 S. W. 537, 157 Mo. 140.

<sup>25</sup> Snow v. Beard, 162 P. 258, 82 Or. 518.

<sup>26</sup> Snow v. Beard, 162 P. 258, 82 Or. 518.

titled to be paid for his services, if he has not been paid, although the litigation terminated to the dissatisfaction and detriment of defendant.<sup>27</sup>

**§ 968. Effect of representations by attorney that expense of services will not exceed specified sum**

The court instructs the jury that, if the jury believe from the evidence that, at the time the plaintiff was employed by P., the supervisor of the town of ———, to attend to the ——— suit, said P. asked said plaintiff what the expense of his (said plaintiff's) services in said suit would be, and that said plaintiff told said P. that he thought said expense would not be more than ——— dollars, and that said plaintiff made such statement with the purpose and the intention that said P. should rely upon said statement, and employ him (said plaintiff) in reliance thereupon; that said P. did rely upon said statement, and employ said plaintiff in reliance thereupon—then and in such case said plaintiff cannot recover more than said sum of ——— dollars for his services in said suit.<sup>28</sup>

The court instructs the jury that, if the jury believe from the evidence that the conversation between the plaintiff and P., the supervisor of the town of ———, at the time of the employment of said plaintiff, was of such a character that what was said by said plaintiff was calculated and intended by said plaintiff to assure said P. that the charges or compensation of said plaintiff for the services for which he was then employed would not exceed ——— dollars, and that said P. relied upon such assurance, and in reliance thereon employed said plaintiff, then and in such case the jury must find that it was agreed between said plaintiff and said P. that the compensation of said plaintiff for the services for which he was then employed should not exceed ——— dollars, and the compensation of said plaintiff for such services cannot be estimated by the jury at a greater amount than ——— dollars.<sup>29</sup>

**§ 969. Compensation for services other than legal**

The jury are instructed that, if you find from the evidence that the plaintiff performed any services for the defendant in and about the estate of his brother, ———, deceased, but that such services were not legal services, but were business transactions only, then you will not be warranted in considering the expert testimony adduced on the trial in this case tending to show the value of legal services as such.<sup>30</sup>

<sup>27</sup> *Blizzard v. Applegate*, 77 Ind. 516.

<sup>28</sup> *Town of Bruce v. Dickey*, 6 N. E. 435, 116 Ill. 527.

<sup>29</sup> *Town of Bruce v. Dickey*, 6 N. E. 435, 116 Ill. 527.

<sup>30</sup> *Warder v. Seltz*, 57 S. W. 537, 157 Mo. 140.

**§ 970. Compensation for services rendered other attorneys**

You are instructed that, if you, the jury, do not find that the firm of B. & E., or that ———, for said firm, told ——— that they would take the two ——— notes for collection for a fee of ——— per cent., and you do not believe that plaintiff and the said B. & E. had a contract for an equal division of the amount collected on said notes, then I instruct you that under the law the said B. & E. will be entitled to receive a reasonable compensation for their services rendered plaintiff for the collection of the entire amount, collected and uncollected, against ———, as appears from the evidence before you, and no more; and if the sums already collected and appropriated by them exceed such reasonable compensation, then plaintiff will be entitled to a verdict against the said B. & E. for such sums as were so collected and appropriated in excess of such reasonable compensation, together with interest, etc.<sup>81</sup>

**§ 971. Fee contingent on result of litigation**

The court instructs the jury that if they believe from the evidence that the defendant employed the plaintiff as his attorney at law, to conduct on his behalf the litigation between the defendant and the C. Company with respect to the timber and railroad rights claimed by such company upon the tract of land known as the ——— farm, and that the defendant agreed to pay the plaintiff as a fee contingent upon the result of said litigation, one-half of the difference between the sum of \$—— and whatever sum might be realized by the defendant, on a subsequent sale of the said land, in excess of the said sum of \$——, or one-half of the pecuniary value of such benefits as might accrue to the defendant as a result of said litigation, in excess of the said sum of \$——, and that as a result of said litigation, such company was required by the court of last resort of ——— to remove said timber within one year from the date of the certification of its decree to this court, and thereafter the said defendant sold the said land for \$—— to ———, then in a settlement of the accounts between the plaintiff and defendant, the defendant is chargeable with the fee of \$—— charged by the plaintiff in his account against the defendant.<sup>82</sup>

The court further instructs the jury that if they believe from the evidence that the litigation between the C. Company and the said defendant grew out of controversies over the ——— farm or the timber thereon, and that the said plaintiff entered into an agreement whereby he was to prosecute and defend the said liti-

<sup>81</sup> Britt v. Burghart, 41 S. W. 389, 16 Tex. Civ. App. 78.

<sup>82</sup> Carpenter v. Smithey, 88 S. E. 321, 118 Va. 533.

gation between such company and the said defendant, for one-half of the timber on the said farm, and that defendant did not recover the said timber by virtue of said litigation with such company, then the said plaintiff is not entitled to recover any fee for said service, and they should find for the defendant as to the fee of \$—— charged in his account for said services.<sup>33</sup>

**§ 972. Agreement to pay certain per cent. of funds realized**

The court instructs you that the language used in this contract, upon which plaintiff seeks to recover, is, namely that, "The party of the second part does hereby agree and promise to pay to the party of the first part, out of the moneys and property which may come to her out of said estate, unconditionally and directly," and the court charges you that if you find from a preponderance of the evidence in the case that she in the suit brought by her in the federal court in the state of —— against her mother and uncle, ——, prior to the commencement of this action, that is, prior to ——, caused moneys and property from the estate of her father to be deposited in the registry of said court, and said moneys and property were admitted to belong to and to be her property, then such of said moneys and property as were so admitted to belong to her, and were deposited as her property, came to her within the meaning of the contract as I have outlined to you, and plaintiff in this case is entitled to receive his commission thereon as provided in the contract.<sup>34</sup>

You are further instructed, if you believe from a preponderance of the evidence in the case that the brewery stocks belonging to the estate of the father of defendant and delivered by the defendant in the suit commenced by her, as complainant, and against her mother and uncle, ——, for an accounting, were at her request deposited in the registry of the court in said cause, with the mutual understanding and agreement between all the parties to said litigation that said stocks belong to her, then in that event said stocks came to the plaintiff within the purview of the contract of ——, in litigation herein, and became the property of the defendant, constituting an accounting as to said property so deposited, and the plaintiff herein would be entitled to his commission thereon as stipulated in the contract.<sup>35</sup>

<sup>33</sup> *Carpenter v. Smithey*, 88 S. E. 321, 118 Va. 533.

<sup>35</sup> *Dolph v. Speckart*, 186 P. 32, 94 Or. 550.

<sup>34</sup> *Dolph v. Speckart*, 186 P. 32, 94 Or. 550.

**§ 973. Right to attorney fees on mortgage foreclosure**

You are instructed that the amount and mode of payment specified in bond for services of making collections by suit is whatever may be collected as attorney's fees in such suit, which, of course, cannot exceed the amount specified in the judgment, which amount is fixed by the bond or other instrument securing the loan sought to be collected by such suit. There can be little or no difficulty when the full amount of the attorney's fees provided for in the judgment was in fact collected in money by sale or otherwise. That is what the plaintiff was entitled to. If he got that, then he was entitled to no more. If the defendant collected it, and failed to pay it over to him, then the defendant was bound to compensate him therefor.<sup>86</sup>

You are instructed that if a judgment was taken in such suit, but it has never been satisfied, by sale or otherwise, then the plaintiff is not entitled to recover the attorney's fees specified in such judgment, for by the bond he is entitled only to such sum "as may be collected as attorney's fees."<sup>87</sup>

Suppose, however, that in a suit for collection upon a loan made by plaintiff, prosecuted by him in behalf of defendant, he recovered a judgment for \$1,050, including say \$50 attorney's fees, suppose that he procured a sale of the land mortgaged to secure such loan, to satisfy such judgment, and that upon such sale only \$500 was bid, and nothing more was ever realized upon said judgment, what would the plaintiff be entitled to out of the amount realized? I answer that he and the defendant would each be entitled to receive out of the fund realized in proportion to their interest in the judgment itself; that is, in the case supposed, the plaintiff would be entitled to  $\frac{1}{21}$  part, or \$23.81, and the defendant to  $\frac{20}{21}$ , or \$476.19.<sup>88</sup>

Suppose, again, that after taking judgment, as in the case last supposed, for \$1,050, including \$50 attorney's fees, the plaintiff procured a sale of the mortgaged land, but nobody bid anything, and in order to sell or get anything out of the judgment, it was bid in by defendants at \$500, this being all that it was worth, and nothing further ever being realized upon such judgment, what would be the compensation to which plaintiff would be entitled in such case? I answer, that it would be just the same as in the former case; that is, he would be entitled to a sum out of the actual value

<sup>86</sup> Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63.

<sup>87</sup> Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63.

<sup>88</sup> Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63.

of the land in proportion to his interest in the judgment, which would be, in this case, as in the other \$23.81, and this the defendant would become liable for to the plaintiff as soon as the land was bid off.<sup>39</sup>

#### § 974. Recovery of reasonable value of services

##### § 974(1). Illinois

You are instructed that, if you find from the evidence that the plaintiff has performed services for the defendant, with her consent, since ———, and has advanced and paid moneys for her while acting as her solicitor, in matters connected with her employment, you will find for the plaintiff a reasonable value for such service, as shown by the evidence, and also the amount of moneys which the evidence shows he has advanced for her.<sup>40</sup>

##### § 974(2). Indiana

The jury are instructed that, as to the second paragraph of the complaint, the burden of proof is on the plaintiff, and before he can recover thereon he must show by a preponderance of the evidence that he did the work, or some of it, sued for, at the instance and request of the defendant. So far as the second paragraph of the complaint is based upon a claim for services rendered as an attorney, I instruct you the plaintiff claims that he was employed to render the services sued for, and that there was no special contract as to what he was to be paid for such services. If you find from the evidence that plaintiff rendered the professional services sued for, or any of them, at the request of the defendant, without any agreement as to what he was to have for the service, then as to such services the law implies that he was to be paid the fair value of such services, and you should allow the fair, reasonable value thereof, as shown by the weight of the evidence.<sup>41</sup>

##### § 974(3). Michigan

You are instructed that plaintiff has introduced testimony tending to show the value of his services, and, if he relies upon value, rather than upon his express contract as alleged, he must stand by the actual value of his services, and must accept, under the law, such amounts as those services were reasonably worth; and if from all the testimony in this case the jury believe the amounts which he has received, and of which he acknowledges credits, were

<sup>39</sup> Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63.

<sup>41</sup> Blizzard v. Applegate, 77 Ind. 516.

<sup>40</sup> Bennett v. Connelly, 103 Ill. 50.

sufficient in amount to compensate him for his services, then and in such case he cannot recover, and the verdict of the jury must be for the defendant.<sup>42</sup>

**§ 974(4). Missouri**

The jury are instructed that, if you believe from the evidence that the employment of the plaintiff was undertaken without any agreement as to the amount of his fees, then he is only entitled to recover a reasonable fee for his services.<sup>43</sup>

**§ 975. Matters considered in determining reasonable value of services**

**§ 975(1). Delaware**

You are instructed that an attorney at law when retained by another is entitled to fair and reasonable compensation for professional services rendered, and he may maintain an action therefor. In the absence of an express agreement, there is no fixed standard by which the value of the services of an attorney can be determined. Their value and reasonable price may vary with the magnitude and importance of the particular case, the degree of responsibility attaching to its management, the difficulty of the questions involved, the ability and reputation of counsel engaged, the labor bestowed, and other matters which will readily occur, especially to members of the profession.<sup>44</sup>

**§ 975(2). Oklahoma**

Baker v. Tate, 138 P. 171, 41 Okl. 353, to same effect, see International & G. N. R. Co. v. Clark, 16 S. W. 631, 81 Tex. 48, § 975(3).

**§ 975(3). Texas**

The jury are instructed that, in ascertaining the reasonable value of the services of plaintiffs, you will consider the nature of the litigation, the amount involved, the interests at stake, the capacity and fitness of plaintiffs for the required work, the services and labor rendered by plaintiffs, the length of time occupied by them, and the benefit, if any, derived by defendant from the litigation, and you are further instructed to look to all the evidence in the case, and to exercise your sound discretion and judgment therein, and allow plaintiffs such reasonable amount as you may believe they

<sup>42</sup> Babbitt v. Bumpus, 41 N. W. 417, 73 Mich. 331, 16 Am. St. Rep. 585.

<sup>43</sup> Rose v. Sples, 44 Mo. 20.

<sup>44</sup> Hope v. Burton, 90 A. 466, 5 Boyce, 22.



are justly entitled to, not to exceed the amount claimed in their petition.<sup>45</sup>

**§ 976. Same—Financial condition of client**

The jury are instructed that you will not allow the wealth of the parties engaged in the litigation of the suit of ——— against ——— to influence your finding as to what would be a reasonable fee for the services of the defendant attorney, unless the same increased or diminished the burden of the services of said attorney.<sup>46</sup>

**§ 977. Same—Services rendered by attorney not party to contract**

The court instructs the jury that you should determine what the services of plaintiff were reasonably worth, as rendered in this case, without regard to the number of lawyers engaged, and in fixing the value of such services you will have a right to consider the services rendered by R., although the latter could not recover directly from the defendant for such services; that is, you can consider the time R. devoted to the case, and the skill he brought into the trial, in determining the reasonable value of the services performed by plaintiff, provided the services rendered by R. were with the knowledge and acquiescence of the defendant.<sup>47</sup>

**§ 978. Same—Effect of opinion of experts**

**§ 978(1). United States**

The jury are instructed that, in determining the value of the plaintiffs' services, the jury are not bound by the opinions of the witnesses, unless the jury shall find, from all the evidence taken together, including the nature of the services, the time occupied in the performance of them, and the result of them, and the benefit derived by the defendants from the rendition of said services, that said opinions are correct.<sup>48</sup>

The jury are instructed that, in determining the value of the plaintiffs' services, the jury are not bound by the testimony of the expert witnesses. That testimony may be considered by the jury; but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable.<sup>49</sup>

<sup>45</sup> *International & G. N. R. Co. v. Clark*, 16 S. W. 631, 81 Tex. 48.

<sup>46</sup> *Hamman v. Willis*, 62 Tex. 507.

<sup>47</sup> *Calhoun v. Akeley*, 85 N. W. 170, 32 Minn. 354.

<sup>48</sup> *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028.

<sup>49</sup> *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028.



§ 978(2). *Missouri*

The jury are instructed that, in the absence of a contract fixing the value of services at the price to be paid therefor, the person rendering the services has a right to a reasonable compensation, and that in considering the reasonableness of such compensation the jury may consider all the circumstances of the case, and are not bound by the opinions of witnesses experienced as experts, although those opinions should be considered in connection with the other evidence in the case.<sup>50</sup>

§ 979. *Defense of payment*

You are instructed that M., without conflict, appears to have had the management of defendant's business in all the litigation referred to in this case, for which the plaintiff seeks to recover, and that the bargain, either under plaintiff's or defendant's version, was made by and between plaintiff and M., and that, if the jury believe from M.'s testimony that some time after plaintiff came to ——— in the interest of M. in the murder case, and after all the services were performed by plaintiff, M. called at the office of the plaintiff, and there requested the plaintiff to show his books, and make a settlement, and that plaintiff refused so to do, claiming that it was unnecessary, as he (plaintiff) had looked his books over, and found that he was indebted to defendant, having received enough moneys to pay him for all his services, then and in such case the plaintiff cannot recover, and the verdict of the jury must be for defendant.<sup>51</sup>

§ 980. *Right of set-off of client*§ 980(1). *Illinois*

The jury are instructed that in this case the defendant, Mrs. R., has filed and claims what in law is known as a set-off, and which is allowed by our courts as a proper proceeding; and if the jury believe from the evidence that the defendant has proven the items claimed by her as a set-off, then the jury should deduct from the claim of the plaintiff such sum as the jury may, from the evidence, believe has been proved, and if the jury further believe, from a preponderance of the evidence, that the items of set-off claimed by the defendant exceed in amount the sum claimed by the plaintiff, then the jury shall find a verdict for defendant for such sum as the set-off exceeds the claim of the plaintiff.<sup>52</sup>

<sup>50</sup> *Rose v. Spies*, 44 Mo. 20.

<sup>52</sup> *Rolfe v. Rich*, 35 N. H. 352, 149

<sup>51</sup> *Babbitt v. Bumpus*, 41 N. W. Ill. 436.  
417, 73 Mich. 331, 16 Am. St. Rep.  
585.

## § 980(2). Iowa

You are instructed that if you find that the plaintiff performed certain legal services for the defendant, with the defendant's knowledge and consent, and that defendant received the benefits thereof without objection, then plaintiff will be entitled to recover the reasonable value of such services, unless the defendant has established by a fair preponderance of the evidence that they were performed under a contract made by him with plaintiff's father, by which the plaintiff's father agreed that plaintiff should perform the said services, and the value thereof should be indorsed upon an indebtedness which was then owing by the father to the defendant, and the plaintiff had knowledge of said agreement.<sup>53</sup>

## § 981. Lien of attorney

The jury are instructed that there is no denial in the case that plaintiffs were managing that insurance case, and there is no denial that defendant knew that they were managing it. There is no pretense anywhere that he objected to their managing it; and he knew that the suit was commenced; that he had a suit in this court against the insurance company, in which plaintiffs were his attorneys. It is denied that he ever employed them to do it so as to make himself liable to pay them their fees, but it is not denied that he knew they were doing it. Neither is it denied, but it is claimed on all hands, that ——— knew that they were doing it. Now, they were doing it rightfully. There is no pretense anywhere that they were representing a name there which they had no right to represent. They were not doing a wrong to defendant, then, in managing that suit, and prosecuting it to completion. The suit went on to completion under their management, and judgment was rendered, and execution issued; a judgment was rendered which produced the money, at any rate. Now, I say to you as a matter of law that as soon as that judgment was rendered, whoever might be the owner of the judgment, defendant or ———, plaintiffs had a lien upon it for the amount of their fees and disbursements in the case. It was money that they had a lien upon. I almost said a mortgage, but it is not technically a mortgage, but a lien on it, which entitles them to so much of that money as they are entitled to, so that whatever they were entitled to collect from defendant or ———, they were entitled to take out of the money that was received upon that execution.<sup>54</sup>

<sup>53</sup> *Hudspeth v. Yetzer*, 42 N. W. 529, 78 Iowa, 11.

<sup>54</sup> *Lindner v. Hine*, 48 N. W. 43, 84 Mich. 511.

**§ 982. Burden of proof****§ 982(1). California**

The jury are instructed that, if you find from the evidence that plaintiff rendered services for defendant in prosecuting the action mentioned in the evidence, and that such services were valuable, then the burden is on defendant to establish the special agreement set up by him, that if the plaintiff failed in such action he was to receive no compensation for his services, and unless he establishes such special agreement by a preponderance of the evidence, his defense founded thereon fails entirely.<sup>55</sup>

**§ 982(2). Colorado**

The burden of proof is upon the plaintiffs to establish that the contract was as claimed by them, including that they were to have one-half the recovery by settlement or compromise out of court or before suit; and if you so find and believe from the preponderance of the evidence your verdict should be for the plaintiffs in the sum of \$———. <sup>56</sup>

**§ 983. Presumption from delay in bringing suit**

You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sued, is susceptible of various explanations consistent with the hypothesis of the justness of his claim, and it is for you to say whether or not the plaintiff has offered one that is satisfactory or not.<sup>57</sup>

<sup>55</sup> Cusick v. Boyne, 182 P. 985, 1 Cal. App. 643. The jury were also instructed that plaintiff must make out his case by a preponderance of the evidence.

<sup>56</sup> Ver Straten v. Leftwich, 177 P. 139, 65 Colo. 468.

<sup>57</sup> Union Mutual Life Ins. Co. v. Buchanan, 100 Ind. 63.

## CHAPTER LXVI

## BAILMENT

- § 984. Definition.
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  - 996. Contractual limitation of liability of bailee for loss of goods—Validity.
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  - 998. Limitation of action by bailor—Knowledge of adverse claim.
  - 999. Presumptions and burden of proof.
  - 1000. Measure of damages for conversion by bailee.
- See, also, Carriers; Garage Keepers; Innkeepers; Livery Stable Keepers; Warehousemen.

## § 984. Definition

The court instructs the jury that a bailment is defined to be a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. One who delivers personalty to another for the purpose of a bailment such as we have defined is called a bailor, and the person to whom such personalty is so delivered is a bailee.<sup>1</sup>

<sup>1</sup> Union Stone Co. v. Wilmington Transfer Co. (Del.) 90 A. 407, 5 Boyce, 59.

**§ 985. Liability of bailee for rental and recovery by him on account of expenditures**

The court instructs the jury that, under the evidence in this case, the plaintiff and defendant, about the \_\_\_\_\_ day of \_\_\_\_\_, entered into a contract whereby plaintiff leased to defendant, with privilege of purchase, \_\_\_\_\_ locomotives for a period of \_\_\_\_\_ months, for use in construction service in \_\_\_\_\_ and \_\_\_\_\_, at a rental of \$\_\_\_\_\_ per month for each locomotive from the time it left plaintiff's shops until returned there, with an allowance of four days' free time on the going trip, and with the privilege of defendant of retaining the engines for a longer period on the same basis.<sup>2</sup>

The court instructs the jury that there is no dispute that the engines were delivered to defendant and taken to \_\_\_\_\_, where his construction work was in progress, and that they remained there or at \_\_\_\_\_ until after the expiration of the \_\_\_\_\_ months period covered by the contract, and that shortly after the expiration of this period, in pursuance of some arrangement made in \_\_\_\_\_ early in \_\_\_\_\_, they were taken to \_\_\_\_\_, for attention, and thereafter returned to defendant, in whose possession they remained until they were taken back to plaintiff's plant at \_\_\_\_\_, some time in \_\_\_\_\_. There is also no dispute that no payment has been made by either party to the other on account of any of the claims covered by this suit. These claims are as follows: \_\_\_\_\_. In the statement of the above claims the court has omitted such as the state of the pleadings and the evidence does not justify submission to you, and you are instructed that your findings must be on the above claims and on those alone.<sup>3</sup>

You are instructed, regarding the right to recovery upon the above claims, that the plaintiff's right to recovery upon any of its claims depends in the first instance upon your finding upon the proposition following: It was a part and condition of said contract that the engines had, when they were hired, been overhauled and were in first-class operative condition, and were suitable for construction work in \_\_\_\_\_ and \_\_\_\_\_. By "suitable for construction work in \_\_\_\_\_ and \_\_\_\_\_" is meant that they were capable of doing the kind and amount of construction work (including hauling ballast) which engines of that character would do, and under the conditions ordinarily surrounding the use of such engines in that kind of work at those points. Therefore, if you find from the evidence that said engines, or any of them, had, when

<sup>2</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

<sup>3</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

hired, been overhauled and were in first-class operative condition, and also that, when delivered into defendant's possession, they were in such condition that if from that time properly cared for and set up they were or would have proved suitable for use in construction work as above defined, your finding should be for the plaintiff at the rate of \$—— per month for such locomotive from the date it left —— until it was returned thereto, with a deduction of —— days for the going trip, and on claim —— for the repayment of any expenses which you find from the evidence were expended by plaintiff in returning said engine or engines from —— to ——, not exceeding the amount claimed, \$——.<sup>4</sup>

The court instructs the jury that, although you may find that the engines complied with the requirements set forth in the paragraph next above this, yet if you also believe from the evidence that, at the —— meeting, plaintiff, as a condition precedent to the further use of the engines, and as an inducement necessary to procure their further use, agreed to repair said engines, or that the parties at that time agreed upon any changes in the terms upon which the engines would be retained, then your finding for rental, if any, should cover only the period of —— months, with —— free days allowed on the trip to —— from ——.<sup>5</sup>

The court instructs the jury that, if you should find for plaintiff above set forth, and also find from the evidence that there was on such engines damages beyond the usual wear and tear and the reasonable usage of said engines within the terms of the contract, you should find for plaintiff for such sum, not exceeding the amount claimed for the respective engines in claim ——.<sup>6</sup>

The court instructs the jury that, if you should find for plaintiff as set forth in the —— paragraph next above this, and should also find from the evidence that defendant, in ——, at ——, requested plaintiff to have repairs made upon such engine under its supervision, you should find for plaintiff on claim —— for any such expenditure shown by the evidence to have been so made under the supervision of ——, and for his salary and expenses, if any, while so engaged, not to exceed the amount claimed, \$——. If, however, you should find from the evidence that such services were not furnished at the request of defendant with the understanding that he would repay the same, but were furnished as a condition precedent to the further use of the engines by de-

<sup>4</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

<sup>5</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

<sup>6</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

fendant, as an inducement necessary to procure this further use, or that there were at the ——— meeting any changes agreed upon by the parties in the terms upon which the engines should be retained, then your finding upon that claim should be against the plaintiff, as those services, if any, would have been furnished under another and different contract than that here invoked.<sup>7</sup>

The court instructs the jury that, if you should find for plaintiff on any of the claims as above set forth, you should add thereto, in compliance with claim ———, interest at the rate of ——— per cent. per annum from ———, the date of service on defendant in this case, to this date, except upon claim ——— for damage, upon which claim no interest can be allowed.<sup>8</sup>

The court instructs the jury that if, however, you should find from the evidence that the engines were not in accordance with the contract, as above defined and explained, you should find against the plaintiff and for the defendant on plaintiff's claims.<sup>9</sup>

The court instructs the jury that, regarding the counterclaim, your finding should be as follows: If from the evidence you find the engines furnished were in accordance with the contract as above set out and explained, you should find against the defendant upon his counterclaim; but if you find the contrary, and also that defendant made expenditures and incurred liabilities in bringing the engine from ——— to ———, and setting them up in running order at ———, and making test trips, in making repairs on engine ——— at ———, in taking down the engines and in watching them while on the siding at ———, you should find for him upon claim ——— for the total of such sum, if any, not exceeding the amount claimed, \$——; and if in addition you should find from the evidence that defendant demanded the payment of such sum from plaintiff upon ———, you should add to such finding, if any, on ———, interest at the rate of ——— per cent. per annum from ———, to this date.<sup>10</sup>

#### § 986. Liability of bailor for repairs

The court instructs the jury that, if the plaintiff stood by and knew that the defendants were repairing the car, and from all of the circumstances had reason to believe that the others were repairing the car at the plaintiff's expense and not their own expense, then the plaintiff would be liable for those repairs, even though

<sup>7</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

<sup>8</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

<sup>9</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.

<sup>10</sup> Southern Iron & Equipment Co. v. Smith (Mo.) 192 S. W. 754.



he did not expressly order the repairs. But, on the other hand, if the defendants assumed and undertook to repair the car at their own expense, and if the plaintiff supposed from the circumstances, and had good reason to suppose, that the defendants were repairing the car at their own expense, and not expecting to charge him for the repairs, then the plaintiff would not be liable for the repairs, and consequently the defendants would have no lien upon the car for those repairs, and would have no right to hold the car after it was demanded, and the sum tendered for the repairs that had been made before the accident.<sup>11</sup>

The jury are not trying the question in this case as to who was liable for the accident that occurred on the hill, and the only reason why that testimony is introduced in this case and admitted is for the purpose of aiding you in determining the main question as to whether or not the defendants voluntarily repaired that car at their own expense, without any expectation of holding the plaintiff liable for the repairs, or whether they repaired that car under circumstances which make the plaintiff liable to pay for the repairs.<sup>12</sup>

The court instructs the jury that the burden of proof is upon the plaintiff to establish, by a fair preponderance of the evidence, all of the facts upon which he bases his right to recover in this case, and there is no dispute that the plaintiff is the owner of the car, and the only question for you gentlemen to decide will be as to whether or not the plaintiff was liable for the repairs made on the car after the damage was done to the car in the accident.<sup>13</sup>

#### § 987. Lien of bailee for repairs

##### § 987(1). Michigan

The court instructs the jury that the burden of proof is upon the defendants to establish by a fair preponderance of the evidence the plaintiff's liability for those repairs made after the accident; and, if you find from all the circumstances that the plaintiff is impliedly liable to pay for those repairs, then it was his duty to tender the full amount of the defendants' bill before he could obtain possession of his car, and, having failed to do that, he would have no right to bring a suit of replevin, and your verdict in that event would be for the defendant.<sup>14</sup>

On the other hand, if the defendants fail to establish by a fair preponderance of the evidence that the plaintiff is liable for those

<sup>11</sup> *Slattery v. Tillman*, 163 N. W. 938, 197 Mich. 349.

<sup>12</sup> *Slattery v. Tillman*, 163 N. W. 938, 197 Mich. 349.

<sup>13</sup> *Slattery v. Tillman*, 163 N. W. 938, 197 Mich. 349.

<sup>14</sup> *Slattery v. Tillman*, 163 N. W. 938, 197 Mich. 349.



repairs made after the accident, then your verdict should be for the plaintiff, because in that event the defendants would have no lien on the car at all, for the reason that they would lose their lien after the tender made by the plaintiff, in regard to which there is no dispute, of \$——, and your verdict would be, in that event, for the plaintiff, allowing the plaintiff such damages for the unlawful detention of the car as you may find to be established by the evidence. It appears that the car was not delivered for two or three days, either for one, two, or three days, say, after it was demanded by the plaintiff's son.<sup>15</sup>

The court instructs the jury that the burden of proof is upon the defendants to show that the plaintiff is liable for the repairs made to the car after it was damaged in the accident. The burden of proof is upon the defendants to show that they had a lien on the car for such damages, and I charge you as a matter of law that, if the defendants show by a fair preponderance of the evidence that the plaintiff assumed liability for those repairs made after the accident, then the defendants would have a lien upon the car for the amount of repair and reasonable value of those repairs, and there is no dispute about that, amounting to \$——, and your verdict in that event would be for the defendants.<sup>16</sup>

§ 987(2). Missouri

The court instructs the jury that engine No. ———, involved in this suit, is the property of the plaintiff, but you are instructed that, notwithstanding that fact, plaintiff is not entitled to the possession thereof, in this action, if the defendant, at the instance and request of the plaintiff, had furnished material and performed labor in the general overhauling and rebuilding, repairing, and refitting thereof, for which it had not been paid and for the security of which it was holding said engine when taken by plaintiff, under the writ of replevin in this cause. And, if you so find, your verdict should be for the defendant. If you so find for the defendant, and further find and believe, from all the evidence, that defendant was to do such work and furnish such material, in overhauling, refitting, rebuilding, and repairing said engine, as requested by plaintiff, and was to be paid therefor the cost of such material and work to the defendant, with a reasonable margin of profit added thereto, and that defendant has complied with its part of said contract and agreement, then you will, in your verdict finding for defendant, assess and find in favor of defendant in such sum as you may be-

<sup>15</sup> *Slattery v. Tillman*, 163 N. W. 938, 197 Mich. 349.

<sup>16</sup> *Slattery v. Tillman*, 163 N. W. 938, 197 Mich. 349.

lieve and find; from all the evidence, to have been the reasonable cost, to the defendant, of the material and work expended on said engine, at such instance and request of plaintiff, plus such a sum as you shall find, from the evidence, to be a reasonable margin of profit thereon, to the defendant, and to the sum so ascertained the jury may add interest at the rate of ——— per cent. per annum from ———, the date of the completion of such work, to the present time.<sup>17</sup>

#### § 988. Waiver of lien for repairs

The court instructs the jury that, if you believe from the evidence that previous to the time defendant returned his automobile to the garage of plaintiff on the afternoon of ———, and after the work done by plaintiff on said automobile was completed, plaintiff had unconditionally and voluntarily surrendered possession of said automobile to the defendant, then any further holding of said automobile by plaintiff for previous charges thereon was illegal and unlawful.<sup>18</sup>

#### § 989. Care required of bailee with respect to subject of bailment

Liability of agister for loss of animals intrusted to his care, see ante, § 768.

##### § 989(1). United States

You are instructed that the defendant in this case, in any event, was only bound to use ordinary care in providing a reasonably safe place for the storage of the cotton, and was bound only to take such precautions and adopt such safeguards as an ordinarily prudent person would adopt to protect his own property.<sup>19</sup>

##### § 989(2). Delaware

The court instructs the jury that a bailor may maintain an action for damages where the subject-matter of the bailment has been misused by the bailee, or where a loss or injury to the property has occurred from the latter's neglect. Where goods or chattels come into the possession of another under a bailment, it becomes and is the duty of the bailee to exercise due and reasonable care with respect to such property under the terms of the bailment.<sup>20</sup>

The court instructs the jury that the degree of care required to be exercised is such as is reasonably necessary to prevent loss or

<sup>17</sup> Jonesboro, Lake City & E. R. Co. v. United Iron Works Co., 94 S. W. 726, 117 Mo. App. 153.

<sup>18</sup> Caldwell v. Auto Sales & Supply Co. (Tex. Civ. App.) 158 S. W. 1030.

<sup>19</sup> Interstate Compress Co. v. Agnew (C. C. A. Okl.) 255 F. 508, 168 C. A. 199.

<sup>20</sup> Union Stone Co. v. Wilmington Transfer Co., 90 A. 407, 5 Boyce, 59.

injury to the property. If loss or damage happens to the property as the result of a failure to exercise due and reasonable care with respect thereto, that is from the want of that degree of care such as an ordinarily prudent man would have exercised under like circumstances, it constitutes a neglect of the duty imposed by the contract of bailment and renders the bailee liable for whatever loss or injury the bailor may have sustained by reason of such failure of duty.<sup>21</sup>

You are instructed that the undisputed proof in this case establishes the relation of bailor and bailee between the plaintiff and the defendant; that is to say, the defendant became the bailee of the plaintiff of certain carpets to be by it cleaned and returned for hire. That relation imposed upon the defendant a certain duty, which was to take reasonable and proper care of the said carpets; and we will say to you that the care required was just such reasonable care as an ordinarily prudent man would take under like circumstances with respect to his own property. And if you find in this case that all through this transaction the defendant did take such reasonable and proper care as an ordinarily prudent man would take under like circumstances, then the plaintiff cannot recover.<sup>22</sup>

You are instructed that the defendant claims that whatever loss or damage was sustained in this case to the carpets in question resulted from a fire. If you believe that the carpets of the plaintiff were damaged as a result of the fire only, and that the said fire was not caused by the negligence or carelessness of the defendant, its agents, or servants, then the plaintiff is not entitled to recover. But if you believe that, after the damage done to these carpets by the fire, they were damaged by the careless and negligent manner in which the defendant conducted its business, in not taking proper care of them, then, while the plaintiff could not recover for the damage sustained from the fire, he would be entitled to recover for whatever damages were caused by the negligence of the defendant after the fire.<sup>23</sup>

**§ 989(3). Illinois**

The jury are instructed that, if you believe from the evidence that the mare in controversy was borrowed by the defendant from the plaintiff, and that during the time she was so borrowed she died from unavoidable accident, and the defendant used such

<sup>21</sup> Union Stone Co. v. Wilmington Transfer Co., 90 A. 407, 5 Boyce, 59.

<sup>22</sup> Bowen v. Isenberg Bros. Co., 67 A. 152, 6 Pennewill, 230.

<sup>23</sup> Bowen v. Isenberg Bros. Co., 67 A. 152, 6 Pennewill, 230.

care as the most prudent person takes of his property under similar circumstances without any carelessness on the part of defendant, you will find for defendant.<sup>24</sup>

### § 990. Liability of gratuitous bailee for negligence

#### § 990(1). Massachusetts

The court instructs the jury that the duty which the law imposes on gratuitous bailees is that the bailee shall act in good faith; that is, shall use the degree of care in the performance of the undertaking which is measured by the carefulness which the depositary uses toward his own property of similar kind, under like circumstances.<sup>25</sup>

#### § 990(2). Missouri

The court instructs the jury that, if you believe from the evidence that plaintiff delivered to defendant the goods described in plaintiff's petition for the purpose of effecting a sale of his said goods to ———, and that defendant was not to receive from the plaintiff any compensation for her said undertaking, then the court instructs the jury that defendant was a mere depositary, a bailee without recompense or reward, a gratuitous bailee and could be liable only for gross negligence if at all.<sup>26</sup>

You are further instructed that by gross negligence in this instruction is meant that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns. You are therefore instructed that the mere fact that the property was lost, if you so find, in the absence of gross negligence as herein defined, does not make the defendant liable and unless you find from the evidence that defendant is guilty of gross negligence as herein defined your verdict should be for defendant.<sup>27</sup>

### § 991. Liability of bailee where bailment for mutual benefit

#### § 991(1). Delaware

The court instructs the jury, if the removal of the planer and the use of the crane were under the exclusive control and management of the defendant, its servant, or agent, the defendant in the absence of any assumption of responsibility on the part of the plaintiff is liable for any loss or injury incident thereto; but if the plaintiff guaranteed the sufficiency of the crane including the tracks and its other equipment for the purpose of lifting and removing

<sup>24</sup> Howard v. Babcock, 21 Ill. 259.

<sup>26</sup> Wall v. Weller (App.) 200 S. W. 731.

<sup>25</sup> Altman v. Aronson, 121 N. E. 505, 231 Mass. 588, 4 A. L. R. 1185.

<sup>27</sup> Wall v. Weller (App.) 200 S. W. 731.

the planer from the building to and upon the truck of the defendant, and if this guaranty extended to the entire tracks both inside and outside of the building then the plaintiff assumed the risk and the defendant is thereby relieved from liability. In other words, if the crane was guaranteed to lift and carry the planer both inside and outside the building, or if the defendant was induced by the plaintiff to believe and did believe that the crane would, in the exercise of reasonable care, prudence and caution, safely carry the planer outside as well as inside the building, and if under all the circumstances such care was exercised by the defendant, then the plaintiff cannot recover for damages to the crane or to the planer, and your verdict should be for the defendant. If, on the other hand, you are satisfied from the evidence that the plaintiff did not assume any responsibility for the crane outside of the building, or that the defendant in the exercise of reasonable care, prudence and caution under all the circumstances knew or ought to have known that the crane could not safely be used outside of the building, then your verdict should be for the plaintiff. <sup>28</sup>

**§ 991(2). Illinois**

The jury are instructed that, if you believe from the evidence that the mares in controversy were hired by ———, the plaintiff, to ———, the defendant, to be used by the latter, and that they were mutually benefited by the arrangement, then defendant was only required to use such care as ordinarily prudent men take of their property in taking care of the mares, and if the jury further believe from the evidence that one of the mares died, and that the defendant used such care and diligence in taking care of the mare, you will find for the defendant. <sup>29</sup>

**§ 991(3). Maryland**

The jury are instructed that, if you find from the evidence that the defendant undertook, for a reward, to deliver the team of horses and vehicle, as described in the evidence, to a person designated by the plaintiff, and in the course of this undertaking intrusted the driving of the team to one who, by his negligence, permitted the horses to run away, whereby the plaintiff suffered damage, then the plaintiff is entitled to recover, and the jury should allow such damages as they may find from the evidence

<sup>28</sup> Union Stone Co. v. Wilmington Transfer Co., 90 A. 407, 5 Boyce, 59. This was an action by a stone company to recover from a transfer com-

pany for failure to take care of a stone planer and safely carry it from one street to another.

<sup>29</sup> Howard v. Babcock, 21 Ill. 259.

the plaintiff suffered by reason of the default of defendant in the premises.<sup>80</sup>

**§ 992. Liability of bailee for injuries as affected by use of subject of bailment in manner different from that authorized**

**§ 992(1). Alabama**

The jury are instructed that, if the defendant borrowed or hired the mare to do light work and put her to heavy work, and while she was doing such heavy work she received an injury from which she died, then the defendant is liable, although the injury to the mare occurred without any fault on the part of the defendant.<sup>81</sup>

The court instructs the jury that, if you believe from the evidence that the defendant got the mare to do a particular kind of work, and put her to a different kind of work, and she was injured while doing such work, this was a conversion, and would make the defendant liable.<sup>82</sup>

The jury are instructed that, if you believe from the evidence that defendant used the mare at different work from that agreed upon, if any was agreed upon, and she received an injury while being so used, from which she died, defendant is liable, whether the mare was borrowed or hired.<sup>83</sup>

**§ 992(2). Georgia**

The jury are instructed that the hirer of a horse is bound to put it to no other use than that for which it is hired, and, if he does so, it amounts to a conversion, and he becomes liable for any injury that occurs after the conversion and while the horse is in his possession.<sup>84</sup>

The jury are instructed that, if you believe from the evidence that the defendant hired the horse mentioned in the evidence from the plaintiff to go to one or more particular places specified in the contract, and that he went to another and a different place and in a different direction from what was specified in the contract of hiring, that would amount to a conversion of the horse; and if the horse died while in his possession, and after he had so converted it to his own use, he would be liable for the value of the horse at the time of the conversion.<sup>85</sup>

<sup>80</sup> American Dist. Tel. Co. v. Walker, 20 A. 1, 72 Md. 454, 20 Am. St. Rep. 479.

<sup>81</sup> Cartlidge v. Sloan, 26 So. 918, 124 Ala. 596.

<sup>82</sup> Cartlidge v. Sloan, 26 So. 918, 124 Ala. 596.

<sup>83</sup> Cartlidge v. Sloan, 26 So. 918, 124 Ala. 596.

<sup>84</sup> Malone v. Robinson, 77 Ga. 719.

<sup>85</sup> Malone v. Robinson, 77 Ga. 719.

**§ 993. Liability of bailee for injuries as affected by obligation of bailor to furnish property suitable for purpose of bailee**

The jury are instructed that, if you find from the evidence that the plaintiff hired his mare to the defendants for the purpose of being used by them in pulling ———, the plaintiff thereby engaged and bound himself that the mare was reasonably fit and suitable for such uses. If, therefore, you find that the mare so hired was injured while in the use of the defendants in pulling ——— without their fault and through the nervousness and fretfulness of said mare, or because of her diseased condition at the time plaintiff hired her to the defendants, or because of her unfitness to pull ———, then you should find for the defendants. But, although it is true that by hiring his mare to the defendants for such use on the ———, the plaintiff impliedly engaged that she was reasonably fit for that purpose, this gave the defendants no right to use her after it became manifest to them that by reason of her nervousness or fretfulness or diseased condition she was not fit for such work. They had no right to abuse her. If her board devolved upon them, it was their duty to supply her with plentiful food and water, and at the proper time. It was their duty, also, not to require her to do more work than it was manifest she could perform without injury, and if, during such use, it was plainly evident to the defendant's employes that she was exhausted, overheated, or suffering by reason of disease, and her continued use was dangerous to her health and life, it was their duty then to abstain from further use of her without obtaining the plaintiff's consent to the same; and if, without so doing, they negligently persisted in such use, and by reason of the same she was so injured that she died, the defendants are liable. In this connection you are instructed that the defendants were only required to use ordinary diligence in caring for the plaintiff's mare, such diligence only as ordinarily prudent men under like circumstances would use in regard to their own property. <sup>36</sup>

**§ 994. Duty of agricultural society to exhibitors**

The jury are instructed that, if you believe from the evidence that the defendant agricultural society, in published advertisements, invited the public to place articles on exhibition at a fair to be held by it at a stated time and place, and in such advertisements promised to keep an efficient police force on the grounds

<sup>36</sup> Bass v. Cantor, 24 N.E. 147, 123 Ind. 444.



day and night to take care of articles on exhibition, and that plaintiff, in response to such invitation and at the direction of one of the officers of defendant, placed a ——— in one of the buildings of defendant on said fair grounds for the purpose of exhibition at the said fair, and if you further believe from the evidence that no police force whatever was provided for such buildings, and that plaintiff's ——— was stolen therefrom as a result of such failure to provide police protection, then your verdict should be for plaintiff.<sup>27</sup>

### § 995. Contributory negligence of bailor

#### § 995(1). Kansas

The jury are instructed that, if you believe from the evidence that the plaintiff, when he intrusted the eggs in question to defendant for storage, knew the unfitness of the warehouse of defendant for the purpose of such storage, or if you believe from the evidence that the plaintiff had equal opportunities with defendant of knowing such unfitness, and that he saw and inspected the place of storage, and passed judgment upon it as a fit place for his purposes, then plaintiff cannot recover for the damages to the eggs resulting from the unfitness of the warehouse for the purpose of such storage, although you may further believe from the evidence that defendant was negligent in the construction of such warehouse, and in failing to determine what kind of material was adapted to the purpose of such storage.<sup>28</sup>

#### § 995(2). New York

The jury are instructed that if you believe from the evidence that when plaintiff went into defendant's shop to get shaved he hung his overcoat mentioned in the evidence on a peg near the entrance where other coats were hanging and that while being shaved it was stolen from the peg, yet, if you further believe from the evidence that defendant had a closet where the clothes of his customers were kept and that a boy was constantly in attendance in charge of such closet and who gave checks to customers for clothes placed in the said closet and that plaintiff knew of this arrangement, then your verdict will be for the defendant.<sup>29</sup>

<sup>27</sup> *Vlgo Agricultural Society v. Brumfiel*, 1 N. E. 382, 102 Ind. 146, 54 P. 672, 59 Kan. 626, 68 Am. St. Rep. 383.

<sup>28</sup> 52 Am. Rep. 657.

<sup>29</sup> *Trowbridge v. Schriever*, 5 Daly,

<sup>30</sup> *Parker v. Union Ice & Salt Co.*, 11.



**§ 996. Contractual limitation of liability of bailee for loss of goods—Validity**

The court instructs the jury that one who undertakes to care for or to provide custody for goods for hire has a legal right to limit his liability by special contract, so as to cover only such damage as may be caused by the willful or gross negligence of the party in caring for said property or providing storage therefor.<sup>40</sup>

The court instructs the jury that a custodian for hire, who has limited the liability thereunder to only such damages as may be caused by the willful or gross negligence of such person, can only be held liable for such damage as naturally resulted from the willful act of such person in caring for said property or for such damage as has resulted from the gross negligence of such person in taking care of said property while in his possession.<sup>41</sup>

The court instructs the jury that the following provisions contained in each of the receipts issued by the defendant to the plaintiff, or his grantors, for each of the bales of cotton delivered by plaintiff to defendant, and in the latter's possession at the time of the fire, to wit, "Not responsible for loss by damage, fire, flood, or other agencies, unless caused by the willful act or gross negligence of this company," constitutes a part of the contract of bailment, and is a valid and binding provision thereof, and before plaintiff will be entitled to recover in this case he must show to your satisfaction by a preponderance of the evidence that defendant's agents or employes were guilty of some act or omission contributing to the destruction of plaintiff's cotton by the fire in question, which was willfully performed or omitted, or which amounts to gross negligence or fraud.<sup>42</sup>

**§ 997. Right of bailor to follow property into hands of third persons**

The court instructs the jury that, when one lends property to another for temporary use, the former does not part with the possession, but only the custody of the property for the time being. The lending of property to another for use without pay constitutes one of the several kinds of bailment. The lender does not part with the possession but intrusts the custody of the property to his bailee. If the latter embezzles or fraudulently converts the property to his own use, such conversion does not divest the owner of

<sup>40</sup> Interstate Compress Co. v. Agnew (C. C. A. Okl.) 255 F. 508, 168 C. C. A. 199.

<sup>41</sup> Interstate Compress Co. v. Ag-

new (C. C. A. Okl.) 255 F. 508, 168 C. A. 199.

<sup>42</sup> Interstate Compress Co. v. Agnew (C. C. A. Okl.) 255 F. 508, 168 C. C. A. 199.

his title in the property; for it is a well-recognized rule of law that if personal property is sold without the consent of the owner by one who has only a temporary right to its use by lending, or otherwise, or a qualified possession of it for a specific purpose, as for personal use, the owner can follow and reclaim it in the hands of any person, however innocent. The possession of the owner cannot be divested by a tortious or fraudulent conversion, as by an unlawful sale to another.<sup>43</sup>

**§ 998. Limitation of action by bailor—Knowledge of adverse claim**

You are instructed, if you find from the evidence that the plaintiff purchased the property in suit or any thereof for herself, and became and was the owner of it, and that subsequently plaintiff loaned the same or any thereof to the defendant for his temporary use, and defendant was in possession of said property by reason of such loaning, and not otherwise, the mere fact, if it is a fact, that he was in possession of the same, for a period of more than ——— years prior to the commencement of this action, does not entitle him to the continuous possession of the same after demand made for it by the plaintiff, unless you further find that for more than ——— years prior to the commencement of the action he claimed to be the owner of the property, and such claim for more than ——— years was known to the plaintiff.<sup>44</sup>

**§ 999. Presumptions and burden of proof**

The court instructs the jury that ordinarily failure of duty will not be presumed. It must be proved by the plaintiff. But where property under a contract of bailment is damaged or injured while in the exclusive custody of a bailee, his servant or agent, it is incumbent upon the bailee to satisfy the jury that the injury was not occasioned by the default or neglect of himself or his servant or agent.<sup>45</sup>

**§ 1000. Measure of damages for conversion by bailee**

The court instructs the jury that if you find that the defendant did not have a lien upon the said automobile at the time of its seizure, and that such seizure was wrongful, your verdict will be for the plaintiffs for such sum as will reasonably compensate them for the deterioration, if any, on their said automobile, from ———,

<sup>43</sup> *McClemy v. Brown* (Del.) 99 A. 48, 6 Boyce, 253.

<sup>44</sup> *Woods v. Latta*, 88 P. 402, 35 Mont. 9.

<sup>45</sup> *Union Stone Co. v. Wilmington Transfer Co.* (Del.) 90 A. 407, 5 Boyce, 59.

such payment enabled the bank to obtain a greater proportion of its debt than any other creditor of the same class, then, in that event, you should find for the plaintiff. If, however, all of these conditions above named are not met, you should find for the defendant.<sup>3</sup>

§ 1003(2). Virginia

You are instructed that a person is deemed to have given a preference, if, being insolvent, he has made a transfer of any of his property, and the effect of this transfer is to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.<sup>4</sup>

You are instructed that, if an insolvent person has made such a transfer, and within four months thereafter he files a petition in bankruptcy, then if the person receiving this transfer, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, then this preference shall be voidable by the trustee of the bankrupt, and he may recover the property, or its value, from the person receiving the same.<sup>5</sup>

The court instructs the jury further that if they believe from the evidence that on ———, Mrs. ———, while insolvent, and within four months of the filing of a petition in bankruptcy by her, transferred a portion of her property to the defendant with the intention to prefer it over the other creditors, and that subsequently she was adjudged to be a bankrupt, and that the defendant receiving the payment or benefiting thereby, or its agent acting therein, had reasonable cause to believe that it was intended thereby to give a preference, then they should find for the plaintiff, and assess his damages at \$———, with interest thereon from the time demand was made on the defendant by the plaintiff, and in ascertaining whether there was a reasonable cause for such belief the jury should look to all the dealings between the parties as disclosed by the evidence, and all the facts and circumstances known to the defendant, or its agent surrounding and attendant upon the final transaction of payment.<sup>6</sup>

<sup>3</sup> First Bank of Maysville v. Alexander, 153 P. 646, 49 Okl. 418.

<sup>4</sup> Johnston v. George D. Witt Shoe Co., 50 S. E. 153, 103 Va. 611.

<sup>5</sup> Johnston v. George D. Witt Shoe Co., 50 S. E. 153, 103 Va. 611.

<sup>6</sup> Johnston v. George D. Witt Shoe Co., 50 S. E. 153, 103 Va. 611.

**§ 1004. Same—Reasonable cause to believe that preference intended**

**§ 1004(1). Illinois**

The jury are instructed that the law presumes, and it is your duty to presume, that the defendant had no reasonable cause to believe a preference would be created by the payment of the note and overdraft, and you should act upon and enforce this presumption of the law, unless it has been overcome by a preponderance of the evidence.<sup>7</sup>

**§ 1004(2). Oklahoma**

You are instructed that the term "reasonable cause to believe that a preference was intended," as used in the instructions heretofore given you, does not require actual belief on the part of the creditor receiving the transfer of the property, but it is enough to constitute a reasonable cause to believe him insolvent that the facts and circumstances with reference to the transfer or his financial condition, which when brought home to the creditor or transferee are such as will put an ordinarily prudent man upon inquiry, which if pursued would lead to knowledge of his insolvency.<sup>8</sup>

**§ 1004(3). Virginia**

The court instructs the jury further that, even though they may believe from the evidence that at the time he received the acceptances of ———, the defendant's treasurer had a suspicion in his mind that the debtor was insolvent, this alone is not sufficient to support a verdict for the plaintiff. They should find for the defendant, unless they believe further from the evidence that at the time of the transfer the defendant or its treasurer actually knew, or had reasonable cause to believe, that it was intended thereby to give a preference.<sup>9</sup>

The court instructs the jury further that if they believe from the whole evidence that at the time of the transfer by W. to the defendant company the said company and its treasurer believed that W. was solvent, and that the facts and circumstances within its knowledge or that of its agent did not furnish probable cause to believe that a preference was intended, then they should find for the defendant, even should they further believe that at the time of the transfer the debtor was actually insolvent.<sup>10</sup>

You are instructed that if the debtor making the payments is

<sup>7</sup> *Chisholm v. First National Bank*, 176 Ill. App. 382.

<sup>8</sup> *First Bank of Maysville v. Alexander*, 153 P. 646, 49 Okl. 418.

<sup>9</sup> *Johnston v. George D. Witt Shoe Co.*, 50 S. E. 153, 103 Va. 611.

<sup>10</sup> *Johnston v. George D. Witt Shoe Co.*, 50 S. E. 153, 103 Va. 611.

actually insolvent at the time, and the means of knowledge upon the subject are available, and the creditor receiving or being benefited by the payment, or his agent conducting the transaction, is in possession of such facts and circumstances as would lead a prudent business man to conclude that the aggregate of the debtor's property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to hinder, delay, and defraud his creditors, would not, at a fair valuation, be sufficient to pay his debts (or if the facts and circumstances in possession as aforesaid are such as clearly ought to put a prudent business man on inquiry), then, in either case, the law considers that there is reasonable cause to believe that the transferor intended to give a preference, as hereinbefore defined, and the transfer is voidable.<sup>11</sup>

**§ 1005. Same—Effect of mere suspicion of possible insolvency**

You are instructed that, if the facts and circumstances within the knowledge of the creditor or his agent at the time of the transaction do not create more than a suspicion in the mind of possible insolvency, then the creditor is not put upon inquiry, and he is not charged with knowledge of his debtor's financial condition. It is for the jury to determine upon the evidence in any given case whether the facts and circumstances known to the creditor, or his agent, at the time of the transfer by the debtor which is the subject of investigation, were adequate to furnish a reasonable cause to believe that a preference in the meaning of the law was intended to be given, or whether, falling short of this, they simply sufficed to create a suspicion in the mind of possible insolvency.<sup>12</sup>

**§ 1006. Same—Questions for jury**

The court instructs the jury that it is their province to determine from the evidence in this case, taking into consideration all the facts and circumstances established as to the nature, character, course, and details of the dealings between the plaintiff and defendant, whether this evidence establishes by a fair preponderance thereof that at the time of the transfer the debtor was insolvent, and the creditor or its agent knew it, or had reasonable cause to believe that a preference was intended, in which event they should find for the plaintiff, or whether it merely establishes that the debtor was insolvent at the time of the transfer, but that the creditor and its agent was unaware of it, or had a mere suspicion of the insolvency, in which event they should find for the defendants. Rea-

<sup>11</sup> Johnston v. George D. Witt Shoe Co., 50 S. E. 153, 103 Va. 611.

<sup>12</sup> Johnston v. George D. Witt Shoe Co., 50 S. E. 153, 103 Va. 611.

sonable cause to believe that the debtor intended to make a preference by a transfer and reasonable cause to believe that at the time of this transfer the debtor was insolvent are the same thing, so far as the creditor receiving or being benefited by the transfer is concerned.<sup>13</sup>

**§ 1007. Avoidance by trustee of transfers by bankrupt as fraudulent**

The court instructs the jury that if the jury believe from the evidence that within four months prior to the filing of the petition in bankruptcy, with the intent on her part to hinder, delay, or defraud her creditors, or any of them, ——— made a transfer of \$—— of her property to the defendants, and that such transfer was not to purchasers in good faith and for a fair present consideration moving at that time, the said transfer is void and they must find for the plaintiff.<sup>14</sup>

**§ 1008. Valuation of assets**

The jury are instructed that in determining the value of the property and assets of the respondent on the ——— day of ———, you are required to fix such value at a fair valuation. This does not mean what the property would bring at a forced or auction sale. A fair valuation of the real estate is such sum as the property would reasonably have sold for to a purchaser desiring to buy, and the owner wishing to sell. A fair value of the merchandise, implements, and other personal property is the sum that could have been fairly realized from the sale of such property in bulk, or in parcels, in the usual and ordinary way of selling such classes of property for cash in this market. A fair valuation of the notes and accounts is the net sum that, in your judgment, from all the evidence before you, could have been, with reasonable diligence, realized from the collection of such notes and accounts, within a reasonable time after ———, and not the amounts as shown by their face, unless their face value was in fact their fair value.<sup>15</sup>

**§ 1009. Effect of discharge in bankruptcy—New promise**

The court instructs the jury that the cause of action of the plaintiff is barred by the defendant's discharge in bankruptcy, and they should find for the defendant, unless they believe from the evidence that the defendant promised and agreed to and with the

<sup>13</sup> Johnston v. George D. Witt Shoe Co., 50 S. E. 153, 103 Va. 611.

<sup>14</sup> Webb's Trustee v. Lynchburg Shoe Co., 56 S. E. 581, 106 Va. 726.

<sup>15</sup> Plymouth Cordage Co. v. Smith, 90 P. 419, 18 Okl. 249, 11 Ann. Cas. 445.

plaintiff that he would, as soon as he was able, pay to plaintiff said debt after the plaintiff had paid said indebtedness, and that he was able to pay, and that said promise, if any there was, was made after the payment of said debt by the plaintiff and after defendant's discharge in bankruptcy, and before the filing of plaintiff's amended petition on ———, and in that event they should find for the plaintiff; but to revive the debt a promise must be explicit, direct, positive, and unequivocal, and must have been made to the plaintiff.<sup>16</sup>

<sup>16</sup> *Brashears v. Combs*, 192 S. W. 482, 174 Ky. 844.

## CHAPTER LXVIII

## BANKS AND BANKING

## A. OFFICERS AND AGENTS

- § 1010. Individual liability of organizers of bank for acts of officers in creating debts.
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- § 1036. Same—What are demands against a bank for purpose of determining its solvency.  
1037. Evidence of value of assets.

#### A. OFFICERS AND AGENTS

##### § 1010. Individual liability of organizers of bank for acts of officers in creating debts

You are instructed, further, that if at the meeting of defendants on or about the ——— day of ———, it was agreed by defendants that T. should go with V. to ——— county and secure the signature of V.'s father to said note with such other security as T. should regard as sufficient, and T. went to ——— county with V., and came back and reported to or told defendants that said note had been signed by V.'s father, and V. had it to get one of the ——— to sign it, and it would be forthcoming in a few days, and defendants acted upon this and organized the bank by electing directors and officers, or by electing directors, who, in turn, elected officers, and that defendants permitted said officers to carry on and operate said bank and the indebtedness herein sued upon was created by said officers in the conduct of said bank in the usual course of a banking business, then the defendants, including ———, would be liable for the indebtedness herein sued upon.<sup>1</sup>

##### § 1011. Authority of president to employ attorney—Ratification by directors

The court instructs the jury that, if you find from the evidence in this case that ———, while acting as president of the defendant bank, employed the plaintiff ———, as its attorney, and that under such employment the said plaintiff performed services for the said bank or held himself in readiness at all times to advise, consult, or otherwise serve the bank, being its regular attorney, for which service he has not been paid, you will be warranted in finding for the plaintiff in such an amount as the proof in the case shows his services to be reasonably worth, provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them and they acquiesced in said employment by the president and ratified the same.<sup>2</sup>

You are further instructed that, if you find from the evidence in this case that the plaintiff, as an attorney at law, performed

<sup>1</sup> Curtis v. First Nat. Bank of Ft. Worth (Tex. Civ. App.) 138 S. W. 795.

<sup>2</sup> Dent v. People's Bank of Imboden, 175 S. W. 1154, 118 Ark. 157, 1 A. L. R. 688.

services, such as giving advice about the business of the bank during the period of years as alleged in the complaint in this case, that he refrained from taking cases against the bank, and always held himself in readiness to serve the bank when called upon by its cashier or other officers, and that the services rendered were at the solicitation of the cashier and other officers of the bank, that such services have never been paid for, then in that event you will be warranted in finding for the plaintiff in such an amount as the proof shows such services to be reasonably worth, provided, that you further find that the employment of the plaintiff and services rendered were known to the directors of the defendant bank, and were accepted by them and they acquiesced in said employment by the president and ratified the same.<sup>3</sup>

**§ 1012. Authority of officer or agent to certify check**

The court instructs the jury that the indorsement on the face of the check sued on is in proper form to constitute a certification thereof; and the court instructs you that if you find from the evidence that ———, defendant's paying teller, at the time of making said indorsement, had authority, or apparent authority, as defined in these instructions, to make the indorsement of certification upon said check, and if you further find from the evidence that plaintiff acted in good faith and without fraud, as defined in another instruction herewith given, then your verdict must be for the plaintiff.<sup>4</sup>

The court instructs the jury that plaintiff is not required to prove that defendant's paying teller had actual authority conferred upon him by defendant to certify checks, but that plaintiff had the right, in good faith, to rely upon the apparent authority of said paying teller to certify checks.<sup>5</sup>

The court instructs the jury that if they find from the evidence that checks were certified by the paying tellers of the defendant company, and if you further find from the evidence that said certifications were made in the general course of the defendant's business, and if you further find that plaintiff, in good faith, dealt with said defendant company on the basis of said course of business, and if you further find from the evidence that the officers of defendant knew of said course of business, then the defendant will

<sup>3</sup> *Dent v. People's Bank of Imboden*, 175 S. W. 1154, 118 Ark. 157, 1 A. L. R. 688.

<sup>4</sup> *Muth v. St. Louis Trust Co.*, 67 S. W. 978, 94 Mo. App. 94.

<sup>5</sup> *Muth v. St. Louis Trust Co.*, 67 S. W. 978, 94 Mo. App. 94.

be bound by the act of its paying teller in making the certification of the check sued on.<sup>6</sup>

**§ 1013. Same—Certification of check by cashier drawn by himself payable to his own order**

You are instructed that this general authority as such general agent of the bank to draw drafts or checks on the bank in the conduct of its business does not, by itself, permit him to draw such drafts or checks in payment of his personal debts, or to raise money for the transaction of his personal business. Where, therefore, as in this case, he draws a draft or check on the bank, payable to his own order, and for his individual debt, the party acting thereon takes the risk that the agent or the cashier may act without authority to do so. But if it appears that the agent had repeatedly done such acts on previous occasions; and that such acts had been ratified, and not repudiated, by the officers of the corporation, then, providing such acts have been done for a period sufficiently long to establish a settled course of business, it may be inferred, from the general manner in which they have been done, that such acts were known, or ought to have been known, by the directors, and that the cashier had authority to do such acts. If that be shown, the bank is liable. The authority to make such personal use of the funds of the bank may be shown, therefore, by the long-continued doing of such acts under such circumstances as warrant the inference that the acts were known and authorized by said bank; that is, the authority of the cashier may be inferred from the power he was accustomed to exercise without the dissent of the bank, and with its acquiescence.<sup>7</sup>

**§ 1014. Implied authority of teller to certify checks**

The court instructs the jury that unless they find from the evidence that P., the person whose name appears on the face of the writing offered by the plaintiff, was authorized or held out to the public by the defendant company as being authorized to certify or mark "Good" writings or checks of the character of the paper sued on by plaintiff, they will find for the defendant. And the court states to the jury that the fact that the said P. signed himself as "teller" or was designated or called "teller," or "paying teller," of the defendant company, is not of itself sufficient to justify the conclusion that the said P. was clothed with any such authority.<sup>8</sup>

<sup>6</sup> Muth v. St. Louis Trust Co., 67 S. W. 978, 94 Mo. App. 94.

<sup>7</sup> Gale v. Chase Nat. Bank, 104 F. 214, 43 C. C. A. 496.

<sup>8</sup> Muth v. St. Louis Trust Co., 67 S. W. 978, 94 Mo. App. 94.

## B. DEPOSITS

### § 1015. Relation of bank and depositor

The court instructs the jury that the relation of banker and depositor is the relation of debtor and creditor. The depositor when he deposits money in a bank becomes the creditor of that bank and the bank becomes his debtor for the amount of money deposited. The depositor is entitled to draw orders by checks, drafts or notes, for the payment of money, upon the bank and the bank, if indebted to the drawer of the order in an amount equal or in excess of that appearing upon the order, must pay it upon presentation for payment, and for any balance due the depositor the bank is the debtor for that balance.<sup>9</sup>

### § 1016. Effect of certification of check

The court instructs the jury that if you find from the evidence that the check sued on was certified by the authority of the defendant company, and that at the time of said certification there was sufficient funds of the maker of said check on deposit with defendant to pay said check, then defendant had the right to retain out of the funds of said maker a sufficient amount to pay said check whenever the same might be presented.<sup>10</sup>

The court instructs the jury that, if they find from the evidence that at the time the check sued on was presented to defendant for certification, there were sufficient funds of the drawer on deposit with the defendant to pay the same, that it became the duty of the defendant to retain said funds to pay said check, provided the jury finds from the evidence that defendant's teller had authority to certify said check.<sup>11</sup>

### § 1017. Title of bank to checks deposited

The court instructs the jury that if they shall believe from the evidence that the plaintiff bank received the check which is the subject of this suit as a deposit to be treated as cash, and that such was the intention of the parties (——— and the bank), at the time the check was received and deposited, then title to said check passed to the bank at that time. But if the jury shall believe from the evidence that the parties intended that the bank should not receive said check as cash, but only as an agent for collection, then

<sup>9</sup> People's Nat. Bank of Middletown v. Rhoades (Del.) 90 A. 409, 5 Boyce, 63.

<sup>10</sup> Muth v. St. Louis Trust Co., 67 S. W. 978, 94 Mo. App. 94.

<sup>11</sup> Muth v. St. Louis Trust Co., 67 S. W. 978, 94 Mo. App. 94.

title to said check did not vest in the bank at the time of the deposit.<sup>12</sup>

The court further tells the jury the question as to whether the parties intended the check when deposited to be treated as cash or merely for collection is one of fact for the jury under all the facts and circumstances proven in the case relating thereto and throwing light thereon.<sup>13</sup>

**§ 1018. Improper charges to account of depositor**

You are instructed that, if you find ———, as cashier of the bank, transferred amounts from the account of ——— without her authority to his individual account, and caused entries to be made on the books of the bank by virtue of authority of charge tickets made by himself, which operated to transfer the amounts to his credit, and that charge tickets as used by said cashier in said transactions could only be made by an officer or agent of the bank, and that by this system the said cashier appropriated amounts to his own use, then you are instructed that as between the bank and the said depositor the bank would be liable for such charges made to her account, unless with knowledge of said improper charges she has by silence ratified and adopted the same as proper charges, or she received a statement from the bank with vouchers representing such charges, and she, upon receiving them did not in a reasonable time notify the bank that they were improper, and the bank was injured by her failure to so notify it.<sup>14</sup>

**§ 1019. Authority of bank to pay deposits**

The jury are instructed that if the jury believe from the evidence that the check for \$——, dated ——, drawn upon the defendant bank, signed “——,” and afterwards paid by the defendant, was in fact signed by the plaintiff, in the name of plaintiff, or by another for her and with her consent, or by her authority, they should find for the defendant.<sup>15</sup>

**§ 1020. Same—Scope of authority given by depositor to loan out deposit**

I instruct you that, if defendant bank, through its president, undertook to find a good loan for plaintiff, and then, without fur-

<sup>12</sup> Fayette Nat. Bank v. Summers, 54 S. E. 862, 105 Va. 689, 7 L. R. A. (N. S.) 694.

<sup>13</sup> Fayette Nat. Bank v. Summers, 54 S. E. 862, 105 Va. 689, 7 L. R. A. (N. S.) 694.

<sup>14</sup> Citizens' Bank & Trust Co. v.

Hinkle, 189 S. W. 679, 126 Ark. 266. In this case there was no evidence that the depositor was furnished with a statement showing improper charges.

<sup>15</sup> Phoenix Nat. Bank v. Taylor, 67 S. W. 27, 113 Ky. 61.

ther authority, said president transferred plaintiff's funds to another account for the use and benefit, in full or in part, of the president of the defendant bank, defendant is still liable for any deposits of plaintiff's so transferred, unless you should find that plaintiff, with full knowledge of the facts, has ratified or sanctioned such transfer of funds, and that bears upon the question of ratification; you are to bear in mind the instructions already given you upon that subject.<sup>16</sup>

I further instruct you that in this case, if you find from the evidence that the plaintiff authorized the defendant bank through its president to find a good loan or loans for the plaintiff, that fact would not of itself authorize the president of the bank to sign the name of the plaintiff to a memorandum check or other check withdrawing plaintiff's funds from the bank or transferring it to the credit of another. No one could lawfully withdraw plaintiff's funds from the bank or transfer them to the credit of another unless expressly authorized so to do, and if her funds were so withdrawn or transferred without plaintiff's authority by S., as president of the defendant bank, then the bank itself is chargeable with knowledge of the fact that S. had no such authority for the reason that the knowledge of S., as president of the bank, was the bank's knowledge, and his act was the act of the bank.<sup>17</sup>

**§ 1021. Right of bank to apply deposit to debt of depositor—Special deposits**

You are instructed that, if you shall believe from the evidence that C., on or about ———, drew a check on the ——— bank of ———, directing said bank to pay to the plaintiffs herein \$———, and that thereafter, and on about ———, the said C., delivered to ———, at ———, a check for an amount sufficient to pay checks drawn to plaintiffs to be deposited in defendant bank to his credit for the purpose of paying the check drawn to plaintiffs, and that said check was delivered to said ——— with instructions to be deposited in defendant bank for the purpose of paying outstanding checks delivered to the plaintiffs, and that said check delivered to said ——— was collected by said bank before the protest of plaintiffs' check, and that said bank had notice through ———, or otherwise, that said deposit was made for the purpose of paying the plaintiffs' outstanding check, then they will find for the plaintiffs the sum of \$———. <sup>18</sup>

<sup>16</sup> De War v. First Nat. Bank of Roseburg, 171 P. 1106, 88 Or. 541.

<sup>17</sup> De War v. First Nat. Bank of Roseburg, 171 P. 1106, 88 Or. 541.

<sup>18</sup> First Nat. Bank of Hazard v. Barger (Ky.) 115 S. W. 726.

**§ 1022. Liability of bank on paying forged checks**

The court instructs the jury that if you find and believe from the evidence in this case that in ———, the plaintiff was doing business with defendant bank and furnished said bank with the signature of its employé, who issued checks and had authority to issue checks drawn by the plaintiff on said defendant bank, then and in that event the defendant is presumed to know the signature to the checks drawn upon its bank, and if it paid these forged checks, that is, checks not signed by plaintiff, or by any persons by it authorized, the loss will fall upon the defendant bank; and you are therefore instructed, if you find and believe from the evidence in this case that the plaintiff at said time was doing business with said bank, the defendant was furnished with the signature of its employés having authority to issue checks, and that the defendant cashed the checks in question here, alleged to be forged, and that said checks were not genuine checks of the plaintiff, but were forged checks, and if you further find that the defendant cashed said checks, and that they were bogus or forged checks, and not the checks of the plaintiff, and not drawn by any person by the plaintiff authorized, and that the defendant thereupon collected the amount of said checks from the plaintiff by means of a draft testified to in this case, without the plaintiff having seen, or before plaintiff had seen, the alleged checks, and that thereafter in due course, under the system of doing business between the plaintiff and defendant, as soon as the checks reached plaintiff, it notified the defendant that said checks were false and forged, and demanded payment for the amount of said checks back from the defendant, and the defendant refused same, then you will find the issues in this case for the plaintiff, and against the defendant.<sup>19</sup>

You are further instructed that, if you find and believe from the evidence that the checks in question were not signed by the plaintiff, and that the signature to the checks was forged and written without any authority, and without the knowledge of the plaintiff, then the court instructs you that they were not the checks of the plaintiff, and the defendant had no authority to pay the same, provided you further find that the checks were drawn upon the defendant bank, unless you find the facts to be as set out in another instruction.<sup>20</sup>

<sup>19</sup> East St. Louis Cotton Oil Co. v. Bank of Steele, 205 S. W. 96, 200 Mo. App. 180. In this case the evidence did not tend to connect the plaintiff with the forgery.

<sup>20</sup> East St. Louis Cotton Oil Co. v. Bank of Steele, 205 S. W. 96, 200 Mo. App. 180.



You are further instructed that where checks are drawn upon a bank as the checks in question were drawn upon the defendant bank, and the bank cashes said checks, then such bank is bound to know the signature thereto, and cashes the same at its peril, and if it afterwards turns out that said check is forged, false, and bogus, then the loss falls upon said bank, unless the bank is relieved of this responsibility from some other cause, as set out in other instructions given in this case.<sup>21</sup>

**§ 1023. Same—Effect of notice to agent of depositor**

The jury are instructed that the plaintiff is charged with such knowledge as its cashier, ———, had in making the examination of its bank book and the inspection of returned checks and comparison of the same with the stubs of plaintiff's check book.<sup>22</sup>

**§ 1024. Fraudulently raised draft—Right of drawee bank**

The jury are instructed that if they find from the evidence, that the ——— Bank of ——— on or about the ——— day of ———, issued its draft upon the plaintiff bank for the sum of \$——, payable to the order of H., and delivered it to him for that sum, but afterwards the said draft was fraudulently altered and raised by said H., or some person unknown, so that it purported to be drawn for the sum of \$—— instead of for the sum of \$—— only, without the knowledge or consent of the said bank, the drawer thereof; and that afterwards the said draft, so fraudulently raised and altered as aforesaid, was presented to the plaintiff for certification and acceptance; and that thereupon the said plaintiff, by its duly authorized agent in that behalf, without knowledge that said draft had been changed or altered, indorsed upon said draft the following words: "Accepted, payable through ——— Clearing House, ———, when properly indorsed. ——— Bank, by P., Teller;" and that the said draft was by the said H. deposited for credit in the A. Bank, and that the same was by said A. Bank indorsed and delivered to the defendant; and that afterwards said plaintiff paid to the defendant, in the usual course of business, the full sum of said \$——, being the amount of said draft after the same had been so fraudulently changed and raised as aforesaid, instead of the sum of \$——, being the sum for which said draft was actually drawn, without knowledge of the fact that it had been so raised and changed; and that subse-

<sup>21</sup> East St. Louis Cotton Oil Co. v. Bank of Steele, 205 S. W. 98, 200 Mo. App. 180.

<sup>22</sup> First Nat. Bank of Richmond v.

Richmond Electric Co., 56 S. E. 152, 106 Va. 347, 117 Am. St. Rep. 1014. The cashier of plaintiff had been raising the amount of its pay roll checks.



quently, and within a reasonable time after the discovery of the fact by the plaintiff that said draft had been fraudulently changed and altered, as aforesaid, from \$—— to \$—— (if the jury find, from the evidence, that it had been so fraudulently changed and altered), demand was made by the plaintiff on said defendant for repayment of said amount so received and collected on said draft in excess of \$——, the sum for which it was originally drawn; and that payment thereof by said defendant was refused—then the jury are instructed that the plaintiff had a right to recover of the defendant in this action the sum of \$——. The jury are further instructed that in case they find, from the evidence, the plaintiff is so entitled to recover from said defendant the sum of \$——, and if they further find, from the evidence, that there has been unreasonable and vexatious delay in the payment of the same by the said defendant to the said plaintiff, they may allow interest thereon at the rate of —— per cent. per annum.<sup>23</sup>

**§ 1025. Ratification of unauthorized payment of deposit**

The jury are instructed that if the jury believe from the evidence that the check described in the above instruction was paid by the defendant, and the plaintiff, with knowledge thereof, received the proceeds of said check, or the same was deposited to the plaintiff's credit at the —— Bank of ——, and the same was drawn out of said bank by her, or by her order or authority, they should find for the defendant, even if the jury believe from the evidence that the plaintiff did not actually sign said check, or authorize another to sign the same for her.<sup>24</sup>

**§ 1026. Criminal liability of officers for altering accounts of depositor of public funds**

The court instructs the jury that, if you find from the evidence that the defendant was cashier of the Bank of ——, or assumed to act as such cashier, and that the book of accounts of said bank showed a true credit to the account of —— as treasurer, and that the defendant, in —— county, within three years next before the finding of this indictment and on or before the —— day of ——, procured or caused said account to be altered or changed so that he should have credit for same, and that the account of said —— as treasurer should be diminished or closed thereby and that said alteration or charge was false and made

<sup>23</sup> Metropolitan Nat. Bank of Chicago v. Merchants' Nat. Bank of Chicago, 55 N. E. 360, 182 Ill. 367, 74 Am. St. Rep. 180.

<sup>24</sup> Phoenix Nat. Bank v. Taylor, 67 S. W. 27, 113 Ky. 61.

with the intent to defraud ——— as treasurer, or the common school fund of ——— county, or the bondsmen of the said ——— as treasurer you will find the defendant guilty.<sup>25</sup>

The court instructs the jury that it is not necessary that the defendant should have himself falsely changed the account. He would be guilty if he procured or caused it to be done with the intent to defraud the said ——— as treasurer, or his bondsmen, or the common school fund of ——— county.<sup>26</sup>

You are instructed that in determining the intent of the defendant in causing the alteration to be made, if you find that the defendant caused such change in the account, or procured it to be done, you may consider the state of the defendant's individual account with said bank and his indebtedness, if he was indebted, along with all the other facts and circumstances in the case.<sup>27</sup>

You are instructed that the fact that others than the defendant may have consented to, or acquiesced in, or assisted in said alteration or change of said account, is no defense. Even though others may have consented to, or acquiesced in, or assisted in, changing said account, if you find that said account was changed, if the defendant caused or procured said account to be changed, and said change was false and made with intent to defraud the said ——— as treasurer, or his bondsmen, or the common school fund of ——— county, it is your duty to convict the defendant.<sup>28</sup>

### C. COLLECTIONS

#### § 1027. Duty to collect in funds in which obligations payable

The court instructs the jury that if they believe, from the evidence, that the plaintiffs sent the certificates of deposit, given in evidence, to the defendants for collection, which were collected by the defendants, and there was no express or implied agreement as to the relation which should exist between the parties, no agency was created as to the funds collected, except to collect the certificates in the funds in which they were payable and to hold the same subject to demand of the plaintiffs.<sup>29</sup>

You are instructed that, if the jury believe, from the evidence, that the defendant bank received the proceeds of the certificates of deposit sent by plaintiffs, and credited the plaintiffs with the same,

<sup>25</sup> *Quertermous v. State*, 127 S. W. 951, 95 Ark. 48.

<sup>26</sup> *Quertermous v. State*, 127 S. W. 951, 95 Ark. 48.

<sup>27</sup> *Quertermous v. State*, 127 S. W. 951, 95 Ark. 48.

<sup>28</sup> *Quertermous v. State*, 127 S. W. 951, 95 Ark. 48.

<sup>29</sup> *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463.

the relation of debtor and creditor is created between the defendants and the plaintiffs, so far as to require the payment to plaintiffs of the same funds in which the certificates were payable, on the demand of the plaintiffs.<sup>80</sup>

**§ 1028. Diligence required in presenting check received in payment**

The court instructs the jury that, if they believe the facts stated in the agreed statement, and also from the evidence in the cause that the plaintiff transmitted to the defendant, as its correspondent in ———, for collection the bill of exchange for \$———, dated the ———, which has been offered in evidence, and that the defendant as such correspondent received and undertook and assumed to collect the same on the morning of the ———, and placed it in the hands of the witness H. for that purpose, and that said H. was an officer or agent of the defendant, and that said H. presented said bill of exchange to the said ——— Company, about one o'clock in the afternoon of the ———, and that the said ——— Company, on whom the same purports to have been drawn, were then in doubtful credit, and that the said H. then received from the said ——— Company, for said bill of exchange and other claims also in the hands of the defendant, the check on the ——— Bank for \$———, which has been offered in evidence, and gave up said bill of exchange to ——— Company, and that the latter marked said bills as canceled, and that the said ——— Bank was at that time within the same square with the banking house of the said ——— Company, and that the banking house of the defendant is several squares off from the latter, and that the said check would have been paid by the ——— Bank, if it had been presented any time between one and two o'clock in the said afternoon of the ———, and that said check was taken by the said H. to the defendant, and the amount thereof placed by it to the credit of the plaintiff, and that the payment of said check was not demanded until a few minutes before or after three o'clock in the afternoon of the ———, and if they shall also believe that at the time last mentioned there was a usage among the banks of the city of ———, as between them and their correspondents abroad, to get checks received for sight bills of exchange, when said checks were drawn by houses or individuals of doubtful credit, paid or indorsed good before taking them back to the banks holding them for collection, then the plaintiff is entitled to recover in this action the amount of said bill of exchange: Provided the jury find that the defendants in fail-

<sup>80</sup> *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463.

ing to have the said check presented for payment or to be endorsed as good by the ——— Bank before three o'clock on the ———, were guilty of a want of due care, skill and diligence in their employment as collectors of the said bill of exchange, and that they also find that the said check, if it had been presented for payment between the hours of one and two o'clock on that day, would have been paid by the ——— Bank, and the said draft collected.<sup>81</sup>

### D. LOANS

#### § 1029. Overdrafts

The court instructs the jury that when the depositor draws upon the bank in excess of the amount the bank is indebted to him, and the bank honors the order and pays it, such payment by the bank is a loan made to the depositor, and if the loan is not made good the bank may then sue for the repayment of the loan, upon the implied promise on the part of the person to whom the loan was made, to repay the same. On the other hand, when the bank is indebted to the depositor in an amount exceeding that appearing upon his order presented, the bank must pay it if the order is regular in all respects. In the present case the question for you to consider and determine is whether or not, on the ——— day of ———, the defendant was overdrawn in his account in the ——— Bank of ———, the plaintiff in this case, and if overdrawn at that time, then you must determine in what amount, and if you should determine that he was not at that time overdrawn in his said account, then there is nothing further for your determination. If you believe from the evidence that the defendant overdrew his account in the ——— Bank, and that the checks and notes overdrawing his account were paid by said bank to his use the plaintiff is entitled to recover in this action the amount of such overdraft remaining due and unpaid by the defendant. And if you believe from the evidence that the plaintiff paid checks of the defendant, and paid discounted notes for the defendant to an amount exceeding the total amount of his deposits, the plaintiff is entitled to recover the amount paid by it, for the use and benefit of the defendant, in excess of his total deposits and which remains unpaid by him.<sup>82</sup>

If the jury believe from the evidence that the plaintiff notified the defendant on or about the ——— day of ———, that one of his checks, to the amount of \$——, had been presented to it for

<sup>81</sup> The Merchants' Bank of Baltimore v. Bank of Commerce in New York, 24 Md. 12.

<sup>82</sup> People's Nat. Bank of Middletown v. Rhoades (Del.) 90 A. 409, 5 Boyce, 65.

payment and the plaintiff had not at that time any funds of the defendant in its hands to pay said check, and the defendant promised the officers of the plaintiff that if they paid the check he would reimburse the bank, if the plaintiff pursuant to said promise paid said check and the defendant did not have funds in the hands of plaintiff to pay the same, then it is entitled to recover the amount so paid.<sup>33</sup>

**§ 1030. Same—Presumption of funds in hand to meet check**

The court instructs the jury that, when the plaintiff bank paid the checks of the defendant drawn upon the said bank, the presumption of law is that the defendant had funds in the bank to meet checks drawn by him which the said bank is shown to have paid. Such presumption is not conclusive, but it is open to the plaintiff to rebut the presumption of funds in hand by the production of evidence satisfactory to the jury. In considering all the evidence in this case the jury should take into consideration this presumption and also the evidence to rebut it.<sup>34</sup>

**§ 1031. Liability of bank for taking usury**

You are instructed that in this state a bank is not permitted under the law to knowingly collect a greater rate of interest than ——— per cent. per annum for the loan or use of money, and, in case a greater rate of interest has been knowingly charged by a bank, the person from whom same is collected is entitled to recover double the amount of interest so paid from the bank so knowingly collecting same, by suit brought within ——— years after the said collection.<sup>35</sup>

You are instructed that the burden of proof is on plaintiff to make out his case by a fair preponderance of the evidence.<sup>36</sup>

**E. INSOLVENCY**

**§ 1032. Criminal liability for accepting deposits when insolvent—  
Elements of offense**

**§ 1032(1). Iowa**

The court instructs the jury that the material points to be considered by you and necessary to be proven by the state beyond a reasonable doubt are: (1) That the defendant was engaged in the

<sup>33</sup> People's Nat. Bank of Middletown v. Rhoades (Del.) 90 A. 409, 5 Boyce, 65.

<sup>34</sup> People's Nat. Bank of Middletown v. Rhoades (Del.) 90 A. 409, 5 Boyce, 65.

<sup>35</sup> Farmers' Nat. Bank of Wewoka v. McCoy, 141 P. 791, 42 Okl. 420, Ann. Cas. 1916D, 1243.

<sup>36</sup> Farmers' Nat. Bank of Wewoka v. McCoy, 141 P. 791, 42 Okl. 420, Ann. Cas. 1916D, 1243.

business of banking and receiving deposits in the name of the ——— Bank at ———; (2) that while so engaged in the banking or deposit business the defendant, on ———, knowingly received or accepted for deposit for the C. Bank a check, the property of ———, of the value of \$———; (3) that at the time of receiving or accepting said check as a deposit for the C. Bank the said C. Bank and the defendant were both insolvent; and (4) that the said defendant then knew of said insolvency. You are instructed that if the state has failed to prove, beyond a reasonable doubt, any one of the foregoing material points, then you should acquit the defendant; but, if you find from the evidence that each and every one of said material points are proven beyond a reasonable doubt, then it would be your duty to find the defendant guilty.<sup>87</sup>

§ 1032(2). *Kentucky*

The court instructs the jury that, if they should believe from the evidence, to the exclusion of a reasonable doubt, that the defendant, in ——— county, and before the finding of the indictment herein, willfully, unlawfully, and feloniously assented to the ——— Bank receiving from ———, a partnership composed of ———, ———, ———, and ———, doing business under the firm name of ———, a deposit of \$———, or property to that amount and value, for deposit in said bank; and that same was so deposited in said bank; and that defendant at the time he assented to said bank receiving said deposit, if he did so assent, was president of said bank; and that said bank was at the time insolvent, and defendant at said time had knowledge of the fact that said bank was insolvent, if it was so insolvent—then, and in that event, the jury should find the defendant guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary for not less than ——— nor more than ——— years, in their discretion.<sup>88</sup>

§ 1033. *Same—What constitutes insolvency*

§ 1033(1). *Arkansas*

The court instructs the jury, upon the question of insolvency, that the bank was insolvent in the sense used in the indictment: First, if the bank at the time of the deposit by ——— referred to in the indictment did not have assets sufficient to pay its debts; second, if the bank was financially unable to pay its debts or obligations when they became due. Now, this inability to pay its debts

<sup>87</sup> *State v. Dunning*, 107 N. W. 927, 130 Iowa, 678.

<sup>88</sup> *Parrish v. Commonwealth*, 123 S. W. 339, 136 Ky. 77.

does not mean a temporary inability to pay its debts such as might occur when there is a "run on the bank" or failure of the officers of the bank to have enough available cash on any particular day to run the bank that day, or because of any other emergency, but it means an inability to meet the bank's obligations or debts and pay depositors in the ordinary course of business when given such a reasonable time to get the money as might be expected or required by a bank in carrying on its banking business. In other words, if the bank, under ordinary and usual circumstances, was unable to get the money by putting up its collateral and credit to pay its debts or depositors as same became due and presented for payment in the ordinary course of its business, it was insolvent in the sense used in the indictment.<sup>39</sup>

§ 1033(2). Kentucky

You are instructed that a bank is "insolvent" within the meaning of these instructions when its property and assets are of such character and value that it cannot meet its demands in the ordinary course of its business.<sup>40</sup>

§ 1033(3). Missouri

The court instructs the jury that a banking institution is in failing circumstances when it is unable to meet the demands of its depositors in the usual and ordinary course of business, and this is true even though you shall believe that there was at the time a stringency in the money market.<sup>41</sup>

§ 1034. Same—Knowledge by defendant of insolvency

§ 1034(1). Missouri

The court instructs the jury that the failure of the banking institution in question is prima facie evidence of knowledge on the part of its president that the same was in failing circumstances on \_\_\_\_\_. The court instructs the jury that prima facie evidence is such that raises such a degree of probability in its favor that it must prevail unless it be rebutted, or the contrary proved.<sup>42</sup>

The court instructs the jury that although by the statute the failure of the \_\_\_\_\_ Bank is made prima facie evidence of knowledge on the part of the defendant that the same was in failing circumstances on the \_\_\_\_\_ day of \_\_\_\_\_, yet the burden of prov-

<sup>39</sup> Skarda v. State, 175 S. W. 1190, 118 Ark. 176, Ann. Cas. 1916E, 586.

<sup>40</sup> Parrish v. Commonwealth, 123 S. W. 339, 136 Ky. 77. This instruction cannot be construed to mean that the

bank must be able to pay all depositors on the same day on demand.

<sup>41</sup> State v. Darragh, 54 S. W. 226, 152 Mo. 522.

<sup>42</sup> State v. Darragh, 54 S. W. 226, 152 Mo. 522.



ing the state's case is not really changed. The law enables the state to make a prima facie case by proof of the assenting to the creation of said indebtedness and the reception of the money into the bank; but the defendant can show the condition of the bank, and the circumstances attending the failure, and any facts tending to exonerate him from criminal liability, and then, on the whole case, the burden still rests on the state to establish defendant's guilt beyond a reasonable doubt. The presumption of innocence with which the defendant is clothed rests with him throughout the case, notwithstanding a prima facie case may have been made out by the state.<sup>43</sup>

§ 1034(2). Washington

The court instructs the jury that if you believe from the evidence that the defendant as such president, by the exercise of such reasonable care and diligence in the performance of his duty as president as a person of ordinary prudence would have exercised under like circumstances, could have known of the unsafe and insolvent condition of the bank at the time charged, but did not actually know of such condition, then the defendant would be charged with such knowledge of such unsafe and insolvent condition of the bank, and the fact that he did not actually know of the unsafe and insolvent condition of the bank in such case would constitute no defense in this case.<sup>44</sup>

§ 1035. Same—Knowledge of, or participation by, defendant in act of receiving deposit

§ 1035(1). Idaho

The court instructs the jury that to authorize a conviction of the defendant it is not essential that he should have personally received the deposit in question or that he should have known that such deposit was made. If you believe from the evidence beyond a reasonable doubt that on the \_\_\_\_\_ day of \_\_\_\_\_, at the city of \_\_\_\_\_, county of \_\_\_\_\_, state of \_\_\_\_\_, one \_\_\_\_\_ deposited \$\_\_\_\_\_ in cash in the \_\_\_\_\_ Bank, and that said deposit was actually delivered to \_\_\_\_\_, the cashier of said bank; and if you further believe that said bank was on said day open and kept open with the knowledge and consent and under the general authority of defendant as an officer, to wit, the vice president of said bank, if you find he was such officer, and other officers of said bank, for the doing of business and the reception of deposits, and that

<sup>43</sup> State v. Darragh, 54 S. W. 226, 152 Mo. 522.

<sup>44</sup> State v. Welty, 118 P. 9, 65 Wash. 244.

said defendant as such officer knew that deposits were being received in said bank on said day and that he knew that the bank was insolvent then you may find that said deposit so made by said ——— was received, within the meaning of the statute, by defendant as such officer of said bank.<sup>45</sup>

§ 1035(2). *Iowa*

The court instructs the jury that, in determining whether the defendant received or accepted the alleged deposit of ———, you are instructed that it is not necessary that the evidence should show, or that you should find, that the defendant in person received such deposit, nor that he was personally present when it was received from said ———, if received at all; it is enough if it was received by the cashier or agent of defendant under his authority. And you are further instructed that even though the defendant instructed ——— to close the bank, and refuse to receive or accept further deposits, and that, after such instructions to so refuse deposits, the said ——— did accept and receive from said ——— the deposit in question, if so you find from the evidence, still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said ——— by said ———, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit. If, however, such deposit was so received without his authority, and was not accepted by him, if at all, with full knowledge of the manner and circumstances of its being deposited, if at all, then he will not be deemed to have knowingly received or accepted such deposit.<sup>46</sup>

§ 1035(3). *Kentucky*

You are instructed that if the deposit mentioned in the foregoing instruction was received by an employé of the ——— Bank, who was engaged as such employé in receiving deposits for and on behalf of said bank while it was conducting its business, with the knowledge and under the general authority of defendant, then defendant assented to the receiving of said deposit within the meaning of the foregoing instruction.<sup>47</sup>

<sup>45</sup> *State v. Cramer*, 119 P. 30, 20 Idaho, 639.

<sup>46</sup> *State v. Elfert*, 65 N. W. 309, 102

*Iowa*, 188, 38 L. R. A. 485, 63 Am. St. Rep. 433.

<sup>47</sup> *Parrish v. Commonwealth*, 123 S. W. 339, 136 Ky. 77.

**§ 1036. Same—What are demands against a bank for purpose of determining its solvency**

You are instructed that the demands of a bank, within the meaning of the foregoing instructions, are all sums owing by it to other banks, firms, corporations, or persons, whether for money borrowed, or for money deposited with it either on time certificates of deposit, or on free deposit subject to check; but the amount owing by the bank to its stockholders, as such, for its capital stock and surplus, if any, should not be considered as a debt against the bank within the meaning of the foregoing instructions.<sup>48</sup>

**§ 1037. Evidence of value of assets**

The court instructs the jury that in determining the value of any of the assets of the ——— Bank on the ——— day of ———, as shown on this trial, the testimony of expert witnesses who have testified before you, if deemed by you unreasonable, may be disregarded.<sup>49</sup>

<sup>48</sup> *Parrish v. Commonwealth*, 123 S. W. 339, 138 Ky. 77.

<sup>49</sup> *State v. Darragh*, 54 S. W. 226, 152 Mo. 522.

## CHAPTER LXIX

## BASTARDY

- § 1038. Nature and purpose of proceeding.  
1038(1). Kansas.  
1038(2). Nebraska.
1039. Facts necessary to be proved to charge defendant.
1040. Marriage contract as defense.
1041. Effect of intercourse with others than defendant.  
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1050. Credibility of complainant.
1051. Sufficiency of evidence.  
1051(1). Alabama.  
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1052. Sufficiency of evidence of nonaccess of husband, where complaining witness is married woman.
1053. Form of verdict.

## § 1038. Nature and purpose of proceeding

## § 1038(1). Kansas

You are instructed that the purpose of a proceeding in bastardy, such as this, is to compel the father of an illegitimate child to assist in supporting the fruits of his immoral act, and to indemnify the public against the burden of supporting the child.<sup>1</sup>

## § 1038(2). Nebraska

The court instructs the jury that a proceeding in bastardy is a civil action and not a criminal one, and that its purpose is to establish the parentage of the child and to provide that the father shall support it.<sup>2</sup>

<sup>1</sup> Stahl v. State ex rel. Lorimer, 74 P. 238, 67 Kan. 864.

<sup>2</sup> McDonald v. Brown, 134 N. W. 263, 90 Neb. 676.

**§ 1039. Facts necessary to be proved to charge defendant**

The court charges that, unless the defendant had intercourse with the prosecutrix within the period of gestation before the birth of the child, your verdict should be for the defendant.<sup>3</sup>

**§ 1040. Marriage contract as defense**

The jury are instructed that, if you believe from the evidence that the prosecuting witness, ———, and the defendant, ———, entered into a marriage contract by and between themselves, and in good faith accepted each other as husband and wife, you shall return a verdict of not guilty. Such a contract, to constitute a defense, must have been made before the intercourse when the child was conceived, and both parties must have understood that the agreement was in place of a marriage ceremony. If the prosecuting witness did not understand the agreement to be all that was necessary to constitute a valid marriage, then there was no valid marriage. There could be no valid marriage, unless both parties acted in good faith and each intended to become husband and wife.<sup>4</sup>

**§ 1041. Effect of intercourse with others than defendant**

**§ 1041(1). Illinois**

The jury are instructed that, even if the prosecuting witness had intercourse with other persons than the defendant, such fact would not warrant the jury in finding the defendant not guilty, if they believe from a preponderance of the evidence that defendant is the father of the child in question.<sup>5</sup>

**§ 1041(2). Indiana**

You are instructed that if you find from a preponderance of all the evidence that the relatrix, ——— has been delivered of a bastard child, and that said child is now living, and that the defendant, ———, is the father of such bastard child, it would make no difference how immoral the relatrix has been, or what acts of intercourse she has had with other men, as the purpose of this suit is to determine the paternity of such bastard child, and provide for its maintenance and education.<sup>6</sup>

You are instructed that if you should be satisfied from the evidence that the relatrix did have intercourse with O. about the time the child in question was begotten, it does not necessarily follow that your finding shall be for the defendant, but is a circumstance

<sup>3</sup> Allred v. State, 44 So. 60, 151 Ala. 125.

<sup>4</sup> Baird v. People ex rel. Wenderlandt, 66 Ill. App. 671.

<sup>5</sup> People v. Moore, 188 Ill. App. 418.

<sup>6</sup> Rinehart v. State ex rel. Keith, 55 N. E. 504, 23 Ind. App. 419.

you should consider in determining the question as to whether or not the defendant is the father of the child.<sup>7</sup>

**§ 1041(3). Wisconsin**

You are instructed that it is the law that when the evidence in a bastardy case causes the jury to find or believe that the complaining witness had sexual intercourse with any person other than the defendant at, near, or about the time she claims she became pregnant, it is impossible for the complaining witness to know which act produced pregnancy, and which person is the father of her child; and in such case the jury should return a verdict of not guilty, notwithstanding the testimony of the complaining witness as to who is the father of the child; and if you find from the evidence in this case, or the evidence causes you to believe, that the complaining witness had sexual intercourse with some person other than the defendant at, near, or about the time she claims she had intercourse with the defendant, then you must find the defendant not guilty.<sup>8</sup>

**§ 1042. Presumptions and burden of proof**

**§ 1042(1). Connecticut**

You are instructed that the defendant claims that, in addition to his sworn denial of the charge, there is a presumption in his favor arising from what he claims is the probability that a man will not commit any heinous or repulsive act, or one which would subject him to heavy damages, and that there is an improbability that a man will do such acts as are charged against him here, and that that is a presumption which must be overcome by the plaintiff's evidence, as well as the force of his own denial. Such is his claim. In view of this request, I ought to inform you that the penalty for fornication, which is a misdemeanor, is a fine of not more than \_\_\_\_\_ dollars, or imprisonment for not more than \_\_\_\_\_ days, or both. I charge you then, gentlemen, in reply to the request just referred to, that, in arriving at your conclusion, you will, of course, consider the probabilities of the case. You are to consider whether the defendant would probably do the acts with which he is charged, under the circumstances detailed in the evidence. You are to consider the nature of the act, and its probable consequences. You are to consider human nature, and its many infirmities. You are, in short, to consider the probability of the truth of the plain-

<sup>7</sup> Goodwine v. State ex rel. Dove, 31 N. E. 554, 5 Ind. App. 63.

<sup>8</sup> Suckow v. State, 99 N. W. 440,

122 Wis. 156. This instruction was refused, because covered by other instructions.

tiff's charges, as it is detailed by her, and make that a factor in your conclusions.<sup>9</sup>

**§ 1042(2). Wisconsin**

The court instructs the jury that in a bastardy case the defendant is presumed to be innocent until the contrary is proved. The guilt of the accused must be proved beyond a reasonable doubt. If you have a reasonable doubt of the guilt of this defendant, it will be your duty to render a verdict of not guilty. But if you believe the testimony of the complainant, and her statement that she did not have intercourse with any other man, and that it is proved beyond a reasonable doubt that the defendant is the father of this child, then it will be your duty to render a verdict accordingly for the state—of guilty.<sup>10</sup>

**§ 1043. Presumption of legitimacy**

The jury are instructed that, for the peace and repose of families and for the good of society, a child which is the issue of a man and woman lawfully married to each other is presumed to be legitimate. This presumption may, however, be rebutted by positive proof that the child could not be the lawful child of a man and his wife.<sup>11</sup>

**§ 1044. Same—Proceedings by married woman**

You are instructed that if you believe from the evidence that the child mentioned in the evidence was borne by the complainant about three months after her marriage with A., and that about the time the child was begotten A. was visiting complainant as a suitor once or twice a week, then you are instructed that the presumption of legitimacy of the child is so strong that it can only be overcome by distinct, strong, satisfactory, and conclusive evidence to the contrary.<sup>12</sup>

**§ 1045. Evidence considered in determining issues**

You are instructed that in determining the question as to whether appellant did or did not have sexual intercourse with the relatrix at or about the time the child was begotten you may consider whether the defendant did or did not have a certain venereal disease, whether said disease was contagious or otherwise, the prob-

<sup>9</sup> *Fay v. Reynolds*, 21 A. 418, 60 Conn. 217.

<sup>10</sup> *Sonnenberg v. State*, 102 N. W. 233, 124 Wis. 124.

<sup>11</sup> *Pooler v. Smith*, 52 S. E. 967, 73 S. C. 102.

<sup>12</sup> *State v. Romaine*, 58 Iowa, 46, 11 N. W. 721.



ability of its being communicated to relatrix, and whether or not she had had such disease.<sup>13</sup>

### § 1046. Character of complaining witness

#### § 1046(1). Nebraska

You are instructed that in determining whether or not the defendant is the father of said bastard child, it is entirely immaterial as to the plaintiff's chastity prior to the time that the child in question was begotten; and it is improper for you to consider, in passing upon this point, or take into consideration, the fact that the plaintiff was the mother of another bastard child, several years previous to the birth of this one.<sup>14</sup>

#### § 1046(2). Wisconsin

You are instructed that the material question to be determined in this action is not what is the character of the complaining witness ———, but the question for you to determine from the evidence, under the instructions of the court, is, is the defendant the father of her bastard child as charged? If you shall find from the evidence in the case, under the instructions given you, that the defendant is the father of her bastard child, it is immaterial, on that question, what the character of the complaining witness, ———, was or is.<sup>15</sup>

### § 1047. Character or reputation of defendant for chastity

The jury is instructed that some testimony has been introduced in regard to the previous reputation of the defendant for chastity and virtue. You are instructed that the character and reputation of the defendant for chastity and virtue are not at issue in this case, and you will entirely disregard such testimony.<sup>16</sup>

### § 1048. Declarations during travail

You are instructed that, if you believe from the evidence that the complainant, at the time of her travail and while giving birth to the child mentioned in the evidence, declared that defendant was the father of the child, such declaration may be considered in con-

<sup>13</sup> Dehler v. State ex rel. Bierck, 53 N. E. 850, 22 Ind. App. 383.

<sup>14</sup> Morgan v. Stone, 93 N. W. 743, 4 Neb. (Unof.) 115.

<sup>15</sup> Suckow v. State, 99 N. W. 440, 122 Wis. 156. This instruction is proper, in connection with other instructions which make plain that the character or reputation of the com-

plaining witness for truth and veracity is not immaterial.

<sup>16</sup> Collister v. Ritzhaupt, 120 N. W. 489, 83 Neb. 794. In this case defendant's questions on his own behalf brought out the only testimony relating to his reputation for chastity, and it was this testimony alone that the jury was directed to disregard.

nection with all the other testimony in the case, and you may give it such weight as you may deem proper.<sup>17</sup>

#### § 1049. Limiting effect of evidence

You are instructed that evidence has been permitted to go to you of the relatrix's association with one O. The purpose of evidence of this character is to prove that at about the time the child in question was begotten the relatrix had intercourse with said O., and that the child was begotten by such intercourse; and it is competent only for this purpose. It is your province alone to determine the weight of the evidence, and it is for you to say whether or not the evidence on this point is sufficient to establish the fact that such intercourse did take place between the relatrix and O.<sup>18</sup>

#### § 1050. Credibility of complainant

The court instructs the jury that the complainant is entitled to appear as a witness in her own behalf, and the question of her credibility is left to the jury; and on behalf of the defendant it is your duty to take into consideration any want of credibility in the complainant, any variations in her testimony before the justice of the peace which has been introduced as evidence in this case and her testimony before the jury, if any there be, and also any other confessions or statements which she may have made at any time, if the evidence discloses any such, which does not agree with her testimony.<sup>19</sup>

#### § 1051. Sufficiency of evidence

See, also, ante, § 1042.

#### § 1051(1). Alabama

The court charges you, gentlemen of the jury, that you should carefully consider the whole of the testimony, and if, upon the whole evidence, your minds are left in a state of doubt or uncertainty, so that you cannot reasonably say that the defendant is guilty, then you should acquit him.<sup>20</sup>

The jury are instructed that, if you reasonably believe the weight of the evidence is on the side of the state, and that ———, the defendant, is the father of the child in question, you should find that the defendant is the father of the child.<sup>21</sup>

<sup>17</sup> Johnson v. Walker, 39 So. 49, 88 Miss. 757, 1 L. R. A. (N. S.) 470, 109 Am. St. Rep. 733.

<sup>18</sup> Goodwine v. State ex rel. Dove, 31 N. E. 554, 5 Ind. App. 63.

<sup>19</sup> Stoltenberg v. State, 106 N. W. 975, 75 Neb. 631.

<sup>20</sup> Allred v. State, 44 So. 60, 151 Ala. 125.

<sup>21</sup> Lusk v. State, 30 So. 88, 129 Ala. 1.

## § 1051(2). Indiana

You are instructed that the state must show by a preponderance of the evidence that the defendant is the father of the child, and if you should find from the evidence that about the time the child was begotten both the defendant and O. had intercourse with the relatrix, and that you are unable to tell which of them is the father of the child, then you must find for the defendant.<sup>22</sup>

The jury are instructed that the prosecuting witness testifies that the bastard child was begotten on the \_\_\_\_\_ day of \_\_\_\_\_, that the defendant had sexual intercourse with her on that date and on several other occasions subsequent to that time. If you should believe from the evidence that she is mistaken as to the day when the child was begotten, but believe from all the evidence in the case that the defendant is the father of said bastard child, you should find for the plaintiff.<sup>23</sup>

## § 1052. Sufficiency of evidence of nonaccess of husband, where complaining witness is married woman

You are instructed that in a bastardy proceeding the most conclusive evidence of nonaccess on the part of the husband during the period within which the child might have been begotten is required, and that neither the husband nor wife is a competent witness to give evidence of nonaccess so as to bastardize a child, and that in this case, unless you find from the evidence, outside of the evidence of the prosecuting witness, \_\_\_\_\_, conclusive evidence of nonaccess of the husband to her during the time within which, under the evidence in this case, the child might have been begotten, you should acquit the defendant.<sup>24</sup>

## § 1053. Form of verdict

The jury are instructed that two verdicts will be given you in this case, one reading: "We, the jury in the above-entitled case, find the defendant, \_\_\_\_\_, to be the father of the bastard child born to \_\_\_\_\_." If after examining all the evidence you can fairly and conscientiously say that the preponderance of the evidence is in favor of the state (that is, you believe the weight of the evidence shows \_\_\_\_\_ begot this child on or about the \_\_\_\_\_), then you should bring in this verdict. The other verdict will read: "We, the jury in the above-entitled case, find the defendant, \_\_\_\_\_, not to be the father of the bastard child born to \_\_\_\_\_." If upon examination of all the evidence you find this to be the case, then it will be your duty to bring in this verdict.<sup>25</sup>

<sup>22</sup> Goodwine v. State ex rel. Dove, 31 N. E. 554, 5 Ind. App. 63.

<sup>23</sup> Spivey v. State ex rel. George, 8 Ind. 405.

<sup>24</sup> Bell v. Territory, 56 P. 853, 8 Okl. 75.

<sup>25</sup> State v. Goetz, 181 N. W. 514, 21 N. D. 569.

## CHAPTER LXX

## BIGAMY

- § 1054. Elements of offense.
- 1055. Proof of prior marriage.
  - 1055(1). Georgia.
  - 1055(2). Texas.
- 1056. Validity of prior marriage.
  - 1056(1). Nebraska.
  - 1056(2). New York.
- 1057. Proof that first wife is living.
- 1058. Effect of honest belief of defendant in right to marry.
  - 1058(1). Georgia.
  - 1058(2). Indiana.
  - 1058(3). Texas.
- 1059. Place of offense.

## § 1054. Elements of offense

The court instructs the jury that if you believe and find from all the facts and circumstances in evidence, beyond a reasonable doubt, that the defendant, in \_\_\_\_\_ county, state of \_\_\_\_\_, on or about the \_\_\_\_\_ day of \_\_\_\_\_, did marry \_\_\_\_\_, when he (the defendant) was a married man and having a wife living at the time, and if you further find that the name of the said wife was \_\_\_\_\_, as alleged in the indictment, then you should find the defendant guilty, and assess his punishment at imprisonment in the penitentiary not less than \_\_\_\_\_ or more than \_\_\_\_\_ years, or in county jail not less than \_\_\_\_\_ months, or by a fine of not less than \_\_\_\_\_ dollars or by both a fine of not less than \_\_\_\_\_ dollars and imprisonment in county jail not less than \_\_\_\_\_ months.<sup>1</sup>

## § 1055. Proof of prior marriage

## § 1055(1). Georgia

You are instructed that it is not necessary to prove the prior marriage by any record, or by a witness who saw the ceremony performed, but that the same may be proved by the admissions of the accused of the fact of such marriage.<sup>2</sup>

## § 1055(2). Texas

You are instructed that, whatever be the form of the ceremony, or, if there be no ceremony, if the parties agree to take each other for husband and wife, and from that time on live confessedly in

<sup>1</sup> State v. Edmiston, 61 S. W. 193, 100 Mo. 500.

<sup>2</sup> Murphy v. State, 50 S. E. 48, 122 Ga. 149.

that relation, proof beyond a reasonable doubt of these facts would be sufficient proof of a marriage, binding on the parties.<sup>3</sup>

### § 1056. Validity of prior marriage

#### § 1056(1). Nebraska

You are instructed that in this case, so far as the invalidity of the alleged first marriage is concerned, it makes no difference whether or not the defendant, ———, or the witness ———, or either of them, resided or had their place of abode or residence in the parish of ———, ———, before obtaining the license, or before the marriage ceremony; and you will therefore disregard all evidence received upon the trial of this case on the subject of said residence and places of abode prior to the marriage ceremony on ———, in so far as the question of the validity or invalidity of the license and marriage ceremony are concerned.<sup>4</sup>

#### § 1056(2). New York

You are instructed that, if the jury find that the defendant, ———, had a wife living, with whom he had contracted marriage, and to whom he was married in ———, and that wife was living at the time of the alleged marriage between the defendant and the woman called ——— in the indictment, then the people are not entitled to a verdict of guilty under this indictment.<sup>5</sup>

You are instructed that under the laws of the state of ——— the defendant could not contract a legal marriage, or one for which or upon which a conviction for bigamy could be predicated, if at the time of such marriage he had a former wife living, and from whom he was not legally divorced.<sup>6</sup>

You are instructed that, if the jury find that the defendant was already lawfully married at the time the first marriage alleged in the indictment took place, such marriage is utterly void, and the second marriage alleged in the indictment cannot constitute the offense of bigamy.<sup>7</sup>

### § 1057. Proof that first wife is living

You are instructed that, if you do not believe beyond a reasonable doubt that the defendant married a woman, known as “———,” and that she was alive at the time of his marriage to said ———, then you will find him not guilty.<sup>8</sup>

<sup>3</sup> Hearne v. State, 97 S. W. 1050, 50 Tex. Cr. R. 431.

<sup>4</sup> Hills v. State, 85 N. W. 836, 61 Neb. 589, 57 L. R. A. 155.

<sup>5</sup> People v. Corbett, 63 N. Y. S. 460, 49 App. Div. 514.

<sup>6</sup> People v. Corbett, 63 N. Y. S. 460, 49 App. Div. 514.

<sup>7</sup> People v. Corbett, 63 N. Y. S. 460, 49 App. Div. 514.

<sup>8</sup> Hearne v. State, 97 S. W. 1050, 50 Tex. Cr. R. 431.

**§ 1058. Effect of honest belief of defendant in right to marry.****§ 1058(1). Georgia**

The court charges you, in this case, that if you believe from the evidence in the case that the defendant honestly believed that he had been divorced from his wife, that he made such diligent inquiry in that respect as was necessary to ascertain the truth of this (you will look to the evidence in the case and see whether or not the defendant made any efforts to ascertain whether or not his wife had been divorced), in other words, if he did make reasonable and diligent efforts to ascertain that fact, and believed, after this inquiry, that he had been really divorced from his wife, and in good faith acted upon that, why, then, in that event, he would not be guilty of the offense of bigamy, and in arriving at the intention and the bona fides of the defendant the jury would have a right to consider all the circumstances connected with the perpetration of the alleged offense.<sup>9</sup>

**§ 1058(2). Indiana**

The jury are instructed that, if you believe from the evidence that the defendant had been informed that his first wife had been divorced and that he used due care and made due inquiry to ascertain the truth of such information, and had, considering all the circumstances, reason to believe and did believe, at the time of his second marriage, that his former wife had been divorced from him, you should find him not guilty.<sup>10</sup>

**§ 1058(3). Texas**

You are instructed that our statute provides that, if any person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense. The mistake as to fact which will excuse a person must be such that the person so acting under a mistake would have been excusable, had his conjecture as to the fact been correct, and it must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense. Therefore, if you believe from the evidence that defendant had been informed and believed at the time he married ——— that his first wife was dead, and if you believe he exercised proper care to ascertain whether she was in fact dead, then, in that event, you will acquit him. If you believe the defendant was laboring under a mistake of fact

<sup>9</sup> Robinson v. State, 65 S. E. 792, 6 Ga. App. 606.

<sup>10</sup> Squire v. State, 46 Ind. 459.

as to his first wife's death, but you believe such mistake arose from a want of proper care on his part, such mistake would not avail him.<sup>11</sup>

**§ 1059. Place of offense**

The jury are instructed that, if you believe from the evidence that the second marriage was celebrated or contracted in \_\_\_\_\_ county, about a mile or more from the boundary line of this county, in which defendant has been indicted, then you must find the defendant not guilty.<sup>12</sup>

<sup>11</sup> Welch v. State, 81 S. W. 50, 46  
Tex. Cr. R. 528.

<sup>12</sup> Beggs v. State, 55 Ala. 108.



## CHAPTER LXXI

## BILLS AND NOTES

## A. FORM AND REQUISITES

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- 1061. Signing by agent.
- 1062. Consideration.
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- 1072. In general.
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## A. FORM AND REQUISITES

## § 1060. Signing note in blank

The court instructs the jury that, though you believe deceased signed the note, but at time of signing the amount thereof was blank, and this was afterwards written or filled in by words and figures, and that deceased did not authorize any one so to fill such blank by inserting the amount, then the verdict should be for defendant, unless the jury further believe the note was pledged or transferred to plaintiff by — before maturity as security for existing debts to the plaintiff.<sup>1</sup>

## § 1061. Signing by agent

The jury are instructed that, if you find from the evidence that defendant had mental capacity to make a contract and another signed his name to the note sued on with his consent or authority, then it would be his contract, and as legally binding on him as if he had done it himself, and in such event you will be authorized to find against the plea of non est factum to the note and in favor of its being his contract.<sup>2</sup>

## § 1062. Consideration

## § 1062(1). Arkansas

You are instructed that, if you find that the plaintiff's testator, —, the defendant, and —, entered into an arrangement to buy the right to the state of — in a patented invention known as the "— System" for manufacturing sand lime brick, by which the said testator was to advance the defendant's part of the purchase money, that he did advance the money to pay for said patent, taking an assignment thereof in his own name, and afterward executed assignment to the defendant for a fourth interest in said patent right as of the same date as the assignment to him, and the note sued on was executed for such advance, you will find for the plaintiff.<sup>3</sup>

You are instructed that, if you find that said note was executed for money advanced by U. to pay for a one-fourth interest in a patent right in the state of — to manufacture sand lime brick purchased for the said U., the defendant, and one —, you will find for the plaintiff, although you may believe that the patent was of no value.<sup>4</sup>

<sup>1</sup> Exchange Bank v. Robinson, 172 S. W. 628, 185 Mo. App. 582.

<sup>2</sup> Norman v. Georgia Loan & Trust Co., 18 S. E. 27, 92 Ga. 295.

<sup>3</sup> Mann v. Urquhart, 116 S. W. 219, 89 Ark. 239.

<sup>4</sup> Mann v. Urquhart, 116 S. W. 219, 89 Ark. 239.

## § 1062(2). Delaware

You are instructed that a promissory note, such as sued upon in this action, although the proviso annexed thereto destroys its negotiability, purports a valuable consideration; but the consideration may, as between the original parties to the note, be attacked, and if a total failure of consideration be shown as between them a recovery cannot be had upon the note.<sup>5</sup>

## § 1062(3). Illinois

You are instructed that, if H., owed to the plaintiff the amount of the note sued upon, and if the property of H. was under the control of the defendant, and if, at the request of H., the defendant gave to the plaintiff the note sued upon in satisfaction of the debt of H. to the plaintiff, and the plaintiff accepted the note as such satisfaction, then the note was given upon sufficient consideration, and the plaintiff is entitled to recover the amount due upon the note.<sup>6</sup>

## § 1062(4). Indiana

You are instructed that, as a rule, where there is no fraud, and a party receives all the consideration he contracted for, the contract will not be set aside for want of failure of consideration; and, where the value of the consideration is indefinite and uncertain, the parties have a right to determine it for themselves, and courts and juries ought not to overturn their decisions upon its sufficiency; and whether one contracts for the performance of an act, or several acts, which will afford him pleasure, gratify his ambition, or please his fancy, his estimate of the value should be left undisturbed, and the fact that love and affection or kinship may have been part of the consideration cannot defeat the plaintiff's right of recovery.<sup>7</sup>

## § 1062(5). Iowa

The court instructs the jury that, if you find from a preponderance of the evidence that at the time the ——— were paid on the old note the validity of the old note was in the minds of the parties either as a valid claim, or it was a question in their minds whether or not it was a valid claim, and in order to get an extension of time to avoid litigation, and in order to settle the supposed or claimed rights of the parties in the old note, the defendant executed and delivered the note in suit, then in such case you

<sup>5</sup> Pyle v. Gallagher, 75 A. 373, 6 Pennewill, 407.

<sup>6</sup> Harris v. Harris, 54 N. E. 180, 180 Ill. 157.

<sup>7</sup> Ray v. Moore, 56 N. E. 937, 24 Ind. App. 480.

would be warranted in finding that the note sued on is supported by a valid consideration.<sup>8</sup>

The jury are instructed that, if you believe from the evidence that the defendant delivered the note in suit to plaintiff, under an agreement that he was signing the same as one of the stockholders of the ——— Association, and that the same was to become binding only upon condition that other stockholders of said association should sign the same, then plaintiff cannot recover in this case. Or if you believe from the evidence that there was no consideration for said note, then the plaintiff cannot recover. The only claim of consideration in the pleadings is that said note was given for the purpose of securing an extension of time for the said association, and you are told that, if this was the consideration, it was sufficient. The note, being a written instrument, and in the possession of plaintiff, purports a delivery and a consideration, and the burden is upon the defendant to show, by a preponderance of the evidence, either that there was no delivery or no consideration.<sup>9</sup>

The jury are instructed that, on the other hand, if you believe that the defendant was a stockholder and officer of the ——— Association, and that said association was without funds, and in order to extend the time of payment of said claim, and prevent the plaintiffs from immediately enforcing their claim against the said association, the defendant delivered the note to the plaintiffs, intending the same as his obligation, but that it was understood and agreed that the defendant might have the privilege of securing other names to share the liability, then the note would be a binding obligation upon him, and the plaintiff would be entitled to recover. You are told that if the defendant delivered the note to the plaintiffs without an agreement that other names should be secured to the same before it should be binding, then the law presumes he intended it as his own obligation.<sup>10</sup>

**§ 1062(6). Michigan**

The jury are instructed that if you find—to make it more specific—that, when this note was drawn and signed by S., there was no understanding and agreement on the part of defendant H. with the other defendants that he was to sign the note with them, and that the payee did not accept the note as signed, but merely took it into his possession, temporarily, in order to procure the other

<sup>8</sup> Robinson v. Robinson, 125 N. W. 216, 147 Iowa, 615.

<sup>9</sup> Zimbleman & Otis v. Finnegan, 118 N. W. 312, 141 Iowa, 358.

<sup>10</sup> Zimbleman & Otis v. Finnegan, 118 N. W. 312, 141 Iowa, 358.

signers, and that he did not turn over this personal property to S. until after all the others had signed it, then your verdict should be for the plaintiff. Now, on the other hand, as I have indicated to you, gentlemen, if this note was made out and signed by S., or S. and either of the two next defendants, and passed over to plaintiff as a fully-executed note, and he thereupon delivered over the personal property which this note was given for to S., and he took possession of it, and then afterwards plaintiff carried this note to H., and he signed his name to it, that signature was utterly void. It was without consideration, and it would be of no consequence; and your verdict should be for the defendant.<sup>11</sup>

**§ 1063. Same—Compromise of disputed claim**

**§ 1063(1). Illinois**

The jury are instructed that, if you believe from the evidence that the plaintiff, ———, in the month of ———, in good faith supposed he had a cause of action against the defendant on account of personal injuries which he believed resulted from the conduct of the defendant, and thereupon threatened to sue the defendant on account thereof, and thereupon the differences between them were compromised, and the defendant executed the note sued on in consideration that the plaintiff would not sue him for such injuries, and the plaintiff accepted the note in settlement of such claim, such compromise and settlement is a good and lawful consideration for such note.<sup>12</sup>

**§ 1063(2). Texas**

You are instructed that the abandonment and discontinuance of a suit or action brought to enforce a doubtful right or claim is a sufficient consideration for a promise, and so is the compromise of a disputed claim made bona fide, even though it ultimately appears that the claim compromised was wholly unfounded. If, therefore, you should believe and find from the evidence that the note sued on in this case was given in consideration of a compromise of the suit instituted by plaintiffs on the \$——— note, and that said suit was dismissed by plaintiffs, and that said agreement of compromise was carried out by the parties thereto, then you are instructed that said agreement forms a sufficient consideration for the note sued on.<sup>13</sup>

The jury are instructed that, if you believe and find from the

<sup>11</sup> Steers v. Holmes, 44 N. W. 922, 79 Mich. 430.

<sup>12</sup> Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588.

<sup>13</sup> Hunter v. Lanus, 18 S. W. 201, 82 Tex. 677.

evidence that P., defendant herein, together with ——— and ——— in ———, executed and delivered to plaintiffs the \$—— note introduced in evidence, and that plaintiffs had brought suit on said note in the district court of ———, and had in such suit attached certain property of said defendants, or either of them, and that P., after the institution of said suit, and while the same was still pending and undisposed of, agreed with plaintiffs on the amount that was still due on said note for \$——, and that in order to and for the purpose of procuring the dismissal of the suit then pending, and a release from the attachment of property which had been levied on, or in order to and for the purpose of procuring an extension of the time of payment of the amount still claimed to be due by plaintiffs on said \$—— note, agreed with plaintiffs or with their attorneys on a settlement of the differences existing between them as to the amount still due on said note, and in pursuance of said agreement the defendants in this suit executed and delivered to the plaintiffs the note herein sued on, and the plaintiffs thereupon in consideration of the execution of said note did in fact dismiss their suit on said \$—— note, and release the property which had been levied on in that case, and accepted in lieu of said note the note herein sued on, then you are instructed that said agreement, and the subsequent compliance therewith by the parties thereto, is a sufficient consideration for the note sued on, and you will find for plaintiffs.<sup>14</sup>

**§ 1064. Same—Note given for patent right**

**§ 1064(1). Arkansas**

You are instructed that the letters and telegrams that passed between M., acting as the agent of U. and the defendant while the said M. was in ——— in ———, evidenced an agreement that the defendant would join the said M. and U. in the purchase of the patent right of making sand lime brick in the state of ——— jointly, and that the said U. would advance the money to pay for the interest of the defendant, the same being a one-fourth interest, in said patent right for the state of ———, and if you find that the note sued on was executed for the money advanced by said U. to pay for the defendant's part in said patent right, you are instructed that the statute requiring a note given to a vendor for a patented machine or patent right shall be executed on a printed form, and show on its face that it was executed in consideration of the patented machine or patent right, does not apply to said note.<sup>15</sup>

<sup>14</sup> Hunter v. Lanlus, 18 S. W. 201, 82 Tex. 677.

<sup>15</sup> Mann v. Urquhart, 116 S. W. 219, 89 Ark. 239. No prejudicial error to the defendant and appellant.



## § 1064(2). Missouri

The jury are instructed that the inventor should confine his specifications to substances which he knows will answer the purpose for which they are used; that the specification accompanying the letters patent read in evidence makes use of the general term "water"; and if the jury believe from the evidence that the waters of the ——— in general use will not accomplish the end for which water is used in said composition, either by reason of their alkaline properties or otherwise, then the specification is insufficient, and the letters patent are void, there was no consideration for the note sued on, and the verdict must be for the defendant.<sup>16</sup>

## § 1065. Same—Legality of consideration

The court instructs the jury that, if they shall find that ———, the defendant, signed the note sued on in this case, and shall further find that the only or any material part of the consideration which the defendant received for signing the note sued on was an agreement or promise by ———, the payee in said note, not to defend the divorce suit afterward instituted by his wife against him, the said ——— (if they shall find that such divorce suit was subsequently instituted), they shall find for the defendant, unless they further find that the plaintiff was an innocent purchaser of said note for value before its maturity.<sup>17</sup>

## § 1066. Same—Compounding felony as consideration for note

## § 1066(1). Illinois

The jury are instructed that, if you believe from the evidence that the criminal prosecution was commenced by the plaintiff against ——— for the purpose of enabling plaintiff to collect his debt, and that the latter made use of such prosecution to get the note in evidence from the defendant, then this would be a fraud upon the law, and in such case the plaintiff cannot recover.<sup>18</sup>

## § 1066(2). Massachusetts

The jury are instructed that, to entitle the defendant to a verdict, it must appear that there was a mutual understanding between plaintiff and defendant that the criminal prosecution mentioned in the evidence should be suppressed; that it would not be sufficient if the defendant was induced to give said note by understanding the prosecution would be suppressed, unless the plain-

<sup>16</sup> Keith v. Hobbs, 69 Mo. 84.<sup>18</sup> Shenk v. Phelps, 6 Ill. App. 612.<sup>17</sup> Engel v. Schloss, 106 A. 160, 134 Md. 72.

tiff also so understood; and it would not enable the defendant to avoid the note that plaintiff was induced to abstain from prosecuting ——— by the giving of this note, unless there was a mutual understanding as aforesaid.<sup>19</sup>

§ 1066(3). Michigan

The jury are instructed that, if the jury find that one of the inducements held out for defendants to sign the note in question was the settlement of the criminal case against ——— and to obtain his release from prison, then the note is void, and it does not matter what the prosecution did afterwards.<sup>20</sup>

§ 1067. Same—Note given to settle debt created by embezzlement

The jury are instructed that a note given to settle an embezzlement or a shortage of an agent is valid and good, if it was given to settle the indebtedness or shortage, and if there is no agreement to stifle the prosecution for the embezzlement.<sup>21</sup>

§ 1068. Same—Partial illegality of consideration

The jury are instructed that, if you believe that the consideration for the notes sued on was the purchase by defendant of the right to sell the safety sash lock in the county of ———, state of ———, and also the right on the part of defendant to appoint other agents with the same power which he possessed, as shown by the power of attorney offered in evidence, then the question as to whether or not the transaction was fraudulent would depend upon what was the real consideration for the execution of the notes. If the right to sell the safety sash locks in the county of ———, state of ———, constituted any substantial part of the consideration, then the transaction was not fraudulent, and your verdict should be for the plaintiff. The power of attorney in evidence which was given defendant at the time of the execution of the notes by him is void as against public policy, and if you believe that such power of attorney was the real consideration for the execution of the notes, and the right to sell the sash locks in said county was only an incident, and given only for the purpose of giving the transaction the color of legality, and not as a substantial part of the consideration, then the entire transaction in the execution of the notes was fraudulent, and whether plaintiff can recover or not in this case will de-

<sup>19</sup> Clark v. Pomeroy, 12 Allen (Mass.) 557.

<sup>20</sup> Fosdick v. Vanarsdale, 41 N. W. 931, 74 Mich. 302.

<sup>21</sup> Wolf v. Troxell's Estate, 54 N. W. 383, 94 Mich. 573.

pend upon whether or not it purchased the notes for value, before maturity, and without notice of the fraud in their execution.<sup>22</sup>

### § 1069. Delivery of note

Conditional signing of notes, see post, §§ 1111-1113.

You are instructed that, if you further find that the note was never delivered for both or either defendant as mentioned in the preceding instruction, but that the defendant D., after signing the note, placed it in the keeping of the ——— Bank at ———, with direction that it should remain there until replaced by another note signed by D., and that, while the note sued on was being so held, the witness ———, without the consent of the defendants, or either of them, by any means whatever, got the note from the bank and into possession of the plaintiff, then if you find these to be facts, they would not constitute in law a delivery of the note sued on. But if you find that D. deposited the note in said bank on condition that it was to become the property of plaintiff on completion of the railroad, as required by the terms of the note, and if defendants had the right to substitute another note of the same amount and terms in its stead, signed by both defendants personally, but did not do so, then such action would be a valid delivery of the note.<sup>23</sup>

### § 1070. Ratification of unauthorized delivery

The jury are instructed that, although the witness T. delivered the note in suit to witness Y. in violation of the instruction of defendants, and although he communicated his instructions to witness Y. at the time of such delivery, yet, if the jury find and believe, from the evidence, that after said delivery, and after having knowledge that ——— had not signed said note, defendants approved and adopted as their own the act of said T. in making said delivery to said Y., the verdict should be for the plaintiff.<sup>24</sup>

## B. ACCEPTANCE

### § 1071. Effect of agreement to accept draft

You are instructed that, if you believe from the evidence that the defendants agreed to honor the drafts of ——— for the cost of cattle consigned to the defendants, and that the draft herein sued on was drawn for the cost of the cattle in pursuance of said agree-

<sup>22</sup> *Bank of Ozark v. Hanks*, 125 S. W. 221, 142 Mo. App. 110.

<sup>23</sup> *Scott City Northern R. Co. v. Bilby*, 137 Pac. 984, 91 Kan. 193.

<sup>24</sup> *Hurt v. Ford* (Mo.) 36 S. W. 671

ment, and that said cattle were consigned to the defendants, then you will find the issues in this case for the plaintiff.<sup>25</sup>

You are instructed that, if you find from the evidence that the defendants agreed to accept only one draft, and no more, then you are instructed that if you find from the evidence that the draft sued on was given for the cost of cattle which were consigned to the defendants, and that the defendants were notified of said draft by the holders thereof, and were asked to pay the same before receiving the cattle against which they were told it was drawn; and that thereafter the defendants received and sold the cattle against which they understood said draft was drawn, and received the proceeds of said cattle,—then you will find the issue in this case for the plaintiff.<sup>26</sup>

### C. RIGHTS AND LIABILITIES ON INDORSEMENT AND TRANSFER

#### § 1072. In general

The jury are instructed that if they believe, from the evidence, that on or about the ———, defendant sold to plaintiff the note shown in evidence, and then and there indorsed the same to him by writing his name on the back of said note, and that at the time of said sale, and since the making of said note, the makers were insolvent, then the jury will find for the plaintiff the amount paid by plaintiff for the said note, unless the jury believe, from the evidence, that it was the intention of the parties that defendant should not be liable.<sup>27</sup>

The jury are instructed that it is immaterial in this case as to what idea the defendant had, or what his opinion was, as to his liability as indorser of the note. If the jury are satisfied, from the evidence, that the defendant sold the note to plaintiff and indorsed the same to him, and nothing was said at the time as to whether he should be liable or not, in law he is liable as indorser.<sup>28</sup>

#### § 1073. Capacity of payee to indorse to another

The court instructs the jury that the maker of a note, by the very act of engaging to pay to a particular payee, acknowledges his capacity to receive the money, and also his capacity to order it to be paid to another.<sup>29</sup>

<sup>25</sup> Hall v. First Nat. Bank, 24 N. E. 546, 133 Ill. 234.

<sup>26</sup> Hall v. First Nat. Bank, 24 N. E. 546, 133 Ill. 234.

<sup>27</sup> Hawkinson v. Olson, 48 Ill. 277.

<sup>28</sup> Hawkinson v. Olson, 48 Ill. 277.

<sup>29</sup> Hill v. McCrow, 170 P. 806, 88 Or. 290.

**§ 1074. Transfer by mere delivery—Note indorsed in blank**

The jury are instructed that, where a note has been indorsed in blank, the holder of the same may fill the blank with the name of the indorsee; that the indorsement of the note is said to be in blank when the name of the indorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the indorsee, or of any subsequent holder; and in such a case, while the indorsement continues blank, the note may be passed by mere delivery, and the indorsee or other holder is understood to have full authority personally to demand payment of it, or make it payable at his pleasure to himself or to another person.<sup>30</sup>

The jury are instructed that, if the jury believe, from the evidence, that the note in question was put in the hands of ——— for collection, by ———, indorsed in blank, and that ——— bought said note in good faith, and it was transferred to him in blank, and he sold and transferred it in good faith, then the plaintiff can recover, unless the note was past due when ——— bought it, and it had been paid.<sup>31</sup>

**§ 1075. Title of transferror**

The court instructs the jury that the title of a person who negotiates an instrument is defective within the meaning of the law when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.<sup>32</sup>

**§ 1076. Effect of intention of indorser**

See, also, ante, § 1072.

The jury are instructed that it is immaterial in this case what idea the defendant had as to his liability as the indorser of the note in question; such liability is fixed by the law, and if the jury believe from the evidence that the defendant sold or traded and indorsed the note to the plaintiff by writing his name thereon, then he is liable in law as the indorser, whatever may have been his intention or understanding at the time.<sup>33</sup>

**§ 1077. Effect of guaranty accompanying indorsement**

The jury are instructed that, if you believe from the evidence in this case that the defendant transferred the note offered in evidence, made by C. and payable to the defendant, by indorsing his name on the back of said note, and at the time he delivered it to

<sup>30</sup> Palmer v. Marshall, 60 Ill. 289.

<sup>31</sup> Palmer v. Marshall, 60 Ill. 289.

<sup>32</sup> First Nat Bank of Laramie,

Wyo., v. Vaughan, 151 P. 1118, 96 Kan. 402.

<sup>33</sup> Snow v. Wiggin, 19 Ill. App. 542.

plaintiff agreed, if C., the maker of said note, did not pay it, he would, and if the jury believe from the evidence that said C. did not pay said note, then defendant would be liable to pay the same, and the jury should find a verdict for the plaintiff and assess his damages at the amount of principal and interest due on said note, unless the defendant has shown that plaintiff has been guilty of negligence and that defendant has suffered loss thereby.<sup>84</sup>

**§ 1078. Status of one purchasing with notice of defenses**

**§ 1078(1). Arkansas**

✓ You are instructed that one who purchases a bill or note from the payee, with knowledge of circumstances amounting to a valid defense, stands in precisely the same position as the payee, and in such a case the defendant is entitled to all the defenses he would have as against the original holder of the note.<sup>85</sup>

**§ 1078(2). Connecticut**

✓ You are instructed that, if you find that the notes were obtained from the makers by fraud, and that the plaintiff, when he bought them, had notice of the fraud, or had knowledge of such facts that his action in taking said notes amounted to bad faith, then in either event he cannot recover.<sup>86</sup>

**§ 1078(3). South Dakota**

✓ You are instructed that if, after considering all the evidence in this case, and the circumstances disclosed by the evidence, you are satisfied that plaintiff was not a purchaser in good faith, for value, before maturity, in the ordinary course of business, then your verdict would be for the defendants, for in that case the plaintiff could not recover.<sup>87</sup>

**§ 1079. Status of holder by assignment and transfer**

You are instructed that the plaintiff bank claims to be the holder of the note by assignment and transfer, and that in this case such claim does not cut off equitable defenses against the payee thereof, and if you find from the testimony in this case, by a preponderance thereof, that the defendants were deceived, or that the note was obtained from them by misrepresentation or fraudulent practice on the part of ———, the payee therein, or that he failed to live

<sup>84</sup> Worden v. Solter, 90 Ill. 160. The evidence showed that defendant transferred the note in payment of a debt.

<sup>85</sup> Jackson v. Jones, 127 S. W. 710, 94 Ark. 426. This should be accompanied by other instructions stating

what will constitute defenses against purchasers with notice.

<sup>86</sup> Mack v. Starr, 61 A. 472, 78 Conn. 184.

<sup>87</sup> McGill v. Young, 92 N. W. 1066, 16 S. D. 360.

up to his contract alleged to have been given contemporaneously therewith, then your verdict must be for the defendants in this case.<sup>38</sup>

**§ 1080. Accommodation paper—Action by receiver of accommodation payee**

The jury are instructed that, if you find from the evidence in this case that the defendant signed and delivered all the notes in evidence in this case as an accommodation to the ——— Bank, then your verdict should be for the defendant on all the counts in the petition.<sup>39</sup>

The jury are instructed that, as between the maker and the payee of a promissory note, oral evidence touching the consideration thereof may be considered by you; and if you find from the evidence in this case that the defendant received no consideration for the signing of the notes sued on, and that the same were made for the accommodation of the ——— Bank, then your verdict should be for the defendant.<sup>40</sup>

The jury are instructed that, if you find from the evidence that defendant signed the notes sued upon in this case as an accommodation maker for the ——— Bank, and delivered the notes to the bank, or to one of its officers for the bank, he cannot be held liable thereon, no matter how the bank may have dealt with the notes, so long as it retained ownership and control thereof; and even though you find that the bank, after the notes were delivered to it, gave the manager of the bank, the benefit of the whole or a part of the benefit thereof, this fact would not render defendant liable on the notes. And in this connection you are instructed that the possession of the receiver is the possession of the bank.<sup>41</sup>

**§ 1081. Liability on accommodation paper negotiated after maturity**

You are instructed that, if you believe and find from the evidence in this case that the note sued on was signed by the defendant with E., for the purpose of raising money thereon for the use of said E., that no consideration for said note was then either given or intended to be given by the payee therein, the plaintiff herein, and that said note was delivered by E. to plaintiff, in the first instance, for the sole purpose of having the same discounted for the benefit of said E. by a bank at ———, that plaintiff took

<sup>38</sup> First Nat. Bank of New Castle v. Grow, 188 P. 907, 57 Mont. 376.

<sup>39</sup> Chicago Title & Trust Co. v. Brady, 65 S. W. 303, 165 Mo. 197.

<sup>40</sup> Chicago Title & Trust Co. v. Brady, 65 S. W. 303, 165 Mo. 197.

<sup>41</sup> Chicago Title & Trust Co. v. Brady, 65 S. W. 303, 165 Mo. 197.



said note from E. for that purpose only, and endeavored to have the same discounted, but failed, and thereafter, and before the maturity of said note, returned the same to the possession of said E., one of the makers, and that the said E. continued to hold said note up to and after the date of its maturity, and that after the date of its maturity the defendant E. negotiated and delivered said note for the first time to the plaintiff for value, and received therefor the ——— stock mentioned in the evidence, and if you still further find that the defendant did not authorize the negotiation and delivery of said note after its maturity, and did not know that it had been so negotiated and delivered to the plaintiff after maturity until long after such negotiation and delivery, and that he received none of the stock or the proceeds thereof taken over by said E. for said note, then your verdict should be for the defendant.<sup>42</sup>

**§ 1082. Rights of transferee of non-negotiable paper**

The jury are instructed that, if you believe from a preponderance of the evidence that defendant issued these checks redeemable in money to customers of his, received money for them, placed them in circulation, and they were assigned to the plaintiff in the case for a valuable consideration, then the plaintiff would be entitled to recover the amount of his checks. If, however, you find from the evidence that the defendant loaned these checks to one S. and that defendant received no consideration for them, but merely loaned them as a matter of accommodation to S., and S. put them in circulation and they came into the hands of the plaintiff, then your verdict will be for the defendant.<sup>43</sup>

**D. BONA FIDE HOLDERS**

**§ 1083. Duty of purchaser to make inquiry**

The court instructs the jury that if you find, from all the evidence, that the plaintiffs are the owners of the note described in the complaint, that the same is a negotiable note, and that the plaintiffs took it before maturity, in the usual course of business, without notice of facts which impeached its validity between the original parties to the note, or of such facts as should have put them upon inquiry, then the plaintiffs hold the same by a good title free from all defenses that might have been made by the defendant if it had been sued on by ——— and ———. And the

<sup>42</sup> Schlamp v. Manewal, 190 S. W. 658, 196 Mo. App. 114.

<sup>43</sup> Buckley v. Collins, 177 S. W. 920. 119 Ark. 231.



court further instructs the jury that, unless there are circumstances which excite suspicion, the purchaser is not bound to make inquiry at the time of purchase.<sup>44</sup>

**§ 1084. Necessity of showing bad faith of holder to defeat recovery**

**§ 1084(1). Connecticut**

You are instructed that, to constitute an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. The earlier rule vitiated a negotiable instrument in the hands of an indorser, even though he paid value for it before maturity, if he took it with knowledge of such facts as were reasonably sufficient to excite suspicion in, and put upon inquiry, a person of ordinary prudence. The law now is, however, that good faith, rather than diligence, is made the standard by which the holder's right is determined, and diligence, or the want of it, are immaterial, except so far as they legitimately tend to establish or defeat the claim of bona fide possession of the paper.<sup>45</sup>

**§ 1084(2). Indiana**

The court instructs the jury that the note sued on in this case is a negotiable instrument, the execution of which is admitted by the defendant. You are instructed that the holder of a negotiable paper, who takes it before maturity for valuable consideration, in the usual course of trade, without knowledge of the facts which impeach its validity between antecedent parties, holds it by good title. To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part.<sup>46</sup>

**§ 1084(3). Kansas**

The jury are instructed that, if the plaintiff purchased the note before due, and for a valuable consideration, then, before he would be chargeable with notice of any infirmity in the instrument he must have actual knowledge of the defect or defects as claimed by the defendant, or knowledge of such facts that his action in taking the instrument amounted to bad faith upon his part.<sup>47</sup>

<sup>44</sup> Warren v. Syfers, 55 N. E. 103, 23 Ind. App. 167.

<sup>45</sup> Mack v. Starr, 61 A. 472, 78 Conn. 184.

<sup>46</sup> First Nat. Bank of Ft. Wayne v. Garner, 118 N. E. 813, 187 Ind. 391.

<sup>47</sup> Leavens v. Hoover, 145 P. 877, 93 Kan. 661.

You are instructed that mere suspicion in the mind of defendant at the time he obtained the note in suit, that it was subject to any defense for fraud, is not sufficient to prevent him from recovering judgment in his favor in this action. In order for the plaintiff to recover in this case, he must allege and prove that defendant came into the possession of the note in suit with actual notice of the infirmities claimed by the plaintiff to exist in the note, or that defendant was guilty of bad faith in taking the note.<sup>48</sup>

§ 1084(4). **Kentucky**

To constitute notice of an infirmity in said note, or defect in the title of said ———, the plaintiff, or his agent, must have had actual knowledge of the infirmity or defect in same, or knowledge of such facts in relation thereto that his action in taking said note amounted to bad faith upon his part.<sup>49</sup>

§ 1084(5). **Nebraska**

The court instructs the jury that the mere fact that circumstances at the time of the purchase of the note may be such as to excite suspicion in the mind of a prudent man is not sufficient to impugn the title of an innocent purchaser. The proof must go to the extent of showing that the purchaser purchased with knowledge of such facts and circumstances as shows want of honesty or bad faith on his part in the purchase of the note.<sup>50</sup>

§ 1085. **What amounts to notice or bad faith which will affect title of holder**

§ 1085(1). **Arkansas**

You are instructed that the purchaser of a note, who before purchase is told that the maker refuses to pay it, is not a bona fide purchaser.<sup>51</sup>

§ 1085(2). **Connecticut**

You are instructed that if the plaintiff knew generally that there was something wrong about the notes, without knowing the details, it would be sufficient to put him upon inquiry and affect his title. If he was told there was something wrong about the note, without being told what, or if the facts fairly warrant the inference that he thought the notes were tainted with fraud, such general notice would prevent a recovery. If there was a willful or fraudulent

<sup>48</sup> Youle v. Fosha, 90 P. 1090, 76 Kan. 20. In this case the maker sought to replevin the note.

<sup>49</sup> Childers v. Billiter, 137 S. W. 795, 144 Ky. 53.

<sup>50</sup> First State Bank of Pleasant Dale v. Borchers, 120 N. W. 142, 83 Neb. 530.

<sup>51</sup> Old Nat. Bank of Ft. Wayne v. Marcy, 95 S. W. 145, 79 Ark. 149, 9 Ann. Cas. 339.

failure to inquire into facts inviting inquiry, the jury might regard such failure as notice, if they thought the failure was due to a belief that inquiry would result in knowledge of the fraud. Notice may be of two kinds—explicit notice of the fraud or illegality, and implicit or general notice. If the plaintiff, when he bought the notes, had notice or knowledge of some illegality, or knowledge of some illegality or fraud which vitiated them, though he was not apprised of its nature, this would be such general notice as would affect his title. Mere negligence, however gross, not amounting to this willful and fraudulent blindness, will not of itself amount to notice; but the jury may and should consider the fact of such negligence, as it may tend to prove such general notice.<sup>52</sup>

§ 1085(3). **Indiana**

The court instructs the jury that, before you can return a verdict for defendant in this action, you must find from the evidence that plaintiff knew when it took the note that there was a defense to it, or that it knew such facts that its taking the note under the circumstances amounted to bad faith on its part. The fact, if you should find it to be a fact, that plaintiff when it took the note had knowledge of circumstances which would excite suspicion as to the validity of the note in the mind of a prudent man, or that plaintiff was negligent in taking the note, is not in and of itself sufficient to show bad faith on plaintiff's part. Before you would be justified in inferring that plaintiff acted in bad faith in becoming the holder of the note in suit, the circumstances must be pointed and emphatic, and must lead directly and irresistibly to that conclusion that it had notice.<sup>53</sup>

§ 1085(4). **Kansas**

The court instructs the jury that, to constitute "notice" of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his actions in taking the instrument amounted to bad faith. What is "bad faith" in a case of this kind is a question of fact for the jury, and in this connection the court instructs you that neither a suspicion of defect of title, knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or put him on inquiry, nor even gross negligence on the part of the taker, will affect his rights, unless the circumstances or sus-

<sup>52</sup> *Mack v. Starr*, 61 A. 472, 78 Conn. 184.

<sup>53</sup> *First Nat. Bank of Ft. Wayne v. Garner*, 118 N. E. 813, 187 Ind. 391.

pictions are so cogent and obvious that to remain passive would amount to bad faith.<sup>54</sup>

**§ 1085(5). Michigan**

You are instructed that it is not necessary that plaintiff should have known exactly the fraudulent representations made by defendant in order to get ———, the maker of the note, to indorse the note. If plaintiff had sufficient knowledge to put him upon inquiry, so that he could have found out that ——— had been so induced by fraudulent representations, then the plaintiff cannot recover.<sup>55</sup>

**§ 1086. Effect of notice to agent of holder**

The court instructs the jury that ——— was the agent for the plaintiff in the purchase of said note sued on herein, and if the jury believes he, at the time he purchased said note, had actual knowledge of infirmity in said note, or defect in same or its title by reason of false representations or statements of said W. or D., or knowledge of such facts in relation thereto as that his act in taking said note amounted to bad faith on his part, in that case they shall find for the defendant.<sup>56</sup>

**§ 1087. Effect of notice acquired after purchase**

The court instructs the jury that if they find from the evidence in the cause that the plaintiff purchased the single bill sued on for value, in good faith and before maturity, with no other knowledge that the single bill furnished on its face, then they must find that the plaintiff was a bona fide holder of said single bill, and no knowledge of fraud or want of consideration in the giving of said single bill subsequently acquired by him can affect his title as a bona fide holder for value.<sup>57</sup>

**§ 1088. Payment of value—Giving credit on account.**

You are instructed that where a bank receives a note indorsed without restriction, and gives credit for the proceeds of same to the depositor as cash in a checking account, and such proceeds are checked out by the depositor, the bank becomes the absolute owner of the note.<sup>58</sup>

<sup>54</sup> *Elmo State Bank of Elmo v. Hildebrand*, 177 P. 6, 103 Kan. 705, 8 A. L. R. 54.

<sup>55</sup> *Beath v. Chapoton*, 73 N. W. 806, 115 Mich. 506, 69 Am. St. Rep. 589.

<sup>56</sup> *Childers v. Billiter*, 137 S. W. 795, 144 Ky. 53.

<sup>57</sup> *Arnd v. Heckert*, 70 A. 416, 106 Md. 300.

<sup>58</sup> *Hamilton Nat. Bank v. Emigh*, 192 S. W. 913, 127 Ark. 545.

**§ 1089. Discounting note by bank and placing proceeds to credit of owner**

You are instructed, as to the law of this case, that the plaintiff herein is presumed to have purchased the note sued on for a valuable consideration before maturity thereof, and it will be entitled to recover of defendants the amount of said note, principal and interest, according to its terms, and it will be your duty to return a verdict for plaintiff therefor, unless you find for the defendants under the following instructions: But you are instructed that, the discounting of the note sued on by the ——— Bank of ———, and the placing of the price or proceeds thereof to the credit of M. Bros., did not constitute said bank or the plaintiff herein an innocent holder for value before maturity of said note, unless M. Bros., in the course of their business with the ——— Bank or with the plaintiff bank after the latter's purchase of the note, and before the bank had notice of the imperfections, equities or defenses to be asserted against it, drew out said deposit. But should you believe from the evidence before you that M. Bros. did so draw out said deposit before the bank had such notice, either from the ——— Bank or the plaintiff bank, then the plaintiff bank should, in law, be deemed an innocent holder for value before maturity of the note sued on, and in that event you should find for the plaintiff the amount of said note, regardless of any failure of consideration of the same, or of any damages resulting to the defendants as claimed by them. If, however, you do not find for the plaintiff, under the evidence and the foregoing instructions, then you will determine whether or not the defendants have been damaged and are entitled to set off the note sued on under the evidence and the following instructions.<sup>59</sup>

**§ 1090. Right of bank as holder of check deposited with it**

You are instructed that, if the jury shall believe from the evidence that the parties (——— and the bank), at the time the check was received and deposited, intended that the same should be treated as cash, then the plaintiff is entitled to recover in this action, unless they further believe from the evidence that, at the time of the deposit, the plaintiff had notice of the matters affecting ——'s right to recover on said check, if any.<sup>60</sup>

The court instructs the jury that, if the jury shall believe from the evidence that the check was intended by the parties to be deposited merely for collection, then the plaintiff cannot claim to be a pur-

<sup>59</sup> National Bank of Commerce v. Armbruster, 142 P. 393, 42 Okl. 656. 54 S. E. 862, 105 Va. 689, 7 L. R. A. (N. S.) 694.

<sup>60</sup> Fayette Nat. Bank v. Summers,

chaser for value, and without notice of the matters affecting the consideration of the check; but if the jury shall believe that after said check was protested the bank purchased the check, it is entitled to recover whatever amount of said check, if any, the jury may find due after allowing any offsets, if any they may find due under the evidence, on account of the matters alleged in defendant's special plea.<sup>61</sup>

**§ 1091. Purchase of several notes by the same maker to some of which there is no defense**

You will find for the plaintiff the amount of the first two notes. As to the other notes, the question for you to decide is whether or not the bank purchased them in good faith. The burden of proof is on the defendant to show that the bank had actual knowledge of the defense made here when it bought the notes, or had actual knowledge of such facts indicating the defense that its action in taking the instruments amounted to bad faith. If the bank had such knowledge you will find for the defendants as to the last three notes. If it had not, you will find for the plaintiff on all the notes. In order for you to find for the defendant in this cause you must find that the plaintiff bank knew that all of these notes were given for a single consideration, or that the bank had such notice of that fact as would amount to bad faith on its part in the purchase of the last three notes.<sup>62</sup>

**§ 1092. Notice of defense of breach of warranty to note given for purchase price**

The jury are instructed that the plaintiffs were the holders of these notes in due course of business. That, however, is not conclusive of the action upon which you are to render a decision. Why not? For this reason: Gentlemen of the jury, it appears that defendant in making the purchase signed a written contract for the purpose for the register in question, so that back of the notes which he gave there stood this written contract. Now, there arises for your consideration, first and foremost, this question: Did the plaintiff association know of the existence of that contract? If they did not, then without any further inquiry in the case they are entitled to a verdict at your hands for the full amount due. Your first question should be: Does the evidence in this case satisfy me that

<sup>61</sup> Fayette Nat. Bank v. Summers, 54 S. E. 862, 105 Va. 689, 7 L. R. A. (N. S.) 694.

<sup>62</sup> Old Nat. Bank of Ft. Wayne v. Marcy, 95 S. W. 145, 79 Ark. 149, 9 Ann. Cas. 339.

the plaintiff here knew of the contract which stood behind these notes? If it did not, then and in that event your labors would be ended, because if the association had no knowledge of the contract, since it is a bona fide holder of the notes, it would be entitled to a verdict for its face value. If, on the other hand, you are satisfied from the evidence that the building and loan association in advancing the money, and in acquiring the notes which are the basis of this case, did know of the contract which stood behind the notes, then a further question arises; and what is that question? In making a sale of an article of this kind, gentlemen of the jury, there goes with a sale what is called an implied warranty of the article sold. In this case the manufacturing company, when it sold to the defendant this cash register, by the very fact of making the sale impliedly warranted to the defendant that this instrument was reasonably adapted to the uses for which it was sold. There was not a warranty that it was an absolutely perfect instrument, but the law implies, and therefore requires, the seller in making such sale to deliver to the purchaser a machine which is fairly and reasonably adapted to the uses for the purposes for which the buyer purchased it, so that in making the sale the manufacturing company carried with the sale such an implied warranty. If the plaintiff here, the building and loan association, had knowledge of the contract which stood behind these notes, then the question arises for your consideration: Was the cash register which the manufacturing company sold to this defendant reasonably adapted to the purposes for which the seller represents it to be adapted? If it was so reasonably adapted, then, and in that event, the seller, the manufacturing company, fulfilled the obligation which was resting upon it, and, if it fulfilled the obligations by delivering a machine reasonably adapted for the purposes for which the buyer was to use it, then, of course, the obligation resting upon the manufacturing company was discharged, and the plaintiff would be entitled to a verdict.<sup>63</sup>

**§ 1093. Purchase of notes given for a patent right**

**§ 1093(1). Kansas**

You are instructed that a note or notes given in violation, or in contravention of the above law, is absolutely void as between the maker of the note and the payee thereof, and as between all other holders of the note or notes having knowledge that it was given for a patent right in violation of the statute, or having knowledge of such facts as that their action in taking the note, or notes, amounted to bad faith. So, in this case, if you find from the evidence that M.,

<sup>63</sup> People's Bldg. & Loan Ass'n Co. v. Rutz, 123 N. W. 6, 158 Mich. 440.



as agent for the ——— Company, took the notes sued on herein from the defendant in this case, and that the consideration for which said notes were given was, in whole or in part, the right to sell or to manufacture a patented article, or what was claimed by the said M. to be a patented right, and that the said M. transferred said notes to the plaintiff in this case before maturity and for a valuable consideration, and that the said plaintiff knew, at the time he purchased said notes, that the consideration for said notes, in whole or in part, was a patent right, or the right to sell or manufacture a patented article, or that said plaintiff had knowledge of such facts with reference to the consideration that his taking of the notes amounted to bad faith, then and in that event the plaintiff cannot recover from the said defendant in this case, and your verdict should be for the defendant.<sup>64</sup>

You are instructed that the sale of a right to use, and manufacture for sale and use, for any specified time, in any specified territory a patented article, or what is claimed to be a patented article, is a sale of such interest in the patent right as brings the transaction within the provisions of the statute relating to the registration and sale of patent rights, as above set forth, and requires all notes given for such consideration to be indorsed, as I have before said to you. "Given for a patent right."<sup>65</sup>

§ 1093(2). Ohio

You are instructed that the plaintiff must have had notice or information of such facts as amounted to him, under the circumstances surrounding him at the time, to substantial and real knowledge that the note was given for a patent right, or he is not chargeable with knowledge.<sup>66</sup>

§ 1094. Liability of holder of stolen drafts.

The court instructs the jury that, in order to recover, the burden is upon the plaintiff to prove that his drafts were stolen, and that the defendants received them with knowledge thereof. It is not necessary, however, that the plaintiff should prove that the defendants had actual knowledge that they were stolen. If they received the drafts under such circumstances as would cause a reasonable man to make inquiry as to how the drafts had been secured, then they are charged, as a matter of law, with such information as a careful inquiry would disclose or reveal.<sup>67</sup>

<sup>64</sup> Tredick v. Walters, 106 P. 1067, 81 Kan. 828.

<sup>65</sup> Tredick v. Walters, 106 P. 1067, 81 Kan. 828.

<sup>66</sup> De Long v. Barnes, 12 N. E. 735, 45 Ohio St. 237.

<sup>67</sup> Rumping v. Arkansas Nat. Bank of Hot Springs, 180 S. W. 749, 121 Ark. 202.

The court instructs the jury that, if you find from the evidence in this case that the plaintiff's drafts were stolen from him, or that he was swindled out of them by a fake race or pool room scheme, then you are instructed that it is your duty to carefully consider the circumstances under which the defendants received them. You are to determine from the evidence in the first place whether they actually knew them to have been stolen, or whether the circumstances were such as to lead a prudent man to inquire as to the means by which they had been obtained. And if you find that the defendants or either of them willfully failed to make such inquiry, after knowledge of facts or circumstances which would place an ordinarily prudent man in their position on inquiry then they are responsible for such failure, and are presumed in law to know what such inquiry would have disclosed.<sup>68</sup>

The court instructs the jury that, if you believe from the evidence in this case that the drafts complained of in this case were received by the ——— Bank from S. for collection, and that they were collected and placed to the credit of S. in said bank, and were paid out to S. before this suit was brought, and before the ——— Bank had notice of any right, title, interest, or claim the plaintiff in this case had on said drafts or money, and that the ——— Bank had no knowledge that said drafts had been stolen from the plaintiff at the time they were received by the bank, and that at the time they were received by the bank for collection from S. the latter was a regular customer of said bank, and had for many years been such customer, and that said drafts were received in a regular way and in the usual course of business by said bank, and that the said bank did not know at the time it received said drafts or at any time before it paid the money collected on said drafts to the said S. that said drafts had been stolen, and had no reason to believe that they had been stolen, and had no knowledge of facts to place them on inquiry that they were of this character, then and in that event you should find for the defendant, the ——— Bank.<sup>69</sup>

#### § 1095. Rights of bona fide holders in general

##### § 1095(1). Alabama

The court instructs the jury that if you are reasonably satisfied from the evidence that the note sued on is a commercial paper complete and regular on its face, that plaintiff purchased the same in good faith in the regular course of business for value,

<sup>68</sup> Rumping v. Arkansas Nat. Bank of Hot Springs, 180 S. W. 749, 121 Ark. 202.

<sup>69</sup> Rumping v. Arkansas Nat. Bank of Hot Springs, 180 S. W. 749, 121 Ark. 202.

before maturity thereof, and without notice of any defect of title, or defense set up by defendant, you must find for plaintiff.<sup>70</sup>

§ 1095(2). **Indiana**

You are instructed that inland bills of exchange and promissory notes payable in a bank in this state are governed by what is called the 'law merchant'; that is to say, as applicable to the issues raised in this cause, if you believe from all the evidence in the case that the plaintiffs, in the usual course of business, purchased from ——— and ——— the note sued on for a valuable consideration, before the maturity of said note, without any notice of any defense or equity existing against the same, and that at the time of their purchase they had no knowledge of such facts as put them upon inquiry, then they are entitled to recover, even though, as between the defendant and the original payees of the note, there existed equities in favor of the defendant.<sup>71</sup>

The court instructs the jury that if you believe, from all the evidence given in the case, that the plaintiffs in this action bought this note in the usual course of business, before its maturity, from ——— and ———, and that at the time they purchased the same they had no knowledge of such facts as put them on inquiry, and that they gave or parted with a valuable consideration for said note, then the plaintiffs are entitled to recover the amount of said note, with interest thereon according to its tenor and reasonable attorney's fees.<sup>72</sup>

§ 1095(3). **Maryland**

The court instructs the jury that if they find from the evidence in the cause that defendant signed the single bill sued on in this case, and shall further find that same was passed to the plaintiff for a valuable consideration before maturity, and shall further find that plaintiff purchased said single bill in good faith without notice of any fraud in its obtention or of any failure of consideration therein, then their verdict must be for the plaintiff.<sup>73</sup>

§ 1095(4). **Oregon**

The court instructs the jury that if you find that the plaintiff is a holder in due course, within the meaning of the law as I have given it to you, then I instruct you that he holds the note sued on free from any defect of title of prior parties, and free from defenses available to the defendant as against any other parties to

<sup>70</sup> Hudson v. Repton State Bank, 75 So. 695, 16 Ala. App. 101.

<sup>71</sup> Warren v. Syfers, 55 N. E. 103, 23 Ind. App. 167.

<sup>72</sup> Warren v. Syfers, 55 N. E. 103, 23 Ind. App. 167.

<sup>73</sup> Arnd v. Heckert, 70 A. 416, 108 Md. 300.

the instrument, and that the plaintiff may enforce payment of the instrument against the defendant for the amount thereof.<sup>74</sup>

### E. PAYMENT AND DISCHARGE

#### § 1096. Payment in general

##### § 1096(1). Delaware

You are instructed that the principal and interest on the note together constitute one sum due upon the note, and any payment thereon, whether applied to meet the interest or to meet the principal, is in either event a partial payment on account of the note.<sup>75</sup>

##### § 1096(2). Illinois

The jury are instructed that, if you believe from the evidence that the plaintiff about the ———, as the agent of ———, the makers, paid the amount of the note in controversy to the holder of the same, and that the holder of the said note surrendered the same to the said plaintiff as such agent, then and in that case that would be a payment of said note, and you will find for the defendant.<sup>76</sup>

##### § 1096(3). Missouri

The court instructs the jury that if you find from all the evidence in this cause that the note in question was paid off during the lifetime of the maker, ———, then your verdict should be for the defendant.<sup>77</sup>

The court instructs the jury that, in determining whether or not the note in controversy was paid off during the lifetime of ———, you are at liberty to take into consideration all the facts and circumstances offered in evidence as well as the acts and deeds of ——— and ——— with reference to said note, and if from all the facts and circumstances given in evidence you find said note has been paid off, then your verdict must be for the defendant.<sup>78</sup>

The court instructs the jury that if you find from the testimony in this cause that during the lifetime of ——— and ——— there were various financial transactions between them, including the execution and delivery of the note in controversy, and if you find from all the facts and circumstances given in evidence that prior

<sup>74</sup> Hill v. McCrow, 170 P. 306, 88 Or. 299.

<sup>75</sup> Pyle v. Gallaher, 75 A. 373, 6 Pennewill, 407.

<sup>76</sup> Johnson v. Glover, 12 N. E. 257, 121 Ill. 283.

<sup>77</sup> Sutton v. Libby (App.) 201 S. W. 615.

<sup>78</sup> Sutton v. Libby (App.) 201 S. W. 615.

to the death of the maker, ———, he (the said ———) settled all financial obligations due the said ——— by paying him (——) every dollar due him, then your verdict should be for the defendant.<sup>79</sup>

**§ 1097. Payment to original payee as defense as against transferee**

The court instructs the jury that a maker of a promissory note is charged with the knowledge that the note is negotiable and may be transferred and indorsed by the person or firm to which it is payable to some third party or indorsee; and, when such maker pays the person to whom said note was originally payable, the amount of the said note or any part thereof, without the production of the original note, such payment is made at the maker's peril, and such payments so made are of no effect as against the third party or indorsee thereof who had possession of the note at the time the payments were made. Therefore you are instructed that, although you may believe from the evidence that the note was paid by the ——— Company to the party to whom it was originally payable, yet, if at the time of such payment said note was in possession of the plaintiff herein, your verdict will be for the plaintiff, unless you believe it was altered.<sup>80</sup>

**§ 1098. Effect of surrender of note**

The jury are instructed that, if the payee of the note surrendered it to the maker voluntarily, in liquidation of a just debt then due from him to the maker, the note was fully canceled by the surrender; but if the note was obtained from the payee wrongfully and unlawfully, by threats and duress, it was not canceled by the surrender, and the plaintiff can maintain an action for the amount due thereon, if he is the owner thereof.<sup>81</sup>

**§ 1099. Release of indorser—Extension of time of payment**

**§ 1099(1). Kansas**

You are further instructed that if you believe from the evidence that on or about the ——— day of ———, the plaintiff, through its cashier and agent, H., as a part of the consideration that the defendants ——— would sell to one ——— ——— bushels of corn, agreed that he would extend the time for the payment of the note in controversy ——— days from the ——— day of ———, and the defendant B. did not consent to the same, then such agreement on the part of H. for the plaintiff should be deemed

<sup>79</sup> Sutton v. Libby (App.) 201 S. W. 615.

<sup>80</sup> Hamilton Nat. Bank v. Emigh, 192 S. W. 913, 127 Ark. 545.

<sup>81</sup> Koehler v. Wilson, 40 Iowa, 183.

to be supported by a consideration, and your verdict should be for the defendant B.<sup>83</sup>

§ 1099(2). Virginia

The court instructs the jury that if they believe from the evidence that the note payable to defendant, and indorsed by him, signed by ———, ———, and ———, and the note payable to ——— Bank, and signed by said ———, were both delivered to ——— Bank at the same time, and were given to secure the same debt, then they must be taken together, all as parts of the same transaction, and if they further believe from the evidence that after the debt secured by said note became due an extension of time was given, for valuable consideration, by said bank, to said ———, without the consent of said defendant, then said defendant is released from all liability on said note, and they must find for the defendant.<sup>83</sup>

§ 1100. Same—Delay in suing maker

The court charges the jury that if after the ——— day of ———, and before the ——— day of ———, defendants requested plaintiff not to sue the ——— Company, and expressly promised to pay the debt evidenced by the note, and thereby induced plaintiff not to sue at the first term of the court after the note fell due, then defendants were not discharged from liability as indorsers by plaintiff's failure to sue the ——— Company at the first term of court.<sup>84</sup>

§ 1101. Effect of failure to comply with demand of indorser to exhaust collateral

The court instructs the jury that the maker of a negotiable note cannot take advantage of the indorser's demand that collateral security be exhausted by the creditor before the indorsers are held liable for the payment of any amount due on such note; and, if it should be found by the jury that the indorsers on the notes sued on did demand that the collaterals held by the plaintiff should be exhausted before they were to be called on for payment, this demand would not benefit the maker of the note.<sup>85</sup>

§ 1102. New promise by indorser after discharge

You are instructed that, if you find from the evidence that defendant, knowing all the facts which released him from liability,

<sup>83</sup> Bank of Horton v. Brooks, 62 P. 575, 10 Kan. App. 576.

<sup>84</sup> State Sav. Bank v. Baker, 25 S. E. 550, 93 Va. 510.

<sup>85</sup> Brown v. Fowler, 32 So. 584, 133 Ala. 310.

<sup>86</sup> Fretwell v. Carter, 65 S. E. 829, 83 S. C. 553.

and knowing or believing himself to be discharged from liability as indorser, promised to pay the note, you will be warranted in finding for the plaintiff.<sup>86</sup>

**§ 1103. Extent of liability of indorser—Deduction of amounts paid by maker**

The court instructs the jury that, if the jury believe from the evidence that defendant is liable at all on said note, under instruction No. ———, then they can only find a verdict for the amount remaining unpaid on said note after deducting the amounts paid by ——— on the indebtedness secured by said note.<sup>87</sup>

**§ 1104. Effect of payment by principal—Right to revive note as against surety**

The jury are instructed that, if you believe from the evidence that the note sued on was satisfied in full by payments and receipt, any subsequent arrangement made by the defendant M., by which such payments were to be differently applied, and the obligation of the note revived, is not binding on the defendant D., if the jury further believe from the evidence that the plaintiff knew that D. signed as surety, unless the jury further believe that M. had authority from the other defendants to so change the application of the payments, if any were made.<sup>88</sup>

**F. PRESENTMENT FOR PAYMENT, DISHONOR, AND PROTEST**

**§ 1105. Diligence required in presenting check to charge drawer**

The jury are instructed that the fact that ——— did not present the check in question to the bank for payment until two or three days had elapsed after it was drawn cannot affect the right of the plaintiff to recover, if the jury shall believe from the evidence that D., the drawer of the check, had not sufficient funds in bank to meet it.<sup>89</sup>

You are instructed that if the jury believe, from the evidence in this cause, that the plaintiffs received of the defendant, on the afternoon of the ——— of ———, the two drafts or checks given in evidence, in order to take up two promissory notes of the defendant, of amounts corresponding with the respective amounts of said checks, and the plaintiffs then and there held said notes for another bank for the mere purpose of collection, and,

<sup>86</sup> Hobbs v. Straine, 21 N. E. 365, 149 Mass. 212.

<sup>87</sup> State Sav. Bank v. Baker, 25 S. E. 550, 93 Va. 510.

<sup>88</sup> Miller v. Montgomery, 31 Ill. 350.

<sup>89</sup> Heartt v. Rhodes, 66 Ill. 351.



at the time of receiving said checks, plaintiffs delivered up to defendant his said notes, and on the same day remitted the amount thereof to the party from whom they received said notes, and if the jury further believe, from the evidence, that, immediately after the commencement of banking hours on the next day after receiving the said checks, and soon after 10 o'clock a. m. of the \_\_\_\_\_ day of \_\_\_\_\_, the plaintiffs' teller took said checks to the banking office and usual place of business of the \_\_\_\_\_ Insurance Company, named as drawee in said respective checks, for the purpose of presenting the same at said bank for payment, but was unable to obtain payment of said checks, or either of them, by reason that said bank was closed and had stopped payment, and that plaintiffs immediately, and on the same day last aforesaid, gave the said defendant notice of the said matters and the non-payment by said bank of said checks, then the defendant is liable to the plaintiffs for the amount specified in said checks, and the jury will find for the plaintiffs accordingly, with interest on the amount at the rate of \_\_\_\_\_ per centum per annum after the \_\_\_\_\_ of \_\_\_\_\_.<sup>90</sup>

You are instructed that, where all the parties reside in the same place, the presentation of a check drawn on a bank and received in the usual course of business is deemed within a reasonable time if made during banking hours of the next day after it was so received, and it is the same, whether the check be certified by the bank to be good or not, so far as the drawer of the check is concerned. If the jury, therefore, believe, from the evidence in this case, that the checks in evidence in this cause were taken by plaintiffs in the usual course of business, and were sent to the bank on which they were drawn during banking hours of the next day after they were received, and the said bank had before then and has since been closed, and had and has stopped business, then the court instructs the jury that such effort to present the checks is equivalent to a presentation of the checks, and is within reasonable time to charge the defendant upon the said checks.<sup>91</sup>

#### § 1106. Matters excusing presentment and notice of nonpayment

The court instructs the jury that if there was no money in the bank with which to pay the note, and the holder, maker, and indorsers knew that fact, presentment for payment was not necessary.<sup>92</sup>

<sup>90</sup> Rounds v. Smith, 42 Ill. 245.

<sup>91</sup> Rounds v. Smith, 42 Ill. 245.

<sup>92</sup> Bessenger v. Wenzel, 125 N. W.

750, 161 Mich. 61, 27 L. R. A. (N. S.) 516. In this case the note was payable at the bank.

The court instructs the jury that, if the holder, maker, and indorsers agreed before or at maturity that the note should not be paid, but renewed, then there was no necessity for presenting it for payment.<sup>93</sup>

**§ 1107. Waiver of presentment**

The court instructs the jury that if the defendants, with full knowledge that there had been no presentment, assented to continue their liability, then they would be liable.<sup>94</sup>

**§ 1108. Waiver of notice of dishonor**

**§ 1108(1). Kentucky**

You are instructed that, if you believe from the evidence that notice of dishonor of said notes was not given as described in the preceding instruction, yet if you believe from the evidence that subsequent to the maturity and dishonor of said notes the defendant stated to the plaintiff bank, or any of its officers, that he intended to pay said notes, or his part thereof, this was a waiver of any failure there might have been, if any, to give him such notice of nonpayment, and he is liable on said notes, and the jury should find for the plaintiff; but, unless you so believe from the evidence, the law is for the defendant, and you will so find, provided you also find for the defendant under the first instruction.<sup>95</sup>

**§ 1108(2). Michigan**

You are instructed that, even if the defendant was an indorser of the note, and not a maker, and if no notice of the nonpayment of the note was given him within the time required to make him liable, if he subsequently, with knowledge of the fact that such notice had not been given, promised to pay or "fix it up," or any equivalent words, meaning thereby to arrange for its payment, this would be a waiver of the want of notice, and he would be liable as though the notice had been duly given.<sup>96</sup>

**§ 1109. Effect of waiver of protest**

The court instructs the jury that a waiver of the protest of a negotiable note is not a contract and does not alter or in any manner affect the rights or liabilities of the parties except that it dispenses with the necessity of notice to indorsers of the dishonor of the note; and, if the jury believe from the evidence that at the

<sup>93</sup> *Bessenger v. Wenzel*, 125 N. W. 750, 161 Mich. 61, 27 L. R. A. (N. S.) 516.

<sup>94</sup> *Bessenger v. Wenzel*, 125 N. W. 750, 161 Mich. 61, 27 L. R. A. (N. S.) 516.

<sup>95</sup> *Doherty v. First Nat. Bank of Louisville*, 186 S. W. 937, 170 Ky. 810.

<sup>96</sup> *Cook v. Brown*, 29 N. W. 46, 62 Mich. 473, 4 Am. St. Rep. 870.

time the words, "payment guaranteed, protest, demand and notice of nonpayment waived," were put by means of a rubber stamp on the back of the notes in suit and signed by defendant, there was no treaty or agreement by which defendant was to assume any new or any different liability on the notes, but the whole intent of the parties as expressed in their conversation was to waive the protest, and the defendant signed the same without reading, supposing it to be a waiver of protest only, then the indorsement so stamped on the notes in suit and signed by the defendant can be effectual only as a waiver of protest, and the contractual words "payment guaranteed" are without binding force to hold the defendant to liability on said notes.<sup>97</sup>

### G. DEFENSES ON THE MERITS

#### § 1110. Lack of authority to sign note

We say to you, if ——— signed the name of his wife to the note by her special or general authority, the plaintiff is entitled to a recovery on the note. If, however, the name of the wife was signed to the note without her special or general authority, then your verdict should be for the defendant; because, if you should find that she did not sign the note, or authorize or ratify the signing of the same, the action being against both, you should not in that event return a verdict in favor of the plaintiff.<sup>98</sup>

#### § 1111. Conditional signing of notes

##### § 1111(1). United States

The jury are instructed that, if the jury find from the evidence that the two notes set forth and referred to in the complaint were executed by the defendant upon the terms and upon the understanding and agreement set forth in the answer, and testified to by the defendant, and as shown by the correspondence between the plaintiff and the defendant with reference thereto, they should answer the first issue, "Nothing."<sup>99</sup>

##### § 1111(2). Iowa

The court instructs the jury that the defendant ——— in this case claims that at the time he signed this note he informed A., the other signer of the note, that he did not want the note given to the plaintiff bank, and that he did not want the name of the

<sup>97</sup> Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

<sup>98</sup> Gray v. Gray, 80 A. 233, 2 Boyce (Del.) 308.

<sup>99</sup> Howell v. Ware, 175 F. 742, 99 C. C. A. 318.

plaintiff bank filled in. The burden of proof is upon the defendant to establish this claim of his by a preponderance of the evidence, and if he has shown you by a preponderance of the evidence that at the time he signed the note he informed A. that he did not want the name of the plaintiff bank filled in as payee, then you are instructed that the plaintiff in this action cannot recover upon this note, unless it is allowed to recover on account of some of the grounds hereinafter stated; but if the defendant has failed to establish his claim, then you are instructed that the plaintiff is entitled to judgment as against the defendant for the full amount of the note.<sup>1</sup>

The court instructs the jury that the plaintiff, as a further claim against the defendant, says that on or about the \_\_\_\_\_ day of \_\_\_\_\_, defendant was indebted to A. in the sum of \$\_\_\_\_\_, growing out of the transaction of buying and shipping some stock and defendant agreed with A. to make out a note for that amount with the payee left blank, so that A. could fill in the name of the payee and get the money on said note, and that the note in suit was given by defendant under those conditions. The defendant denies this claim of the plaintiff. Now, you are instructed that the burden of proof is upon the plaintiff to establish the claim made by it in this paragraph of these instructions by a preponderance of the evidence, and if the plaintiff has shown you by a preponderance of the evidence that defendant signed the note under the conditions claimed by plaintiff as set out in this paragraph of these instructions, that then and in that event plaintiff would be entitled to recover in this action the full amount of said note.<sup>2</sup>

§ 1111(3). Texas

The court instructs the jury that, if you find and believe from a preponderance of the evidence that it was agreed by and between the defendant H. and the said insurance agents, G. & K., at the time of the execution of the note sued upon that said G. & K. were to hold said note until the insurance policy applied for by said defendant H. with the \_\_\_\_\_ Insurance Company should be delivered to said defendant H., and you should further find that said agreement to hold said note, if any, was not complied with by said G. & K., and should further find that when the notice was given to the defendant H. by said insurance company that his application for insurance had been rejected by said insurance com-

<sup>1</sup> First Nat. Bank of Marengo v. Athey, 174 N. W. 347, 188 Iowa, 330. Defendant claimed to have signed as surety for A.

<sup>2</sup> First Nat. Bank of Marengo v. Athey, 174 N. W. 347, 188 Iowa, 330.

pany, that the said defendant H. treated said application and obligation thereunder as at an end, and did not thereafter renew his said application for insurance with said company, nor enter into any agreement with said insurance company for the issuance of the policy to him, then you will return a verdict in favor of the defendant H., upon his cross-action herein and against the defendants — Insurance Company, G., and K., jointly and severally, for such amounts, if any, as the plaintiff may recover against said defendant H.<sup>3</sup>

§ 1112. Same—Condition that other signatures shall be procured

§ 1112(1). Illinois

The jury are instructed that, although the defendant signed the note in question, yet such signing alone would not make such note valid, and that before such note would be valid it must further appear that the same was delivered to the payee with the intention that the same should become a valid and binding instrument, and that if the jury find from the evidence that it was understood between the plaintiff and defendant that the note in question in this suit should be signed by defendant's wife before the same should become valid, then the said note never became a valid and binding instrument.<sup>4</sup>

§ 1112(2). Nebraska

The court instructs the jury that, though you may believe, from the evidence, that the makers of the note signed the said note with the understanding and agreement that one — should sign the same, and that they should not be bound on said note unless said — signed also, yet, unless the plaintiff bank had knowledge of this arrangement, it would not bind them or be a defense to said note, and your verdict should be for the plaintiff.<sup>5</sup>

§ 1113. Same—Liability on notes given by abutting owner to paving contractor

You are instructed that if you believe from the evidence that the defendant knowingly permitted plaintiffs to pave and improve that portion of — and — streets adjacent to his property in accordance with the terms of their contract, and that the defendants did not object to the doing of said work while the same was in progress, and if you further believe that the acts and conduct of the defendant were reasonably calculated to induce plain-

<sup>3</sup>Texas Life Ins. Co. v. Huntsman (Civ. App.) 193 S. W. 455.

<sup>4</sup>Gould v. Tilton, 161 Ill. App. 142.

<sup>5</sup>Brumback v. German Nat. Bank of Beatrice, 65 N. W. 198, 46 Neb. 540.

tiffs to believe that he (the defendant) wanted said street paved in front of his property and would pay therefor in accordance with the terms of his contract, and that the plaintiffs were thereby induced to pave and improve in front of defendant's property, you are instructed that the defendant is estopped to deny his liability to pay for said work, and in such event you will find for plaintiffs.<sup>6</sup>

The court instructs the jury that, if you find and believe from the evidence that before the work of paving ——— and ——— streets was begun plaintiffs and defendant agreed that defendant should not be required to pay the notes sued on in this case, and that he would be released from their payment, and that after such agreement, if any was made, plaintiffs proceeded and did the paving in front of defendant's property contrary to defendant's instructions, then you will find in favor of defendant, unless you should find in favor of plaintiffs under paragraph ——— of this charge.<sup>7</sup>

**§ 1114. Mistake of law as to nature of liability attaching to signature**

You are instructed that it is no defense to this note that the defendant, when he signed the same, did not understand the legal effect of signing it as he did, or that he supposed his liability would be that of an indorser merely. His mistake of the law, if there was such mistake, would be no defense.<sup>8</sup>

**§ 1115. Fraud in procuring signature**

**§ 1115(1). Kentucky**

The court instructs the jury that the defendant admits the execution of the note declared on herein, and that they must find for the plaintiff ——— the sum of \$———, unless they shall further believe from the evidence that said note was procured from defendant by fraud and misrepresentations of the value of the stock of the ——— Railway Company, by W. or D., his agent, or that it was agreed by said W. and D. that the defendant should be permitted to renew said note at its maturity, or that said W. or D., his agent, agreed with defendant to purchase from him the same amount of stock in said company that defendant bought in said company at the expiration of one year for the sum of \$———; and they shall further believe from the evidence that the plaintiff, or his agent, before or at the time he purchased said note, had

<sup>6</sup> Chapman v. Levy & Levy (Tex. Civ. App.) 193 S. W. 1101.

<sup>7</sup> Chapman v. Levy & Levy (Tex. Civ. App.) 193 S. W. 1101.

<sup>8</sup> Cook v. Brown, 29 N. W. 46, 62 Mich. 473, 4 Am. St. Rep. 870.

knowledge or notice of the said fraud or misrepresentations, if any, of said W., or D., his agent, in regard to the value of said stock or the conditions, if any, upon which said note was executed—then the law is for the defendant, and they should so find.<sup>9</sup>

The court instructs the jury that, although they shall believe from the evidence in this case that said ——— and ——— did procure from the defendant the note declared on herein, by fraud and misrepresentations of the value of the stock of said company, or that they agreed with the defendant to purchase of him the same amount of stock in said company at the expiration of one year, that he had bought in said company, for the sum of \$———, they cannot find for the defendant unless they shall further believe from the evidence that the plaintiff, or his agent, before or at the time he purchased said note, had knowledge or notice of the said fraud or misrepresentations, if any, of said ——— or ——— in regard to the value of said stock or the conditions, if any, upon which said note was executed.<sup>10</sup>

#### § 1115(2). Maryland

The jury are instructed that in determining whether or not the defendant's signature to the instruments sued on was procured by fraud, they are to consider all the circumstances surrounding the signing of same by defendant as detailed in evidence, and all the other evidence in the case, and if the jury find that the agent of the ——— Company represented to defendant at the time of the sale of the goods to defendant that the ——— Company was the manufacturer of said goods, that the goods are of fine quality and guaranteed to wear from ——— to ——— years, that no goods would be sold in W. and only to one dealer in E., and if the jury further find that the goods were of inferior quality and practically worthless, that other goods were sold by the ——— Company to other merchants in W., then the jury must infer from these facts and other evidence in the case that defendant's signature to the bills of exchange sued on was procured by fraud, and if they so find, their verdict should be for the defendant.<sup>11</sup>

You are instructed that, if the jury believe that certain merchandise was sold to the defendant by the ——— Company upon the representation made by its agent, among others, that no other merchandise would be sold by it within certain bounds of defendant's business, that the defendant was induced by said representa-

<sup>9</sup> Childers v. Billiter, 137 S. W. 795, 144 Ky. 53.

<sup>10</sup> Childers v. Billiter, 137 S. W. 795, 144 Ky. 53.

<sup>11</sup> Stouffer v. Alford, 78 A. 387, 114 Md. 110.



tions to sign the said bills of exchange sued on, that but for said representations he would not have signed them, and that merchandise was sold by the company to others within said bounds, then the jury may infer that the signatures of the defendant were procured by fraud, and if the jury so find the signatures were procured by fraud, their verdict should be for the defendant.<sup>12</sup>

You are instructed that, if the jury believe from the evidence that the defendant was induced to sign the bills of exchange sued on by a misrepresentation, among others, of the agent of the ——— Company as to the kind or quality of the merchandise sold by said company to defendant, then the jury may infer that the signatures of the defendant were procured by fraud, and if the jury so find that the signatures of the defendant were procured by fraud, their verdict should be for the defendant.<sup>13</sup>

The jury are instructed that gross inadequacy of consideration is one of the badges of fraud, and they may consider the evidence of the value of the jewelry, and the price at which it was sold to defendant, in connection with other representations, if any, of the agent of the ——— Company to defendant in arriving at a conclusion as to whether or not defendant's signature to the bills of exchange sued on was secured under such circumstances as to amount to fraud.<sup>14</sup>

§ 1115(3). Texas

The court charges the jury that, if they believe from the evidence that defendant gave his note in payment of a subscription to a syndicate which he was induced to join by the representations of B. that he (the defendant) was to become a member of said syndicate upon exactly the same terms and conditions and upon perfect equality with him (the said B.), and if they further believed from the evidence that said B. had a secret agreement at the time the said defendant executed his note by which he was to receive back \$—— of the purchase money of the lands which were to be purchased by the said syndicate, and made no allowance to the said defendant on account of said \$——, but concealed from the said defendant the fact of his receiving back any such sum, or that he would receive same, and if they further believed from the evidence that the representations of the said B. to the said defendant was a material representation, and induced him to become a member of said syndicate, then and in that event

<sup>12</sup> Stouffer v. Alford, 78 A. 387, 114 Md. 110.

<sup>13</sup> Stouffer v. Alford, 78 A. 387, 114 Md. 110.

<sup>14</sup> Stouffer v. Alford, 78 A. 387, 114 Md. 110.

the said defendant would be entitled to a rescission of his contract and the cancellation of the note.<sup>15</sup>

**§ 1116. Same—Ignorance of maker of contents**

The court instructs the jury that it is the duty of one signing his name to an instrument to read it, if he can read it, or to bring such ability to read as he possesses into use, so far as it may enable him to identify the character of the instrument, or, if he cannot read at all, to otherwise learn the contents of the instrument he is signing, so that he may not be imposed upon by fraud, or sign a note that may cause innocent purchasers thereof to suffer. He is chargeable with any neglect in failing to perform this duty. Whether or not the defendant was guilty of any neglect in signing the note the way he did is a question of fact for you to determine from all the facts and circumstances of the case, taking into consideration the evidence as it may bear upon the question to what extent the defendant was illiterate, and whether or not he was without negligence in the care exercised by him to know the contents of the instrument before he signed it.<sup>16</sup>

**§ 1117. Defense of forgery of indorsement or lack of authority to indorse**

The jury are instructed that forgery creates no legal right or obligation against the party whose name is forged, even though the instrument be sought to be enforced by a purchaser for value without notice; and, if the jury believe from the evidence that the indorsement of defendant upon the two notes sued on was not made by him or by his authority, he cannot be held liable by reason of such indorsement, notwithstanding they may be of opinion that the plaintiff was a purchaser for value without notice and before maturity of the said notes.<sup>17</sup>

The court instructs the jury that, if the jury believe from the evidence that the name of the defendant was used by M., defendant's father, now deceased, without defendant's authority in the indorsement of the two notes in suit, the defendant cannot be bound by such indorsements. But if the jury believe from the evidence that, prior to the making and indorsement of the two notes in suit, M. had general authority from the defendant to use his (the defendant's) name in making and indorsing notes to be discounted for the use and benefit of the said M. at the ———

<sup>15</sup> Hall v. Grayson County Nat. Bank, 91 S. W. 762, 36 Tex. Civ. App. 317.

Dale v. Borchers, 120 N. W. 142, 83 Neb. 530.

<sup>16</sup> First State Bank of Pleasant

<sup>17</sup> Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

Bank, and that such authority continued up to and included the indorsement of the two notes in suit, then they should find the defendant bound by said indorsements. Authority to bind the defendant by such use of his name could not arise out of the mere failure of the defendant to notify the bank that he disclaimed liability when apprised of such use of his name, even if it be true that he was so apprised; but if the jury are of the opinion that it is shown by the evidence that the defendant knew by notices from the bank or otherwise that his father was in the habit of using his (the defendant's) name upon paper discounted for his own (the said M.'s) use at the plaintiff's bank, and made no disclaimer or repudiation of the same, the jury has the right to consider such failure to disclaim as an item of circumstantial evidence, to be weighed along with all of the other evidence in the case bearing on the question, in determining whether or not M. in point of fact used the name of defendant as indorser on the two notes in suit with defendant's authority or permission, general or special.<sup>18</sup>

**§ 1118. Failure of consideration**

The court charges the jury, for the defendant, that if they believe from the evidence that the defendant signed the note sued on upon an agreement that it was to be used to raise money to complete a grading contract of M. & G., that no money was ever raised on said note, that on the \_\_\_\_\_ day of \_\_\_\_\_, said note was credited on the overdraft of M. & G. at the plaintiff bank, that the said firm of M. & G. not only failed to raise any money on said note, but that a short while after the execution of said note the said M. sold and disposed of half of the outfit of said firm with which said grading was to be done, that a month later, the other member of said firm abandoned said work, and that after three months the said M. sold the balance of said outfit and threw up said contract, then there was a failure of consideration, and the defendant is not liable.<sup>19</sup>

**§ 1119. Same—Note given on faith of representations which proved untrue**

The jury are instructed that, if the plaintiff assured the defendant that the system of bookkeeping which he proposed to install could be worked by defendant's then present office force, and with no greater expense, and that this representation was untrue in fact, and that the defendant did not know that it was untrue, and had no means of ascertaining the truth until after the contract was

<sup>18</sup> Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

<sup>19</sup> McNeill v. Bay Springs Bank, 56 So. 333, 100 Miss. 271.

made, and that if you further believe that the defendant gave the system a full and fair trial, and it could not be worked without additional expense, then plaintiff is not entitled to recover.<sup>20</sup>

**§ 1120. Liability as dependent on whether defendant signed as principal or accommodation maker or indorser**

The jury are instructed that you shall find for the defendant, unless you shall believe from the evidence that the defendant, H., and S., as principals, and the plaintiffs, ——— and ———, as sureties for the said H. and S., executed the two notes named in the petition, and shall further believe from the evidence that said plaintiffs, as such sureties, if you shall believe from the evidence they were sureties, paid said notes, in which event you will find for the plaintiffs the sum of ——— dollars, with interest from ———.<sup>21</sup>

The jury are instructed that if, however, you shall believe from the evidence that the defendant signed said notes as an accommodation maker for plaintiffs, you will find for the defendant.<sup>22</sup>

**H. EVIDENCE AND MATTERS PERTAINING TO REMEDY**

**§ 1121. Pleading and proof**

The jury are instructed that, unless the defendants have shown by a preponderance of the evidence that the consideration for the notes sued on has wholly failed, as alleged in their plea, your verdict should be for the plaintiff.<sup>23</sup>

**§ 1122. Presumptions and burden of proof**

**§ 1122(1). Illinois**

The jury are instructed that, in the hands of an assignee before maturity, the question of consideration for a note does not arise until it is shown by evidence that the assignee purchased the note with actual knowledge of the want of consideration.<sup>24</sup>

The jury are instructed that the notes sued on themselves make a prima facie case, and entitle the plaintiff to recover, unless the evidence shows that they were given without any valid consideration.<sup>25</sup>

<sup>20</sup> *Audit Co. v. Taylor*, 67 S. E. 582, 152 N. C. 272.

<sup>21</sup> *Asher v. Howard*, 110 S. W. 895, 33 Ky. Law Rep. 696.

<sup>22</sup> *Asher v. Howard*, 110 S. W. 895, 33 Ky. Law Rep. 696.

<sup>23</sup> *Stocks v. Scott*, 58 N. E. 900, 188 Ill. 266.

<sup>24</sup> *Cisne v. Chidester*, 85 Ill. 523.

<sup>25</sup> *Helmann v. Hainz*, 65 Ill. App. 316.

§ 1122(2). *Indiana*

The court instructs the jury that, if you believe from the evidence that the note sued on was executed by defendant, then the burden rests on defendant to establish his affirmative defense that the note was without consideration, or was given for the individual debt of his partner, because the presumption is, in the absence of evidence to the contrary, that there was a sufficient consideration to support the promise to pay the amount expressed in the note.<sup>26</sup>

§ 1122(3). *Kansas*

You are instructed that the notes in question are what is known in law as negotiable instruments, and in this connection I say to you that the possession of a negotiable instrument, payable to order, and properly indorsed, is prima facie evidence that the holder is the owner thereof, that he acquired the same in good faith, for full value, in the usual course of business, before maturity, without notice of any circumstance which would impeach its validity, and that he is entitled to recover upon it, and this prima facie case is not overthrown by matters which at best do no more than create a suspicion; and in an action of this kind upon negotiable promissory notes claimed to have been transferred by the payee before maturity, without notice of any defense thereto, the burden of proof is upon the defendant maker of the notes where he admits their execution to prove that they were not so transferred.<sup>27</sup>

§ 1122(4). *Massachusetts*

The jury are instructed that the burden of proof is on the plaintiff to show that the note sued on was given upon a valuable consideration, and that, if that is doubtful upon the whole evidence, he cannot recover; that proof of the execution of the note and its production in evidence make a prima facie case for the plaintiff, upon which they may find a verdict for him, unless the defendant has introduced evidence which shows, either that it was not given for a valuable consideration, or that the consideration had failed, or evidence to render it doubtful in their minds whether it was given on a valuable consideration, and that, if not so given, or if it was doubtful whether it was given for a valuable consideration, either for want of a valuable consideration, or for failure of consideration, the plaintiff cannot recover.<sup>28</sup>

<sup>26</sup> *Cunningham v. Hoff*, 20 N. E. 756, 118 Ind. 263.

<sup>27</sup> *Ireland v. Shore*, 137 P. 928, 91 Kan. 826.

<sup>28</sup> *Burnham v. Allen*, 1 Gray (Mass.) 496.

## § 1122(5). Michigan

You are instructed that the note, being fair on its face, makes a prima facie case in favor of the plaintiff. To overcome this, or to make out a defense, the burden of proof is on the defendant. In any disputed question of fact, as to anything which is necessary to make out the defense, the jury should not find the defense established unless they are satisfied, by a preponderance of evidence, that the fact is as claimed by the defendant.<sup>29</sup>

## § 1122(6). Missouri

The court instructs the jury that, if they believe from the evidence in this case that defendant did not sign the note, filed in this case, they will find for defendant, and, that the burden of proof rests upon the plaintiff throughout the entire case to prove by a preponderance of the evidence—and by that is meant the greater weight of the evidence—that defendant signed the note sued on.<sup>30</sup>

The court instructs the jury that under the pleadings and evidence the defendant has admitted the execution of all the notes sued upon by plaintiff in this case, and has admitted that plaintiff is the legal owner and holder of said notes. It is therefore the duty of the jury to find for the plaintiff as to each and all of said notes, unless the jury believe from the evidence that some one or more of said notes was obtained by the bank as a matter of accommodation, as explained in other instructions.<sup>31</sup>

## § 1122(7). South Dakota

You are instructed that, if you believe from the evidence that the note sued on in this case was without consideration and was obtained from the defendant, by fraud, then the burden of proof rests upon plaintiff to show that he is a bona fide purchaser of the note, for value, and before maturity, and that question is submitted to you. You have no right arbitrarily to say that you disbelieve a witness unless you believe from the evidence that you have just cause, under all the evidence in the case, to disbelieve him. But the question of fact is for you to determine whether or not the purchaser of the note [the witness ———], who claims to have bought it for the plaintiff, and who claims to have made some inquiries about it, bought the note in good faith, and for valuable consideration, without any knowledge or notice of any defense to it.<sup>32</sup>

<sup>29</sup> Cook v. Brown, 29 N. W. 46, 62 Mich. 473, 4 Am. St. Rep. 870.

<sup>30</sup> German-American Bank v. Barnes (App.) 185 S. W. 1194.

<sup>31</sup> Chicago Title & Trust Co. v. Brady, 65 S. W. 303, 165 Mo. 197.

<sup>32</sup> Landauer v. Sioux Falls Imp. Co., 72 N. W. 467, 10 S. D. 205.

## § 1122(8). Texas

The jury are instructed that, if you believe from the evidence that the notes sued on, or any of them, were transferred and assigned to ———, the plaintiff, before maturity for a valuable consideration, then you will find for the plaintiff and assess his damages at such amount as may be due on said notes, unless you believe from the evidence that the consideration for said notes has failed, and that the plaintiff had notice of such failure prior to such transfer. You are further instructed that the burden is upon the defendant to prove such notice to plaintiff.<sup>83</sup>

## § 1122(9). Virginia

The court instructs the jury that the burden of proof in the case is upon the bank to prove to the satisfaction of the jury by preponderance of evidence every fact essential to place upon the defendant liability for the debt sued on.<sup>84</sup>

The jury are instructed that, the defendant ——— having, by his plea and affidavit, denied that he either indorsed his name on the said two notes sued on or authorized any one else to indorse his name thereon, the burden of proof is upon the plaintiff to show that the said indorsement of the name of defendant upon the said notes sued on was made by him or some one duly authorized to put his signature upon the said notes and bind him thereon as an indorser on the said notes; and if the jury believe from the evidence that the said defendant did not indorse the said notes, did not authorize any one to indorse them for him, then they cannot find the defendant liable by virtue of such indorsement.<sup>85</sup>

## § 1123. Same—Rule where title of person negotiating sale to plaintiff is defective

You are instructed that every holder of negotiable paper is deemed prima facie to be a holder in the due course of business; but, when it is shown that the title of the person who has negotiated the instrument was defective, the burden is upon the holder to prove that he is the holder in due course of business.<sup>86</sup>

You are instructed that the title of a person who negotiates an instrument is defective within the meaning of the law when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal con-

<sup>83</sup> Kampmann v. McCormick, 59 S. W. 832, 24 Tex. Civ. App. 462.

<sup>84</sup> Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

<sup>85</sup> Bowman v. First Nat. Bank of Broadway, 80 S. E. 95, 115 Va. 463.

<sup>86</sup> Ireland v. Shore, 137 P. 926, 91 Kan. 326.



sideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.<sup>87</sup>

**§ 1124. Presumptions and burden of proof where note obtained by fraud**

**§ 1124(1). Iowa**

The court instructs the jury that if you should find that the said note and the signatures of defendants thereto was obtained through the fraud of ———, the payee, or on account of ——— having warranted the horse to be sound when he was not, then the burden is upon the plaintiffs to show by a preponderance of evidence that they acquired said note in the ordinary course of business, for value, before maturity, and without notice of such fraud or breach of warranty or of either of these, or of any other fact or circumstances which would amount to actual bad faith on their part should they not make an investigation as to the same before they can recover. To constitute notice of an infirmity in the instrument, the person to whom it is negotiated must have actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.<sup>88</sup>

**§ 1124(2). Michigan**

You are instructed that if you find that at the time the note in question was procured from defendant it was represented to him that the ——— Association was a corporation having its principal office and headquarters at ———, in the state of ———, and the defendant, relying upon the truth of such representations, gave the note, and would not have given it but for such representations, and such representations were false, then the note was fraudulently procured, and plaintiff cannot recover, unless he shows himself or ——— to be a bona fide holder for value.<sup>89</sup>

You are instructed that, if you find that at the time the note in question was procured from defendant it was represented to him that the ——— Association was thoroughly responsible, and had \$—— deposited as security for the performance of the contracts made by it, and defendant relied upon such representations, and

<sup>87</sup> Ireland v. Shore, 137 P. 926, 91 Kan. 326.

<sup>88</sup> Bank of Bushnell v. Buck Bros., 142 N. W. 1004, 161 Iowa, 362. In this case the evidence was such as to sustain a finding that the payee negotiated the note for the purpose of cutting off defenses which the court says would in itself be fraudulent.

The court says that the above instruction does not direct the jury that a simple breach of warranty, without fraud, places the burden upon the plaintiff to show that it had no notice of such breach.

<sup>89</sup> Mace v. Kennedy, 36 N. W. 187, 68 Mich. 389.

would not have given the note in question but for such representations, and such representations were false, then the note was fraudulently procured, and plaintiff cannot recover here, unless he shows himself or ——— to be a bona fide holder for value.<sup>40</sup>

You are instructed that, if you find that at the time the note in question was procured it was represented to defendant that the ——— Association was incorporated, and defendant relied upon such representation, and would not have given such note but for such representation, and the same was false, then the note was fraudulently procured, and the plaintiff cannot recover here, unless he has shown himself or ——— to be a bona fide holder of the same for value.<sup>41</sup>

§ 1124(3). Minnesota

You are instructed that, if you find from the evidence that the note sued on was obtained by fraud and artifice, the burden of proof would shift to the plaintiff to show that he took the note in good faith before maturity, in the regular course of business. He must ordinarily show under what circumstances and for what value he became the holder. The reason of this rule is, where there is fraud, the presumption is, he who is guilty of it will part with the note thereby acquired for the purpose of enabling some third party to recover on it, and such a presumption operates against the holder, and suspicion follows the note into his hands, and fastens to his title.<sup>42</sup>

§ 1124(4). Missouri

You are instructed that if you believe from the evidence that the note sued on was without consideration, and that the payee in said note, with the intent to deceive, made false representations to defendant as to the quality of the ——— for the purchase price of which the said note was given, and that defendant relied upon such representations and was deceived thereby to his injury, then, before plaintiff can recover, he must show by the greater weight of the evidence that he is a bona fide owner of such note, that he purchased the said note for value before maturity, and that he had no knowledge of such want of consideration, or of such fraud and misrepresentations.<sup>43</sup>

The jury are instructed that, if the jury believe and find from the evidence that the notes in suit were obtained by fraud on the part of ——— and his agents, then the burden is on the plaintiff,

<sup>40</sup> Mace v. Kennedy, 36 N. W. 187, 68 Mich. 389.

<sup>41</sup> Mace v. Kennedy, 36 N. W. 187, 68 Mich. 389.

<sup>42</sup> First Nat. Bank of Decorah v. Holan, 65 N. W. 952, 63 Minn. 525.

<sup>43</sup> Birch Tree State Bank v. Dowler, 145 S. W. 843, 163 Mo. App. 65.

and it must show by greater weight of the testimony that it bought said notes in good faith, in due course of business, without notice of the fraud by which ——— obtained said notes, and if the plaintiff has not made such proof, then your verdict must be for the defendant.<sup>44</sup>

**§ 1124(5). South Dakota**

You are instructed that the burden of proof in this case is upon the plaintiff upon the question as to whether or not the plaintiff was a purchaser in good faith.<sup>45</sup> ✓

**§ 1125. Burden of proof where indorsement without consideration or procured by fraud**

The court instructs the jury that, if you believe from the evidence that plaintiff, before maturity of the note sued on, at plaintiff's place of business in the town of ———, in good faith, bought of ——— said note, indorsed in blank by defendant, and issued a certificate of deposit for \$—— therefor, without notice that the indorsement was without consideration, or had been procured by fraud, or that said note had been dealt with in any manner which would impeach its validity, then the verdict should be in favor of plaintiff, and the burden is upon defendant to prove that plaintiff at the time it became the holder of the note sued on had notice that the indorsement was without consideration, or had been procured by fraud, or that the note had been dealt with in a manner which would impeach its validity.<sup>46</sup>

**§ 1126. Presumption as to capacity in which note signed**

The court instructs the jury that, although you may believe from the evidence that the name of the defendant, ———, appearing upon the notes offered in evidence, and appearing upon the left-hand side of the notes, was written by her, yet you are instructed as a matter of law that, being so placed upon the left-hand side of said notes, a legal presumption arises that she signed the same in the capacity of a witness, and, unless such presump-

<sup>44</sup> *Bank of Ozark v. Hanks*, 125 S. W. 221, 142 Mo. App. 110.

<sup>45</sup> *McGill v. Young*, 92 N. W. 1066, 16 S. D. 360.

See, also, ante, § 1122, note 32.

<sup>46</sup> *Hudson v. Repton State Bank*, 75 So. 695, 16 Ala. App. 101. Apparently the pleadings and evidence in this case made applicable the rule in Alabama (*Elmore County Bank v.*

*Avant*, 66 So. 509, 189 Ala. 418; *Alabama Nat. Bank v. Halsey*, 19 So. 522, 109 Ala. 197) that, when the evidence shows that the plaintiff purchased the note sued on in due course of trade before maturity for value, the burden then shifts to defendant to show that plaintiff, at time of acquiring the note, had notice of the fraud in its procurement.

tion is overcome by some evidence outside of the notes, your verdict should be for the defendant.<sup>47</sup>

**§ 1127. Presumption as to whether defendant liable as maker or indorser**

You are instructed that it is claimed by the defense that, though the name of the defendant appears on the note in the place of a maker, it was understood and agreed that he was only to stand as indorser, and that only until the note became due. The burden of proving such an agreement is on the defendant who sets it up, and to prove it by a preponderance of testimony. It is not enough that one party so understood and intended it. It must appear that both concurred in it, and so agreed. To make a contract required the meeting of the two minds. Without this it was no contract.<sup>48</sup>

You are instructed that the note being by its terms payable to B., or bearer, would make it payable to any lawful holder without any indorsement by B. No such indorsement would be necessary to enable such holder to collect it, or maintain a suit thereon in his own name. He being named as payee in the note, therefore, affords no presumption that his signature at the bottom of the note was made as indorser, and not as maker.<sup>49</sup>

**§ 1128. Presumptions and burden of proof as to payment**

The jury are instructed that the note sued on, in the possession of the plaintiff and still uncanceled, is prima facie evidence that such note remains unpaid, and that the burden of proving payment thereof is upon the defendant.<sup>50</sup>

**§ 1129. Matters considered in determining whether plaintiff bona fide holder**

**§ 1129(1). Idaho**

The court instructs the jury that, in considering the question whether or not the plaintiff is a holder of the instrument sued on in good faith, you may consider the fact, if shown in evidence before you, as to whether or not the plaintiff has attempted to recover on the promissory note from the indorsers (that is, ———). as he has a right to proceed against ——— as the indorsers of the said promissory note to recover the amount due thereon from the indorsers. You may also consider as to whether or not, if given

<sup>47</sup> Kripner v. Lincoln, 66 Ill. App. 532.

<sup>48</sup> Cook v. Brown, 29 N. W. 46, 62 Mich. 473, 4 Am. St. Rep. 870.

<sup>49</sup> Cook v. Brown, 29 N. W. 46, 62 Mich. 473, 4 Am. St. Rep. 870.

<sup>50</sup> Sheffield v. Cleland, 115 P. 20, 19 Idaho, 612.

in evidence before you, the plaintiff knew or was acquainted with the defendants, or any of them.<sup>51</sup>

The court instructs the jury that the positive statement of the plaintiff as to his actions in purchasing the note in question are not necessarily to be taken as conclusive by the jury, but you should consider all of the circumstances and facts known and given in evidence, and determine from all of the facts and circumstances surrounding the alleged purchase, together with statements of the plaintiff, as to whether or not the plaintiff is such bona fide purchaser.<sup>52</sup>

#### § 1129(2). North Carolina

The jury are instructed that, in passing upon the question of whether the plaintiff has shown that he is such a holder in due course, you may consider the circumstances under which the note was obtained by him, the knowledge, if any he had; as to what the note was given for, the circumstances and position of plaintiff when he took the note, his knowledge, if any you find he had, of the character of business conducted by ———, his want of acquaintance with the makers of the note, and all the surrounding facts and circumstances, as you may find from the evidence, throwing or tending to throw light upon the bona fides of the transaction.<sup>53</sup>

#### § 1130. Parol evidence as to nature of liability

You are instructed that what the contract was between these parties is to be determined by the writing, the note itself. This is not to be controlled or altered or varied by proof of any parol or verbal agreement or understanding between them at or before the time of signing the note.<sup>54</sup>

You are instructed that it is not competent for the defendant to show, by parol or verbal testimony, as against the terms of the written instrument, that the agreement or understanding of the parties was that his liability should be that of an indorser only, nor that he was to be an indorser, or liable as such, only until the note should become due, and no longer, and all such testimony must be disregarded by the jury.<sup>55</sup>

<sup>51</sup> *Park v. Brandt*, 119 P. 877, 20 Idaho, 660.

<sup>52</sup> *Park v. Brandt*, 119 P. 877, 20 Idaho, 660.

<sup>53</sup> *Cochran v. Smith*, 88 S. E. 499, 171 N. C. 369.

<sup>54</sup> *Cook v. Brown*, 29 N. W. 46, 62 Mich. 473, 4 Am. St. Rep. 870.

<sup>55</sup> *Cook v. Brown*, 29 N. W. 46, 62 Mich. 473, 4 Am. St. Rep. 870.

**§ 1131. Sufficiency of evidence**

The court instructs the jury that, if you shall believe from the evidence in this case that defendant signed his name to the note sued on and read to you in evidence, then the law is for the plaintiff, and you will so find, unless you further believe from the evidence that the note was given without consideration.<sup>56</sup>

**§ 1132. Same—Of execution of note**

The jury are instructed that, before you would be warranted in finding a verdict for the plaintiff, you must believe and find from the weight or preponderance of the evidence that the defendant, actually signed, or authorized the signing of, the note in question. If the evidence on that point is equally balanced, your verdict should be for the defendant, and on that question the note itself should not be considered.<sup>57</sup>

You are further instructed, as a matter of law, that no legal obligation arises out of an acknowledgment or a ratification of an indebtedness, unless such acknowledgment or ratification is made with knowledge of all the facts bearing upon the question of liability; and in this case, although you may believe from the evidence that the defendant, ———, acknowledged having signed certain notes, yet if you further believe from the evidence that she had reference to other notes, or other indebtedness, and that she did not, at that time, know of the existence of the notes now in controversy, such acknowledgment would not render her liable on the notes in controversy.<sup>58</sup>

**§ 1133. Questions for jury****§ 1133(1). North Carolina**

The court instructs the jury, that where fraud in procuring the execution of the note sued on is alleged, and evidence offered tending to sustain it, the circumstances and bona fides of plaintiff's purchase are the material questions in the controversy, and both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it are for the jury.<sup>59</sup>

**§ 1133(2). South Dakota**

You are instructed that, on the other hand, the defendants claim that the circumstances disclosed by the evidence showed that this man ——— was not a purchaser in good faith, that it was sold

<sup>56</sup> *Torian v. Caldwell*, 199 S. W. 35, 178 Ky. 509.

<sup>57</sup> *Ingram v. Reiman*, 81 Ill. App. 123.

<sup>58</sup> *Kripner v. Lincoln*, 68 Ill. App. 532.

<sup>59</sup> *Cochran v. Smith*, 88 S. E. 499, 171 N. C. 369.

after it was due, and that, if there was any sale, it was merely colorable and for the purposes of this suit. It is claimed that ——— was not an innocent purchaser, but that he had such knowledge of the circumstances as would require him to make some research and inquiry as to the notes before buying. The defendants claim that these circumstances show that ——— was not a purchaser in good faith, even though he paid a valuable consideration. You gentlemen will have to determine the question whether or not ——— was a purchaser in good faith, for value, before the note became due.<sup>60</sup>

**§ 1134. Amount of recovery**

The jury are instructed that, if you find for the plaintiff, the amount of the verdict should be the face value of the note, with the interest as therein called for.<sup>61</sup>

**§ 1135. Recovery of interest**

The jury are instructed that a note in which no rate of interest is expressed draws interest after maturity, in virtue of the statute, at the rate of ——— per cent. per annum.<sup>62</sup>

<sup>60</sup> McGill v. Young, 92 N. W. 1066, 16 S. D. 360.

<sup>61</sup> First Nat. Bank v. Shank, 128 P. 56, 53 Colo. 446.

<sup>62</sup> New York Life Ins. Co. v. Martindale, 88 P. 559, 75 Kan. 142, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 362, 12 Ann. Cas. 677.



**CHAPTER LXXII****BOARDS OF TRADE**

§ 1136. Effect of rules on third persons.

§ 1136. Effect of rules on third persons

The jury are instructed that, if you believe from the evidence that the plaintiff went upon the Board of Trade and made contracts and traded with the members, he is bound by the rules, regulations, and customs of said board, the same as if he had been a member thereof, and in that case will not be permitted to plead his ignorance of said rules, regulations, and customs as a reason for not being bound by them.<sup>1</sup>

<sup>1</sup> Chicago Packing & Provision Co. v. Tilton, 87 Ill. 547.

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**CHAPTER LXXIII****BONDS**

§ 1137. Execution.

1138. Consideration—Forthcoming bond.

§ 1137. Execution

The jury are instructed that, if you believe from the evidence that the defendant did not sign the bonds sued on, but that his name was signed thereto without his authority, then you must find for the defendant, and in coming to a conclusion on this issue you must bear in mind that the burden of proof is on the plaintiff.<sup>1</sup>

§ 1138. Consideration—Forthcoming bond

The jury are instructed that, if they find that the property enumerated in said instrument in writing, declared on and read in evidence, was in possession of said R., and that plaintiff was about to take possession at the time the defendant executed the same, with the consent and instance of R., and thereupon the defendant voluntarily consented to allow R. to retain the possession thereof, then

<sup>1</sup> Rocky Mount Loan & Trust Co. v. Price, 49 S. E. 73, 103 Va. 298.

this was a sufficient delivery by the plaintiff to the defendant to entitle the plaintiff to recover in this action.<sup>2</sup>

The jury are instructed that if they find, from the evidence, that the goods and chattels in question were transferred to the plaintiff, and that he was entitled to the possession thereof at the time of the execution and delivery of the instrument declared on, and if the jury further find that the plaintiff was about to take possession thereof, and that thereupon R. procured the defendant to execute said instrument, and that R., after the execution of the same, by arrangement with the defendant, continued in possession of said goods and chattels, then the possession of R. was the possession of the defendant, and it became and was the duty of the defendant to deliver up the goods to the plaintiff, or pay the sum of money, according to the condition of said instrument. The arrangement between R. and the defendant, if proved, constituted a sufficient delivery to entitle the plaintiff to recover for a violation of his agreement.<sup>3</sup>

The jury are instructed that if they believe, from the evidence, that plaintiff gave to defendant the right of possession of the property, yet, if the jury further find said plaintiff did not, in fact, give defendant the actual possession (or control) of the property, and that said defendant has not ever been in the actual possession (or control) of said property in question, then the law is for the defendant, and he is entitled to your verdict.<sup>4</sup>

<sup>2</sup> *Leverenz v. Haines*, 32 Ill. 357.  
Plaintiff was assignee for the benefit  
of creditors of R.

<sup>3</sup> *Leverenz v. Haines*, 32 Ill. 357.  
<sup>4</sup> *Leverenz v. Haines*, 32 Ill. 357.

## CHAPTER LXXIV

## BOUNDARIES

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  - 1169(1). Illinois.
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  - 1169(3). South Carolina.
  - 1169(4). Virginia.
- 1170. Same—When verdict for plaintiff defendant on correctness of measurements.

#### D. ACTION FOR PENALTY FOR REMOVING LANDMARK

- 1171. What is landmark.
- 1172. Issues involved.
- 1173. Sufficiency of evidence.

#### A. INTERPRETATION OF DEED OR GRANT

##### § 1139. In general

I charge you that if, from the number of acres mentioned, the shape of the plat, as well as other parts of the description, the jury find that a grantor did not convey a piece of land which is in dispute, then the one who claims under such deed has not title to such land, even though such grantor may at one time have owned it.<sup>1</sup>

##### § 1140. Intention of grantor

You are instructed that, in locating land covered by a deed, in order to find out what land the grantor conveyed, the jury are not bound by any particular rule of location. The rules of location which usually govern must yield to the intention of the grantor as

<sup>1</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.

ascertained from the description of the land contained in the deed, and not from any parol evidence which might tend to contradict or vary its terms.<sup>2</sup>

You are instructed that, while it is true that, in locating the lands covered by a deed, the following rules are usually adopted in the order named: First, natural boundaries, such as creeks, rivers, mounds, etc.; second, artificial marks, which means the artificial marks made on the trees by the surveyor who ran the lines when the deed was made, or such old marks as were adopted then; third, adjacent boundaries; and, fourth, courses and distances—yet it is also true the superior of these rules must, and do, yield to the inferior when it appears from the deed itself that the inferior rule will locate the land so as to carry out the intention of the grantor.<sup>3</sup>

You are instructed that it is the duty of the jury, in locating land covered by a deed, to try and ascertain what land the grantor conveyed, and in doing this they must look to the deed itself, and locate the land by that description in the deed which more certainly shows the intention of the grantor.<sup>4</sup>

In locating a deed, a jury should take into consideration the number of acres mentioned, the shape of the plat, as well as other parts of the description contained in the deed, and locate the land covered by it so as to conform to that part of the description which the more certainly shows the intention of the grantor.<sup>5</sup>

### § 1141. Corners

#### § 1141(1). Missouri

You are instructed that, in determining the true line in question, the jury must give effect to the location of the corners as originally and first fixed by the public government surveyor, and, in order to determine the correctness of any corner in question, it is competent for the jury to consider the testimony of witnesses as to facts within their observation and knowledge; but calls in the field notes and surveys for fixed stones or witness trees, by which the original corners were designated by the surveyor, must prevail over calls for distances, if the two be inconsistent.<sup>6</sup>

You are instructed that the quarter section corner on the south side of section ———, as located and called for by the government field notes, map, and survey in evidence, must be taken as having been unalterably fixed before the surveys made by P., and he had

<sup>2</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.

<sup>3</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.

<sup>4</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.

<sup>5</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.

<sup>6</sup> Granby Mining & Smelting Co. v. Davis, 57 S. W. 128, 158 Mo. 422.

no power to change it or make it agree with new measurements, and the only authority or power he had or could lawfully exercise was in the way of attempting to find the true original location of the line and corners in question; and, if the results of his efforts were different from the results of previous survey or location, neither party is bound thereby, but both are free to show the truth in this case; and the burden is upon plaintiff to prove by the greater weight of the evidence that defendant occupies land over the true line on the east, for, if the weight of the evidence be equal, the verdict must be for defendant.<sup>7</sup>

**§ 1141(2). Nebraska**

The jury are instructed as a matter of law that government corners, fixed by a United States surveyor at the time of the original survey will control the field notes of the survey taken at the time the corner was erected, and will control the field notes or courses and distances of any subsequent survey. Such corner, if identified by proofs, is the best evidence of where the line should be. But in the absence of such corner, or satisfactory proof of its location, the field notes will govern and determine the true line, and such field notes and government plats in such case are prima facie evidence of its true location.<sup>8</sup>

**§ 1141(3). South Dakota**

The court instructs the jury that the government has made these surveys and subdivided them into sections and quarter sections, and surveyors are required to make a plat of them, and they are required at the time they make these surveys to make what they call field notes. These field notes are just simply a little notation of the direction in which they go. They start out from a particular point, and these field notes are a short notation of the direction they go, the distances that they go, and the landmarks, the mounds, or pits, or methods, that they use in designating the corners of these various sections and quarter sections. They are also expected to note the topography of the country around—that is, whether there are any lake beds and hills, etc.—and refer to this in connection with these corners that they may establish. I say they make a plat of that, and together with these field notes, explaining that plat, it is filed in the General Land Office in Washington. When the government of the United States sells or gives to an individual a piece of land, or gives him a patent to a piece of land, it is given or sold to him according to this plat that is there on file. You will find that all patents from the government read—that is to a quar-

<sup>7</sup> *Granby Mining & Smelting Co. v. Davis*, 57 S. W. 126, 156 Mo. 422.

<sup>8</sup> *Harris v. Harms*, 181 N. W. 158.

ter section of land—will call for 160 acres, but it always says, “according to the platted survey thereof on file in the Land Office.” Now that is the way the government hands out its land to the people. Always according to that survey; and, while it is supposed that every quarter section of land will have just 160 acres in it, it is a matter of common knowledge that very often it does not. It may be more, or it may be less; and whether it is more or whether it is less is always ignored by this plat and the survey that is filed in the Land Office. And if that boundary, if the boundary to any quarter section of land, as indicated by that plat and by the survey and field notes that are filed there, can be ascertained, it will govern the amount of land which that man is entitled to under his patent, whether it is more than 160 acres or less, or just 160 acres, and no matter what the particular location of it may be, whether it may be exactly rectangular or exactly on a meridian, or exactly on the line at right angles with a meridian, or not. So I say to you, if it can be ascertained, if the boundary lines of a piece of land, as designated by this plat and by the government survey, can be ascertained, that must always and for all time govern, and no man or no state has any right to change it or alter it in any manner. So, in the first place, when a man gets a patent to a piece of land, he is entitled to whatever is within the bounds of the plat corresponding to his description that is on file in Washington, and so long as he can establish that he is entitled to it, no matter how much it may take from another man, or how little the other man may have. The difficulty arises in the fact that very often the landmarks—and we will call them the corner marks—become, out in this country, obliterated. The instructions of the Land Office require that the surveyor, in subdividing these townships, shall, at every section corner and every quarter section corner, leave certain marks, which are generally a mound and a stake. Sometimes they say they shall put in a piece of charcoal, which is supposed to exist for a long time in the ground, or a charred stake, which lasts for a long time, or sometimes a stone. They describe what the mound shall be, and there is no doubt as to that, for all the witnesses seem to agree in regard to what the mounds and pits should be out in this country. Now, the surveyors, as I say, are required, to make those corner marks when they make this survey. They ought to conform to the instructions of the Land Department in making them. If they did, it is probable that the landmarks would last longer than they quite often do; but it is a matter of common knowledge that these pits are not always made just as perfect as is expected by the Land Department; and it is also a matter of common knowledge that they become destroyed in various and different ways, so that after



a long length of time it may be very difficult for a person to find many or very many of the original mounds or pits that were put there by the surveyors. Consequently these questions and difficulties in boundary lines arise.

Now, in this case, it seems that the people in this township have thought, or some of them at least, that the original lines as run by the original surveyors were indistinct and uncertain, and that they have gotten into some dispute about it, and there has been recently a survey in the last two or three years down in that country, in order to settle the question; and, while it is a matter that the whole township is interested in, the jury is called upon to only decide the question as between the plaintiff and the defendant. The plaintiff, of course, has a patent in this case which calls for the southeast quarter in section ———, 160 acres according to the government plat. The defendant has a patent, or at least succeeds to that patent, which calls for the northeast quarter of section ———, and the northwest quarter of section ———, each 160 acres according to the government plat. The dispute arises between these fellows as to where the original dividing line is between the southeast quarter of section ——— and the northwest quarter of section ———, and you are called upon to determine that question, if you can. When the township was subdivided, I think it practically undisputed that mounds were made along these section and quarter section lines of some kind. Landmarks of some kind were left there by the surveyors. Mr. ——— claims that the original mounds were at certain locations, and that if his line extends to those mounds that he is entitled to the piece of land which is in dispute, which I think is about seven, eight, or nine acres, somewhere in there; anyway, the strip of land between them. Now, if those mounds, or the places where they were, can be established with a reasonable certainty, that will be his line. Those mounds must govern. It don't make any difference whether they were right or wrong; they are the marks that must control the south boundary of Mr. ———'s land, if we can find them, if they can be located. I might go back a little, and say to you that when the original surveyors make a survey that, no matter how incorrect the survey is, no matter how crooked the line may be, no matter how far off from the proper place in the field notes the landmarks may be placed, those must control, if we can find them. So if a surveyor originally subdividing this township, or running this outside line, should have run a zigzag line through the township in either direction, and that line can be located, it must absolutely control; and no surveyor and no law has any business or any right to change it. You have a plat before you there that shows zigzag lines—not exactly zigzag lines, but

a crooked line—a red line running, some of them north and south, and some of them east and west, through this township. The law is, if that was the original line run by the surveyors of the United States, it must control, and it does not matter whether it gives him 160, 150, or 200 acres of land; it must control. If the original landmarks have been lost and obliterated, and the places where they were cannot be ascertained with reasonable certainty, then there are certain rules and certain laws prescribed by the government of the United States for the guidance of surveyors, by which surveyors may go out and as near as possible relocate the old corners. Now, the purpose of a surveyor who is called out to resurvey a township, or a part of it, is not to establish new corners. His business and object is to find the old corners, if he can. If they have been totally lost and obliterated, and he cannot find them by his eyesight, or cannot locate them by inquiry from people who live there, to a reasonable certainty, then he must take these field notes and the instructions of the Land Department, and the general knowledge and experience that a surveyor has, and relocate these old corners as near as he can. It is none of his business to make new corners. His business and object is to find the old ones as near as he possibly can. That is the idea of these resurveys.<sup>9</sup>

**§ 1142. Relocation of lost government corner**

I further charge you that it is the duty of the surveyor to follow monuments as called for in the original government field notes: and if they find a quarter section corner extinct, that is lost, and are unable to determine its original location from the field notes and plats of the government surveyor, then it is their duty to re-establish it equidistant, that is equal distance and in a straight line between the section corners.<sup>10</sup>

**§ 1143. Courses and distances—Presumption that line called for is straight**

**§ 1143(1). Massachusetts**

The jury are instructed that, in the absence of all controlling evidence, the true boundary would be a direct line from the end of one wall to the opposite wall, but that, if the jury should be satisfied that, at the date of the deed, there was in fact a fence passing from wall to wall around the "jog," and should also be satisfied from the acts of the parties to the deed, at the time of its execution and afterwards, that they understood and intended said fence as the

<sup>9</sup> *Mills v. Lehmann*, 133 N. W. 807, 28 S. D. 347.

<sup>10</sup> *Wilcox v. Jenison*, 164 N. W. 484, 198 Mich. 182.

the true boundary between their lands, then the "jog" would not pass by the deed.<sup>11</sup>

§ 1143(2). *South Carolina*

You are instructed that a boundary line, whose commencement is given, must be continued in the same direction, if possible, unless the contrary be shown.<sup>12</sup>

§ 1144. *Same—Reversing course*

See, also, post, § 1154(1).

The jury are instructed that the south line of the R. survey and the north line of the F. survey are coincident, that is, they are the same lines, and it is your duty, as far as you can from the testimony adduced before you (of the weight of which and the credibility of the witnesses you are the sole and exclusive judges), to follow the footsteps of the original surveyor, who put the south line of the R. survey on the ground when it was first surveyed for the purpose of being patented by the state. And in determining this question you are authorized to follow the calls in the way in which they are set forth in the written instruments offered in evidence, or if you deem it necessary, in order to harmonize the various calls and lines, you are authorized to reverse the calls, and to trace them in any way they were permitted to be traced by the witnesses on the stand before you.<sup>13</sup>

§ 1145. *Effect of call for adjoiners*

§ 1145(1). *South Carolina*

You are instructed that, when adjoining lands are called for in a conveyance, the true boundary of the adjoining tract is the true dividing line between the tract undertaken to be conveyed and the adjoining tract.<sup>14</sup>

I charge you that, in locating land covered by a deed, where it describes the land as containing a certain definite number of acres, without the addition of the words "more or less," and gives as boundaries some of the adjacent lands, and refers to a plat attached to the deed for a fuller description of the land conveyed, then, as a rule, the land conveyed is the land marked and delineated by the surveyor who run the lines when the deed was made, and such deed only covers the land so run, marked, and described.<sup>15</sup>

<sup>11</sup> *Davis v. Sherman*, 7 Gray (Mass.) 291.

<sup>12</sup> *Holden v. Cantrell*, 84 S. E. 826, 100 S. C. 265.

<sup>13</sup> *Hermann v. McIver* (Tex. Civ. App.) 140 S. W. 798.

<sup>14</sup> *Holden v. Cantrell*, 84 S. E. 826, 100 S. C. 265.

<sup>15</sup> *Connor v. Johnson*, 37 S. E. 240, 59 S. C. 115.

**§ 1145(2). West Virginia**

The court instructs the jury that in an action of ejectment the plaintiff cannot establish his own lines by running and locating the lines of the defendant's land, unless the plaintiff also shows, to the satisfaction of the jury, that the plaintiff's and defendant's lands join along the disputed line or lines, and that unless they believe from the evidence on this case that the line from A to C, as laid down on the ——— map in this action, is the line of the plaintiff's land as called for in her deed, they cannot find that as the true line between the plaintiff and the defendant.<sup>16</sup>

**§ 1146. Lines actually marked**

You are instructed that lines actually run and marked on the ground are the best evidence of the true location of the survey.<sup>17</sup>

You are instructed that, where the lines of a tract of land have been run and acquiesced in, and can be found, they constitute the true boundaries, which must not be departed from or made to yield to any less certain and definite matter of description or identity.<sup>18</sup>

**§ 1147. Fences as evidence, where monuments placed under original government survey have disappeared**

See, also, post, § 1161(3).

The jury are instructed that, unless you find by the preponderance of evidence that the line located by ——— is on the line located by the original government survey, then the plaintiff cannot recover in any event. It will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, without some proof of its being a true line, located and fixed by the original government survey. The only practical way of ascertaining the true line is by a survey made from some fixed starting point, some monument placed under the original government survey; and, if such monuments are no longer discoverable, the question is, where were they located? And fences of long standing, erected upon what parties have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared.<sup>19</sup>

**§ 1148. Call for highway as boundary**

The court instructs the jury that if, in surveying the boundary of the city of ———, it was found that the survey would not close by following the northern boundary of the L. turnpike, as called

<sup>16</sup> *Vintroux v. Simms*, 31 S. E. 941, 45 W. Va. 548.

<sup>17</sup> *Holden v. Cantrell*, 84 S. E. 826, 100 S. C. 265.

<sup>18</sup> *Holden v. Cantrell*, 84 S. E. 826, 100 S. C. 265.

<sup>19</sup> *Pugh v. Schlindler*, 86 N. W. 515, 127 Mich. 191.

for by the act of the Legislature establishing the boundary of the city of ———, and read to you in evidence, and the northern boundary of said turnpike was a well marked and defined boundary, then in establishing and locating said boundary it was proper to follow said northern boundary of said turnpike from the point where said line first struck same under the calls of said act to the point nearest to the corner called for as being ——— poles south of the intersection of ——— and ——— streets, and to then extend or deflect the line, if necessary to make said survey and boundary close at such point; and if you believe from the evidence before you that such boundary was so located and established in the making of the survey and map or plat of the city offered in evidence, and shall further believe from the evidence that the property of the defendants is within said boundary as so established, then you ought to find for the plaintiff, and unless you so believe you ought to find for the defendant.<sup>20</sup>

**§ 1149. River or stream as boundary—High-water mark**

The jury are instructed that the question as to what in law constitutes ordinary high-water mark is the leading question in this case. It therefore becomes necessary to define what the law regards as ordinary high-water mark. It does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, since the waters brought by these annual rises do not usually remain permanently, or for any great length of time, and crops may be raised on the soil as the water subsides. Nor yet does it mean meadow land adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing or pasturing purposes.<sup>21</sup>

The jury are instructed that the line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner—that is, the owner of adjoining land—and is not the line reached by unusual floods, but that which is shown by the character and condition of the soil and vegetation to be the limit to which high water ordinarily reaches. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow upon it, may be regarded as part of the bed of the river which overflows it, and consequently

<sup>20</sup> *City of Georgetown v. Lynn*, 178 S. W. 1085, 165 Ky. 840.

<sup>21</sup> *Welch v. Browning*, 87 N. W. 430, 115 Iowa, 690.

soil to the use of which the public have the same right that they have to waters of the river.<sup>22</sup>

The jury are instructed that trees may be included under the general head of vegetation, but trees which grow and flourish best in the immediate vicinity of running streams that are subject to overflow, and which shoot up in places as the water recedes, and which can withstand the effect of water encompassing the lower part of their trunks without injury, and for a longer period than other kinds of trees, should not necessarily be classed as the kind of vegetation to which the law refers as marking the limit of ordinary high water in cases of the character such as the one now on trial, unless the soil on which they grow is adapted to and can be used for agricultural purposes, or are so far removed from the effect of ordinary high water as to become permanent. You are to say from the evidence before you whether or not the trees mentioned and located in the testimony as growing upon the particular portion of the land, the character of which is, in this action, the subject of dispute, are or are not growing on soil upon which crops may be raised or grass grown suitable for meadow or pasturage, or are so unaffected by high water as to become permanent. It is for you to say, under the evidence before you, whether the soil upon which these trees grow, and their location in respect to the river, can be used for agricultural purposes, such as the cultivation of crops or as meadow or not. So much of it as you may find susceptible of cultivation and the growing of crops would be above ordinary high-water mark, and not part of the river bed, as would also be groups of trees which have stood for many years unaffected by high water, and are permanently fixed in the ground.<sup>23</sup>

**§ 1150. Same—Effect of meander line**

**§ 1150(1). Iowa**

You are instructed that something was said in the testimony about the meander line of the tract in question. The meander line is not a line of boundary, and should not be so considered by you, but is made for the purpose of ascertaining the quantity of land in the tract. But such meander lines are not always conclusive of the quantities of land in the tract. In the long interval of time following the establishment of the meander line changes may occur by which the area of the tract may be either increased or diminished. It may be increased by earthy deposits made to the tract, which become incorporated with the soil of the tract. Such earthy deposits are usually called "alluvial accretions," and become the prop-

<sup>22</sup> Welch v. Browning, 87 N. W. 430, 115 Iowa, 690.

<sup>23</sup> Welch v. Browning, 87 N. W. 430, 115 Iowa, 690.



erty of the riparian proprietor. On the other hand, the soil of the riparian owner may be diminished by washouts, as they are called, caused by the current of high waters. In addition to this, there may be error in the statement of the quantity of land at the time the meander line was originally drawn.<sup>24</sup>

§ 1150(2). Oregon

I instruct you further that if you find from the evidence offered in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of ——— creek, covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek. I instruct you that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots; and where such line in fact meanders the stream, under the laws of this state, the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a matter of law, that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint.<sup>25</sup>

§ 1151. Effect, in construing grant, of calls, courses, and distances in plat

You are instructed that it is true, as claimed by defendants, that the calls, courses, and distances laid down on a plat at the same time a grant is made cannot control or vary the calls, courses, and distances given in the grant; but where the grant is silent as to the distance between any two natural boundaries called for in the grant, and the distance is laid down on the plat, and you have located one of said natural boundaries, you can consider the distance given on the plat in locating the other natural boundary called for, if it aids you in locating the other natural boundary.<sup>26</sup>

<sup>24</sup> Welch v. Browning, 87 N. W. 430, 115 Iowa, 690.

<sup>25</sup> McNeely v. Laxton, 63 S. E. 278, 149 N. C. 327.

<sup>26</sup> Barnhart v. Ehrhart, 54 P. 195, 33 Or. 274.



**§ 1152. Effect of reference to other documents**

You are instructed that where a deed, after giving certain adjacent boundaries, refers to a plat attached to such deed for a fuller or better representation of the land, then this plat becomes incorporated into the deed as part thereof, and the one who claims title under such a deed is bound by the description of the land contained therein, and it cannot be changed or contradicted by parol evidence.<sup>27</sup>

You are instructed that, when a grantor adopts a plat attached to a deed as the true description of the land sold and conveyed, he thereby only warrants the land sold as described therein, and as run and delineated by the surveyor who surveyed the land at the time the deed and plat was made.<sup>28</sup>

**§ 1153. General rule as to relative importance or weight of various calls****§ 1153(1). North Carolina**

You are instructed that if there be more than one description in the deed or grant, and they turn out upon evidence not to agree, that is to be adopted which is the most certain. Course and distance from a given point is certain description in itself, and therefore not to be departed from, unless there be something else which proves the course and distance stated in the deed or grant was thus stated by mistake.<sup>29</sup>

**§ 1153(2). Texas**

The court instructs the jury that if, from the evidence, the lines, corners, or distances are uncertain, or there are contradictory or uncertain calls in the field notes of said survey, as applied to the evidence, if any, found on the ground, so that the facts, if any, actually found on the ground cannot be reconciled with each other or the field notes, then you will in their order give effect to these calls that in law are considered most certain and most liable to lead to a satisfactory and just conclusion, and to enable the jury to determine with the greatest certainty the true location of the land, to wit: (a) Calls for natural objects, such as streams, springs, mountains, and the like, if any, actually found upon the ground as called for will ordinarily control other calls or will ordinarily be given greater effect. (b) Artificial objects, such as marked lines, established corners, and the like, actually found on the ground, if any, will ordinarily control calls for either course or distance. (c)

<sup>27</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.

<sup>28</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.

<sup>29</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.

The course as called for in the field notes will ordinarily control and be given greater effect than distance as called for. (5) The beginning corner of a survey, as stated in the field notes, is not entitled to any greater consideration than any other corner, neither is the order in which the lines were run, as stated in the field notes, ordinarily of any consequence; reversing the courses, or beginning at some other corner is equally lawful. (6) The object and purpose of all the rules being to enable the jury to determine the true location of the survey, and to determine and establish the lines and corners as they were originally located and established by the surveyor on the ground, if they were so established, when their application as above given lead to contradictory results or uncertainty or confusion, then the rule should be adopted which on the whole leads to the greatest certainty in determining the true location of the land as it was originally located on the ground. (7) Now bearing carefully in mind the foregoing rules of law, you will from the evidence locate and determine the true location of the east boundary line of the ——— school land survey as the same was originally located on the ground.<sup>30</sup>

You are instructed that, in your deliberations to determine the location of the land described in the ——— patent, and whether or not it is included in the ——— survey, you will search for the footsteps of the surveyor in locating the ——— survey, and in this search you will be guided, first, by natural objects; second, artificial objects; and then by course and distance; yet in this case you will investigate all the evidence, and follow the actual survey of said ——— as it was made, if in fact made, by the surveyor, to decide said location of said land described in said ——— patent with reference to the said ——— survey.<sup>31</sup>

**§ 1154. Control of natural or permanent objects called for in deed**  
**§ 1154(1). United States**

You are instructed that our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground with reasonable certainty and, where he cannot be tracked on the ground, we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made; and you will constantly bear in mind, in considering the proof in this case, that in fixing the boundaries of a grant the rule requires that course shall control distance as given in the calls of the field notes of the survey, and that marked trees, designating a corner or a line on the ground, shall control both course and distance. In

<sup>30</sup> Runkle v. Smith, 133 S. W. 745,  
63 Tex. Civ. App. 549.

<sup>31</sup> Mayfield v. Williams, 11 S. W.  
530, 73 Tex. 508.

order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground the corner called for in the grant as the "beginning" corner does not control more than any other corner actually well ascertained, nor are we constrained to follow the calls of the grant in the order said calls stand in the field notes there recorded, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant.<sup>32</sup>

You are instructed that there has been proof given you tending to show where the two small hackberries called for as the intersection of the eastern and northern lines of the grant actually stood at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant; and, if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses ——— and ——— were the hackberries called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where said hackberries stood N. 70° W., until it intersects the western line of said grant will bound the eleven-league grant upon the north, and, if the ——— one-third of a league is situated wholly north of this line, it does not conflict with the said eleven-league grant, and you will find for the plaintiff.<sup>33</sup>

You are instructed that, if the proof does not satisfy you that the two hackberries mentioned in the testimony of the witnesses were the two hackberries called for by the original surveyor to serve as a landmark for corner at the intersection of the back (or north) line with the east line of said grant, and if a consideration of the whole proof satisfies you that the original surveyor began the survey at the "cottonwood" corner (the southeast corner), and marked and measured the east line, and did not actually trace and measure the west line of said grant, you should follow these footsteps of the surveyor, and, from the point where you find his footsteps stop (for it is not disputed that this line is marked to a greater distance than the distance called for in the grant as the length of this line) —from this point where you find the footsteps stop—you will run a line N. 70° W., to the west line of said grant for the north or back line; and, if this line so run will fall wholly south of the ——— survey, you will find for the plaintiff.<sup>34</sup>

You are instructed that if, from the proof, you are not able to fix

<sup>32</sup> *Ayers v. Watson*, 11 S. Ct. 201, 137 U. S. 584, 34 L. Ed. 803.

<sup>33</sup> *Ayers v. Watson*, 11 S. Ct. 201, 137 U. S. 584, 34 L. Ed. 803.

<sup>34</sup> *Ayers v. Watson*, 11 S. Ct. 201, 137 U. S. 584, 34 L. Ed. 803.

the place where the two hackberries called for in the grant as a land mark to designate the ——— corner of the ——— grant then stood, and the proof does not satisfy you that to reverse the calls and trace the lines the other way would most nearly harmonize all the calls with the foot prints left by the surveyor, you will fix the boundaries of the ——— grant by the courses and distances of the first and second lines of the survey, extending the second line so as to meet the recognized east line, extended on its course to the point of intersection with the extended second or north line; and, if the north line so fixed will embrace in the ——— grant any part of the ——— survey, you will find for the defendant.<sup>35</sup>

§ 1154(2). **Delaware**

We charge you, as requested by the plaintiff, that where a deed calls for natural and well-known boundaries, which are inconsistent with the description given in the deed by courses and distances, the lines go to these boundaries, disregarding the courses and distances.<sup>36</sup>

§ 1154(3). **Illinois**

You are instructed that, if there is any discrepancy between the courses and distances and the monuments mentioned in the survey of the road in question, the monuments must control.<sup>37</sup>

§ 1154(4). **North Carolina**

The court charges you that in locating the lines and boundaries of deeds and grants a call for a natural object, such as marked trees and county lines, and the lines of other tracts will control course and distance, so that the court charges you that in locating the lines and boundaries of grant No. ———, if you should find from the greater weight of the evidence that the calls of said grant are, "Beginning on a rock, known as the pinnacle," and find that this rock is the beginning corner of said grant, and "running thence N. 25° E. ——— poles to a pine and locust in the line of ——— and ——— counties," and you should further find from the greater weight of the evidence that said pine and locust are in said county line at the point marked red B, on the official map, and that this is a corner of said grant, and you should so further find that the next call in said grant is S. 58° E. to a white oak, and that the white oak called for is the point marked red C, on the official map, and you find that this is a corner of said grant, then the court charges you that the true line of said grant is from the pinnacle to the locust and in the county line, and thence with the county line to the white oak

<sup>35</sup> *Ayers v. Watson*, 11 S. Ct. 201, 137 U. S. 584, 34 L. Ed. 803.

<sup>36</sup> *Truitt v. Osler*, 90 A. 467, 4 Boyce, 555.

<sup>37</sup> *Daniels v. People*, 21 Ill. 439.

at the letter on the map, and you should so find, notwithstanding the courses and distances called for in the grant, and if you should further so find from the greater weight of the evidence that said grant when so located by you, following its calls from said white oak to the beginning, covers the same lands as are embraced in plaintiffs' grant No. ———, then the court charges you that you should answer the eighth issue "No."<sup>38</sup>

You are instructed that plaintiff has shown paper title to ——— acres of land in the island and to the adjoining main land on the west side; and this being a nonnavigable stream this title carries title to the land in the bottom of ——— river between the two tracts. But title to land is one thing and the location of the boundary line is another. Whether a party has shown title to a tract of land—that is, paper title—is a question of law and is for the court. Where the boundary line of that tract of land is is a question of fact, and is for the jury. And in the location of land lines natural objects such as streams, rocks, and trees govern courses and distances.<sup>39</sup>

**§ 1154(5). South Carolina**

You are instructed that the settled rule is that monuments, whether natural objects or artificial marks, are allowed to dominate courses and distances.<sup>40</sup>

**§ 1154(6). Texas**

You are charged, gentlemen, that in locating land lines and corners resort must first be had to the natural and artificial objects called for in the grant, if any of these can be found, and if any of these can be found the lines and corners must be established by them, and course, distance, quantity, or any other facts or circumstances cannot be considered to vary the result of establishing lines or corners as they would be established by such natural or artificial objects, if found. So in this case, if you find and believe from the facts that the live oak tree and the two stumps referred to by ——— and other witnesses for plaintiffs as being the witness tree for the southwest corner of survey No. ———, are the witness trees called for in the patent to surveys No. ——— or No. ———, or if you find and believe that either the live oak tree or the said stumps so spoken of by said witnesses are, or any one of them is, one of the witness trees called for in either one of said patents, then it is your duty to establish the southwest corner of survey No. ——— at the place claimed by plaintiffs, without considering any other facts or cir-

<sup>38</sup> *Garrison v. Williams*, 74 S. E. 975, 159 N. C. 425.

<sup>39</sup> *Fewell v. Catawba Power Co.*, 86 S. E. 947, 102 S. C. 452.

<sup>40</sup> *Holden v. Cantrell*, 84 S. E. 826, 100 S. C. 265.

cumstances, if there are any by which this result would be defeated, and in such case, if you so find, you will answer question No. ——— in the affirmative.<sup>41</sup>

The court charges the jury that, in determining the location of the line between said surveys, you will be governed by the calls in the patent to ———, and, if the evidence satisfies you as to the true location of said line as originally run and marked by the stakes and bearing tree mentioned in said patent, you should be governed by such line. If, however, the location of said stakes or bearing tree, as they existed when the patent was issued, are not satisfactorily established by the evidence, you will then be governed by the course and distance of said line as called for in the patent.<sup>42</sup>

**§ 1154(7). Virginia**

The court instructs the jury that, in questions of boundary, natural objects called for, marked lines, and reputed boundaries, well established, should be preferred in ascertaining the identity of a tract of land to the corners and distances of the calls of the grant.<sup>43</sup>

**§ 1154(8). West Virginia**

The court instructs the jury that in questions of boundary natural objects called for, marked lines and reputed boundaries should be preferred in ascertaining the identity of a tract of land to courses and distances of the calls of the grant or deed. If, therefore, you believe from the evidence that the poplar tree called for in the grant and the deeds introduced in evidence in this case, the location of which is in dispute, stood at the point designated by ——— and others, and further believe that the large spruce pine stood at the point designated by the said ——— and others, then the line between these said points is the proper location of the line called for in the grant and deeds introduced in evidence, although following the course and distance in said grant and deeds may not take the surveyor to the points where such timbers were located.<sup>44</sup>

**§ 1155. Control of call for artificial marks**

You are instructed that, in locating lands covered by a deed, where there are no natural boundaries, such as a creek, a river, mounds, etc., called for in the description contained in the deed, the next highest rule is the artificial marks made or adopted by the surveyor who ran the line at the time the deed was executed, and not any older marks which may be shown to exist on a different line.<sup>45</sup>

<sup>41</sup> Jackson v. Graham (Civ. App.) 205 S. W. 755.

<sup>42</sup> Boydston v. Sumpter, 14 S. W. 996, 78 Tex. 402.

<sup>43</sup> Reusens v. Lawson, 21 S. E. 347, 91 Va. 226.

<sup>44</sup> Billups v. Woolridge, 91 S. E. 1082, 80 W. Va. 13.

<sup>45</sup> Connor v. Johnson, 37 S. E. 240, 59 S. C. 115.



**§ 1156. Control of call for road over courses and distances**

You are instructed that, if you find that in the deed from \_\_\_\_\_ to \_\_\_\_\_ the intention of both the parties to the deed, in the light of all the evidence, was to make the road referred to in said deed the boundary between the land granted and that portion reserved, and that such intent can only be gratified by adopting the center of the road then existing, where the same does not conform to the courses and distances set out in the deed, then the jury can disregard the courses and distances where the same do not conform to the center of the road and determine the boundaries of the grant by the center line of the road.<sup>46</sup>

**§ 1157. When call for course and distance controls call for natural or artificial objects****§ 1157(1). North Carolina**

The court instructs the jury that if the jury shall find from the evidence that the grantee at the time of taking out the grant did not know where the \_\_\_\_\_ line was, and there was no general reputation at the time of its location, the call for such line would not displace course and distance, although it can now be ascertained mathematically, because it does not furnish as probable and rational evidence as course and distance; it would be appealing from evidence, certain to a common intent, to a thing altogether unknown to the parties at the time.<sup>47</sup>

The court instructs the jury that, if the jury shall find from the evidence that at the time of making the survey and taking out the grant, the location of the \_\_\_\_\_ line was unknown to the grantee, and there was no general reputation of such location, although the grantee may have known that \_\_\_\_\_ had land somewhere in that direction, and may have supposed the line of the same to be at the end of \_\_\_\_\_ poles from the black pine, whereas, as has been since ascertained, it is \_\_\_\_\_ poles to \_\_\_\_\_'s line, then the court charges you that the course and distance is more certain than the call for \_\_\_\_\_'s line, and the termination of the first line would be at the end of \_\_\_\_\_ poles marked "Chestnut Oak" on the map.<sup>48</sup>

You are instructed that, the first call in defendants' grant being N. 35° W. \_\_\_\_\_ poles to stake in \_\_\_\_\_'s line, and the distance from the point of beginning being nearly three times as far, or \_\_\_\_\_ poles, and the testimony of \_\_\_\_\_ being that at the time of the survey no line was actually run, except for the distance

<sup>46</sup> Whitridge v. Mayor, Etc., of City of Baltimore, 63 A. 808, 103 Md. 412.

<sup>47</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.

<sup>48</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.



of a few poles, and that he did not know where ———'s line was, this call is too vague and uncertain to vary the distance called for in the grant, and the first line should terminate where the ——— poles give out.<sup>49</sup>

The court instructs the jury that, the second call in defendants' grant being west ——— poles to a stake in ———'s line, and ———'s line being unknown at the time, and it being necessary, in order to reach any line of ———'s from a point where defendants claim their first line should run, to change this course and distance from due W. to S. 35° W., or almost run at right angles, and to run ——— poles instead of ——— poles, or nearly four times as far, and so doing to cross the lines of older grants twice, this call is too vague and uncertain to vary the course and distance called for in defendants' grant, and that defendants' second line should run ——— poles W. as called for in the grant.<sup>50</sup>

The court instructs the jury that, the third call in defendants' grant being S. 35° E. ——— poles to stake in his own line, and it being necessary, in order to reach the nearest point in his own line, to run ——— poles instead of ——— poles, or more than three times as far, and in so doing again cross the line of an older tract, providing the line is run from a point in ———'s line where defendants claim their second line terminates, this call is too vague and uncertain, to vary the course and distance called for in the defendants' grant, and the defendants' third line should run S. 35° E. ——— poles as called for in the grant from a point ——— poles W. of the point marked "Chestnut Oak" on the map.<sup>51</sup>

The court instructs the jury that, to vary the course and distance as called for in defendants' grant, so as to increase the distance of the first line from ——— poles to ——— poles, to change the course of the second line from due west to S. 28° W., or nearly turn at right angles, and to increase the distance of said line from ——— poles to ——— poles, or nearly four times as far, to increase the distance of the third line from 100 poles to ——— poles, with the result that the lineal measurement of defendants' fourth line, or southern boundary thereof, is practically ——— poles instead of ——— poles, said southern boundary being changed from a line ——— poles long running due east to an irregular line, and with the further result that the quantity of land embraced in defendants' grant would be increased from ——— acres to ——— acres, or practically fourteen times the amount called for

<sup>49</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.

<sup>50</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.

<sup>51</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.

in the grant, is so great a variation from course and distance as to shock probability, to sacrifice the certain for the uncertain; and the jury are instructed that the boundaries of defendants' grant are to be located with reference to the courses and distances named therein.<sup>52</sup>

§ 1157(2). Texas

On the question of the relative importance and dignity of calls mentioned in the court's main charge above given you, I give you the following additional charge on this issue, which you will consider in connection with the main charge: If you believe from the facts and circumstances in this case that the true location of the east boundary line of the one-league ——— county survey, as originally run or established, can be more certainly found or its locality determined by running the courses and distances called for in the field notes from such corner or corners, if any, as are established on the ground, if any, than by observing the calls for natural or artificial objects, if any, then, if you so believe, it will be your duty to locate the said east boundary line by observing calls for course and distance, if any, rather than observing calls, if any, for natural or artificial objects.<sup>53</sup>

§ 1158. Subordination of call for quantity to other elements

§ 1158(1). North Carolina

You are instructed that, in doubtful cases, quantity may have weight over circumstances in aid of the description, and in some cases may have a controlling effect.<sup>54</sup>

§ 1158(2). South Carolina

You are instructed that lines actually surveyed and marked and capable of identification will, according to well-settled principles of law, control calls for courses and distances in the determination and location of a boundary; likewise the call for quantity or a certain number of acres must yield to marked lines.<sup>55</sup>

You are instructed that a statement of the quantity of land supposed to be conveyed and inserted in a deed by way of description must yield to natural or permanent objects called for in the conveyance.<sup>56</sup>

§ 1158(3). Texas

The jury are instructed that, if there is any excess in quantity of land in the ——— survey such excess is not to be considered by

<sup>52</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.

<sup>53</sup> Runkle v. Smith, 133 S. W. 745, 63 Tex. Civ. App. 549.

<sup>54</sup> Wilson Lumber Co. v. Hutton, 68 S. E. 2, 152 N. C. 537.

<sup>55</sup> Holden v. Cantrell, 84 S. E. 826, 100 S. C. 265.

<sup>56</sup> Holden v. Cantrell, 84 S. E. 826, 100 S. C. 265.

the jury whether the same be great or small unless it enables or assists you to determine the true location of the south boundary line of the ——— survey. You are required to find the true location of the line of the survey ——— as originally run and located on the ground retracing the footsteps of the original surveyor, and it does not matter whether a greater or less quantity of land than that called for in the grant be included within the lines as originally run.<sup>57</sup>

### B. ESTABLISHMENT BY ACTS OF PARTIES

#### § 1159. Establishment by agreement—Essentials of agreement

##### § 1159(1). Missouri

The court instructs the jury that, if they believe and find from the evidence that one ——— and one ——— were the adjoining owners of the lands in dispute in this case about the year ——— or ———, and that they about that time procured ——— to run a line between said adjoining tracts of land for the purpose of erecting a fence for their convenience between their said tracts of land, and that on said ——— line a rail fence was erected then the line marked by the rail fence will not be regarded by the jury as establishing an agreed boundary line between their said tracts of land, unless you further find from the evidence that said ——— and ——— agreed that said line marked by said rail fence should be thereafter the boundary line between their land, and that each of them thereafter claimed to own to the said line marked by the said rail fence and no farther.<sup>58</sup>

You are instructed that, before you can find for defendant on the issue that the survey in the lane now dividing plaintiff's and defendant's field has been agreed upon as the division or boundary line between the southeast quarter of the southeast quarter of section ——— and the northeast quarter of the northeast quarter of section ——— you must be satisfied from the evidence that there was a mutual agreement between the owners of the land to that effect. The facts that ———, the former owner in section ———, erected the south line of fence along the lane, and cultivated the lands on the south side of such lane, will not of themselves alone be sufficient to prove such consent and agreement. You are further instructed that, in determining whether the land which divides the plaintiff's and defendant's property has or has not been agreed upon between the former owners of adjacent

<sup>57</sup> Branch v. Simons (Civ. App.)  
48 S. W. 40.

<sup>58</sup> Hilgedick v. Gruebbel, 151 S. W.  
731, 246 Mo. 140.

property as the division or boundary line, it is proper that you take into consideration the long acquiescence of adjoining owners in such line of division.<sup>59</sup>

§ 1159(2). Texas

You are charged that, in order to constitute an agreed boundary line between the owners of adjacent lands, the minds of both parties must meet as to the agreement, and in this case, if you believe from a preponderance of the evidence that \_\_\_\_\_ and \_\_\_\_\_ agreed that they would accept the line when they built the fence in the year \_\_\_\_\_, as a permanent boundary between the surveys Nos. \_\_\_\_\_ and \_\_\_\_\_, then you will find for the plaintiff. But if you find that said parties did not agree that said line upon which said fence was built was to be the permanent boundary line between said surveys, or that said fence was agreed to be built and maintained only until the true boundary line was discovered, then you will find for the defendant. And in this connection you are charged that the minds of both parties to a contract must meet and agree to the terms of the alleged contract. Therefore you are charged that both \_\_\_\_\_ and \_\_\_\_\_ must have agreed to establish a boundary line permanent in its nature, before plaintiff can recover in this case.<sup>60</sup>

The court instructs the jury that, by virtue of the agreement between the parties to this suit, there is but one issue for your determination, and that is: Did \_\_\_\_\_ and \_\_\_\_\_, while the owners of section \_\_\_\_\_ and section \_\_\_\_\_ respectively, agree upon the boundary line between said surveys, as alleged in plaintiff's petition? If you find from the evidence that while the said \_\_\_\_\_ was the owner and in possession of survey \_\_\_\_\_ and the said \_\_\_\_\_ was the owner and in possession of section \_\_\_\_\_ that they agreed upon a boundary line between said surveys as alleged in plaintiff's petition, and you further find that, in pursuance of such agreement, if any you find was made, they erected and maintained their fence thereon, and that the fence was on said line, and the plaintiff or those under whom he claims were in possession of the lands on the east side thereof at the time defendant bought his land, then you will find for the plaintiff. To constitute an agreement, the minds of the parties must meet and there must be a mutual understanding. If you find from the evidence that, in constructing the fence between their respective possessions, the said \_\_\_\_\_ or \_\_\_\_\_ did not intend thereby to fix or locate the boundary line between them, or that said fence was built for temporary

<sup>59</sup> Coleman v. Drane, 22 S. W. 801, 116 Mo. 387.

<sup>60</sup> Talley v. Bailey (Civ. App.) 181 S. W. 230.

purposes, or until the true line could be ascertained, then I charge you that you should find for the defendant.<sup>61</sup>

**§ 1160. Effect of agreement**

**§ 1160(1). Arkansas**

You are further instructed that where there is doubt or uncertainty or a dispute as to the true location of a boundary line, the parties may, by parol, fix a line which will at least, when followed by possession with reference to the boundary so fixed, be conclusive upon them, although the possession is not for the full statutory period; and, if you believe from the evidence in this case that the true location of the line between plaintiff and defendant was in doubt or uncertainty, and that the parties agreed upon a line between them, and in furtherance thereof put a joint fence thereon, and that the parties took possession of the land and cultivated same up to the fence so constructed, then you are instructed the line so fixed is conclusive upon the parties, whether right or wrong, although the possession of the land after agreement is not for the full statutory period of seven years.<sup>62</sup>

**§ 1160(2). Georgia**

The court instructs you that there is another principle of law which is not to be confused with the principle just submitted to you; that is, where the boundary line between coterminous proprietors adjoining landowners is unascertained, unsettled, and not agreed to between the parties and is disputed, and the parties get together by agreement, settle the dispute by establishing fences or marking trees or the like, and then follow up such agreement by each possessing the land up to the line, such agreement operates to settle and establish the line and make it the boundary line between the parties in such case. And the court instructs you that if you believe from the evidence that the parties to this cause, or their predecessors in title, or either of them, have in this manner with adjoining landowners settled upon and established the boundary between the property in controversy in the case, such acts would operate to control you in the determination of this issue.<sup>63</sup>

**§ 1160(3). Illinois**

The jury are instructed that it is perfectly competent for parties owning adjoining tracts of land to settle, by agreement, where the division line shall be; and if the jury shall believe, from the evidence that the plaintiff and defendant owned adjoining tracts

<sup>61</sup> Talley v. Bailey (Civ. App.) 181 S. W. 230.

<sup>62</sup> Turquett v. McMurrain, 161 S. W. 175, 110 Ark. 197.

<sup>63</sup> Shiver v. Hill, 97 S. E. 676, 148 Ga. 616.

of land, and any question or dispute had arisen as to where the line now in controversy was, and the plaintiff and defendant agreed upon the line and established it, as between themselves, then, in that case, it is wholly immaterial where a survey would put the line. Each party is bound by his agreement, and in determining whether there was such agreement and fixing of the line it is competent for the jury to take into consideration acts and statements of the parties at the time, the acts done by each, and the fixing and adjustment of fences and improvements by them, under such agreement, if any are proven.<sup>64</sup>

**§ 1160(4). Kentucky**

The jury are instructed that the line ——— is the true division line between the two patents according to their respective calls, and that you must find for the plaintiff unless you believe from the evidence that the respective owners, being in doubt as to where the true line was situated, established it by agreement at ———, and that ——— and his vendor occupied the disputed territory continuously, openly and notoriously claiming it as their own up to a well defined and marked boundary, in such a way as to give notice of their adverse holding, for ——— years next before the institution of this action, in which event you will find for the defendant.<sup>65</sup>

**§ 1160(5). South Carolina**

You are instructed that, if the boundary between contiguous lands is uncertain, the owners of the adjoining tracts may agree upon a certain line as a boundary, and such boundary is binding upon them and their successors in title, especially so when it is followed up by actual occupation.<sup>66</sup>

You are instructed that, where parties by mutual agreement and for that express purpose meet and fix a boundary line and thereafter acquiesce in the line, such line will be considered the true line between them, where there is no fraud or misrepresentation.<sup>67</sup>

**§ 1160(6). Texas**

The court instructs the jury that, if you find that a valid agreement was made between the said ——— and ——— as hereinabove charged, and that such agreement was acted upon by the mutual construction of a fence on the line agreed upon, and that said fence was being maintained on the line at the time the defendant bought his land, then I charge you that said fence line, if any, was notice to the said defendant of all rights claimed by the plaintiff and

<sup>64</sup> Cutler v. Callison, 72 Ill. 113.

<sup>65</sup> Berry v. Evans, 89 S. W. 12, 28  
Ky. Law Rep. 22.

<sup>66</sup> Holden v. Cantrell, 84 S. E. 826,  
100 S. C. 265.

<sup>67</sup> Holden v. Cantrell, 84 S. E. 826,  
100 S. C. 265.

those under whom he claims on the east side thereof, and that it is not necessary for the plaintiff to show further notice. I further charge you that, if you find an agreement was made between the said ——— and ——— as charged in the first paragraph hereof, such agreement would be binding upon them and their assigns whether the line agreed upon between them, if any, was correct or not, and the true location of the correct line would not be material.<sup>68</sup>

### § 1161. Establishment by acquiescence

#### § 1161(1). Alabama

The court charges the jury that if they believe from the evidence that the boundary line in question was in dispute, and that the adjoining owners caused said line to be established, and that they acquiesced in said line, then the plaintiff would be deemed to be the owner of all lands north of the line so established, lying in section ———, township ———, range ——— west.<sup>69</sup>

#### § 1161(2). Illinois

The court instructs the jury that, even if the jury believe, from the evidence, that F. never expressly agreed to the line upon which the defendant built his fence, yet if they further believe that the defendant insisted on said line being ascertained by survey before he accepted a deed for the part of lot ——— which he then bought, and that a survey was made for that purpose and the line established where he built his fence in the spring of ———, and that the said F. with knowledge of said survey and the purpose of making it, without protest or resistance permitted the defendant to build his fence on the line of said survey, and afterwards built and maintained his part of said partition fence on said line, and, as long as he owned said lot ———, acquiesced in the claim of the defendant that said fence was on the true line between said lots, and that the defendant had possession of the strip of land in controversy when the said F. conveyed to the plaintiff, these facts are proper to be considered by the jury in determining whether there was an implied agreement or not.<sup>70</sup>

#### § 1161(3). Michigan

I charge you that the United States government in its original survey fixed section corners and quarter posts. The division of the section was afterwards done by surveyors and points established thereon from the original corners and quarter posts there-

<sup>68</sup> Talley v. Bailey (Civ. App.) 181 S. W. 230.

<sup>69</sup> Cooper v. Slaughter, 57 So. 477, 175 Ala. 211.

<sup>70</sup> Clayton v. Feig, 54 N. E. 149, 179 Ill. 534.



on, and if the government surveys had all been accurate and in accordance with the rules laid down for the guidance of the surveyor there would commonly be no difficulty in locating the government subdivisions with reasonable certainty even if the monuments had disappeared. But government surveyors were not always accurate in their work, and monuments do sometimes disappear, and a fence of long standing erected upon what the parties have called the true line and up to which they have improved and cultivated is better evidence of the true line than a survey made after the monuments had disappeared.<sup>71</sup>

I further charge you that it is the claim of the defendant that this so-called "true quarter line" was marked by an old fence substantially along such true quarter line, and that such fence constituted a boundary line between the lands of adjacent owners for more than \_\_\_\_\_ years. Now if you find from a fair preponderance of the testimony that such old fence did exist and was acquiesced in as a boundary line, then the plaintiff cannot recover, and your verdict would be for the defendant.<sup>72</sup>

I further charge you that in determining the true boundary line between the parties to this suit, you may consider the testimony with respect to any old fences between the disputed strip of land, and if you find from the testimony that an old fence for \_\_\_\_\_ years continuously or more ran along the north edge of the wood lot in dispute, and that such fence constituted the boundary line between the disputed strip of land adjoining to the north and was acquiesced in as such boundary line by such owners, then it will be your duty to return a verdict for the defendant regardless of whether such line actually constituted the east and west quarter line of sections \_\_\_\_\_ and \_\_\_\_\_, as run by the surveyor, or not.<sup>73</sup>

I further charge you that long acquiescence in a supposed boundary line extending for a period of \_\_\_\_\_ years or more between adjoining landowners, should be considered as such an agreement upon such lines as to be conclusive, even if originally located erroneously, and if you should find that the north line of the wood lot, so-called, has been acquiesced in for a period of \_\_\_\_\_ years or more by the owners of the lands adjoining on the north and south as the boundary between said lands, then you must find that such line is the true boundary between the parties to this suit, and in that event your verdict must be for the defendant.<sup>74</sup>

<sup>71</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>72</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>73</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>74</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

I further charge you that long acquiescence in and recognition of a boundary line between adjoining owners of land extending over a period of ——— years or more is sufficient to support a claim that said line is the true boundary between such owners, and such line should not be disturbed or upset by any surveys based on alleged original monuments or courses of direction.<sup>75</sup>

**§ 1162. Agreement for survey of boundary**

You are instructed that, if the jury believe from the evidence that the defendant ——— made an agreement with the plaintiff to have the line dividing the northern portion of section ——— and the southern portion of section ———, township ———, range ——— west, ascertained by a survey, the jury may look to such an agreement, in connection with all the other evidence, in determining whether the possession of the defendants has been adverse or not.<sup>76</sup>

**C. EVIDENCE**

**§ 1163. Presumptions and burden of proof**

**§ 1163(1). Michigan**

I charge you that the United States statute requires that the government surveyors—that is, men surveying government lands—set the quarter section posts at equi-distance from the north and south lines of the sections, and that the quarter section lines shall run through the middle line of the said sections; and it is the duty of the government surveyor to make his survey and set the quarter section posts in this manner, and he is presumed to have done his duty and to have placed these lines and posts as the law requires him to do.<sup>77</sup>

You are instructed that the burden therefore is upon the party who claims the government surveyor made a mistake in his survey to show that the government surveyor did commit the blunder as claimed and failed to do his duty, and unless the defendant has shown that the government surveyor did make a mistake, and that the ——— line is incorrect, then on this branch of the case, you must find for the plaintiff.<sup>78</sup>

The court instructs the jury that the burden of proof is on the plaintiff to establish her claim by a fair preponderance of the evidence; unless the plaintiff has so established her claim by a fair preponderance of the evidence, your verdict would be for the defendant. There is an exception to this rule, to wit: If she has es-

<sup>75</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>76</sup> Cooper v. Slaughter, 57 So. 477, 175 Ala. 211.

<sup>77</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>78</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

tablished by a fair preponderance of the evidence that the ——— survey is in fact the original government survey line, then the burden is upon the defendant to show that the boundary line between these parties ought to be elsewhere. Now that will require a little explanation to make it consistent and harmonious. I have said to you that the presumption was in favor of the government surveys always, but that presumption may be overcome by evidence. The presumption also is that the government surveyors do their duty and make no mistakes, and that the center line will be in the actual center of the section, that is, the quarter line will be, but that presumption also can be overcome.<sup>79</sup>

§ 1163(2). **Texas**

The court instructs the jury that the burden of proof is upon the plaintiffs to establish the affirmative of questions Nos. 1 and 2 by the preponderance of evidence, and you are further instructed that the burden of proof is upon the plaintiffs to establish the fact that the original surveyors, in fixing the southeast corner of the M. survey and the southwest corner of the E. survey, placed said corner on the N. bank of what plaintiffs claim is the abandoned portion of the river.<sup>80</sup>

§ 1163(3). **Virginia**

The court instructs the jury that the burden in this case is upon the plaintiff to prove to the satisfaction of the jury that he had a complete legal title to the premises claimed by him, and the right to the possession thereof at the institution of this suit, before he can recover, and that he must recover, if at all, on the strength of his own title, and cannot rely on any weakness of the title of the defendant, and that in order to recover he must prove affirmatively that he is entitled to the premises, and that the defendant is not entitled, before recovery can be had.<sup>81</sup>

§ 1164. **Presumption of correctness of field notes showing course and distance**

The jury are instructed that the public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the lines of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the courses of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular cir-

<sup>79</sup> *Wilcox v. Jenison*, 164 N. W. 484, 198 Mich. 182.

<sup>80</sup> *Producers' Oil Co. v. State* (Civ. App.) 213 S. W. 349.

<sup>81</sup> *Bradshaw v. Booth*, 105 S. E. 555.

cumstances require. Therefore, when a government surveyor, in the field notes returned by him to the government, shows that such section and quarter section corners are established on such straight lines between the township corners, and fixes their locations by courses and distances, these field notes are to be accepted as presumptively correct, and can only be overcome by a preponderance of evidence that such surveyor actually established such corner monuments at points other than those indicated by the government field notes. The rule that fixed monuments shall control courses and distances only prevails when the boundaries are fixed and known, and monuments exist. And where the boundaries are not fixed and known, and the location of the monuments themselves is uncertain, or left in doubt by the evidence, then courses and distances as shown by field notes and maps of the original survey, will be considered in fixing the boundaries.<sup>83</sup>

#### § 1165. Effect of original government survey as evidence

##### § 1165(1). Michigan

I charge you that the government lands are required by the United States government to be surveyed into sections one mile square. The government surveyors are required in making such surveys to place monuments at the corners of the sections and also on the four sides of the sections halfway between the corners. These latter are called quarter posts, being half a mile from the north and south lines of the section and dividing it into quarter sections of equal size. The lines between the quarter posts are not run by the government surveyors, but are found by extending a straight line from one quarter post to that on the opposite side of the section. I further charge you that when a boundary line between adjoining proprietors is disputed, the true line is to be determined in accordance with the original government survey, unless fixed by agreement, acquiescence, or adverse possession. I further charge you that as between surveys the original government survey must control, although it may have been incorrect at the time it was made.<sup>84</sup>

The defendants have been permitted to offer in evidence some records of field notes and plats purported to be made by Surveyors \_\_\_\_\_ and \_\_\_\_\_, but I say to you that unless you are satisfied from the evidence that such surveys were based upon the original government field notes, and that they were made in accordance with the monuments as called for in the original government survey, or the original government field notes, then I charge you that such survey should not prevail as against the \_\_\_\_\_ survey, pro-

<sup>83</sup> Pauley v. Brodnax, 108 P. 271, 157 Cal. 386.

<sup>84</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

vided you find the latter survey was made in accordance with and based upon the field notes of the United States government as offered in evidence by the plaintiff.<sup>85</sup>

I charge you that it is a well-settled law in this state that surveyors making surveys after the original government survey is made cannot make monuments of their own which shall control the government surveyors' measure, and that the original government survey must always control, and the effort of the surveyor should be to find, if possible, where the lines are on the ground; the original survey must control as between the surveys, I mean, although it may have been incorrect at the time it was made. If you find, therefore, that the ——— survey was based upon the government survey and the government field notes, and if you find that the line located by ——— is on the line located by the original government survey, then you should treat the line as established by ——— to be the true line, and your verdict should be for the plaintiff, unless the line between these parties has been settled by agreement, acquiescence, or adverse possession.<sup>86</sup>

**§ 1165(2). Nebraska**

You are instructed that the first question for you to decide in this case is the location of the original boundary line, established by the government between the respective tracts of land between the parties to this litigation.<sup>87</sup>

**§ 1166. Effect, as evidence, of surveys of county surveyors**

I instruct you that the record of the survey made by ——— as county surveyor of ——— county as a matter of law constitutes the prima facie evidence of the correct line and correct corner to the land in dispute so far as it appears from the survey, and must be taken by you as the true line and corner to the land in controversy, unless you find from a preponderance of the evidence in this case that some other line and some other corner is the true line and corner.<sup>88</sup>

The court instructs the jury that the records of former county surveyors form the same prima facie evidence as would that of any other surveyor, all of which are records of the same character.<sup>89</sup>

**§ 1167. Effect of surveys not made in compliance with statute**

You are instructed that this controversy arises over the location of the half section line between the plaintiff and the defendant.

<sup>85</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>86</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>87</sup> Stryker v. Meagher, 107 N. W. 792, 76 Neb. 610.

<sup>88</sup> Buffalo Zinc & Copper Co. v. McCarty, 189 S. W. 355, 125 Ark. 582.

<sup>89</sup> Buffalo Zinc & Copper Co. v. McCarty, 189 S. W. 355, 125 Ark. 582.

and this is an issue of fact for you to determine in this case. The records of the ——— and ——— surveys have been admitted in evidence together with the testimony of the several witnesses who have appeared upon the stand relative to muniments of title in relation thereto. You are instructed that neither one of the surveys are conclusive or binding upon you, but you may take them into consideration, together with all the other evidence in the case in determining where said half section line should be located.<sup>90</sup>

**§ 1168. Effect of declarations of predecessor in title**

You are instructed that the opinion or supposition or verbal declaration of ——— as to where his true corner or lines were cannot estop those claiming under him from claiming to the true boundaries of the ——— grant. Yet the jury may consider any such declaration as evidence tending to show what was the true boundary of that patent.<sup>91</sup>

**§ 1169. Sufficiency of evidence**

**§ 1169(1). Illinois**

The jury are instructed that while the owners of adjoining tracts of land may, by parol agreement, settle and establish permanently a boundary line between their lands, which, when followed by possession, will be binding and conclusive, and cannot afterwards be disputed, such agreement must be proved by a preponderance of the evidence, and the agreement must be such as to operate as a settlement of what was unsettled.<sup>92</sup>

**§ 1169(2). Michigan**

You are instructed that it is the claim of the plaintiff that the original government survey marked the quarter section corners of section ——— and ——— at the point designated as the ——— corner; that the original government field notes call for a birch tree at that point. It is the claim of the plaintiff that the evidence of the birch tree was found and seen by Surveyor ——— and by ———, the chainman. If you are satisfied by a fair preponderance of evidence that the government survey called for a birch tree at the disputed quarter section corner, and if you further find by a fair preponderance of the evidence that there had been a birch tree at about the quarter section corner as claimed by the plaintiff, and that the said birch tree was a monument marked under the original government survey as the quarter section corner, then I charge you you have the right to consider that corner indicated by a birch tree

<sup>90</sup> *Jack v. Gerber*, 132 P. 803, 35 Okl. 700.

<sup>91</sup> *Whealton & Wisherd v. Doughty*,

72 S. E. 112, 112 Va. 649; *Reusens v. Lawson*, 21 S. E. 347, 91 Va. 226.

<sup>92</sup> *Henderson v. Dennis*, 53 N. E. 65, 177 Ill. 547.

in the original survey as the true quarter section line between sections ——— and ———, and in that event your verdict should be for the plaintiff, unless it is settled by the other proposition in this case.<sup>94</sup>

**§ 1169(3). South Carolina**

You are instructed that a preponderance of the evidence is all that is necessary to establish a boundary line, and that may be by either direct or circumstantial evidence.<sup>95</sup>

**§ 1169(4). Virginia**

The court instructs the jury that the plaintiff cannot recover by showing a conflict of claims between himself and the defendant, but he must show affirmatively by a preponderance of the evidence that his claim to the premises is positive, valid, and complete, as the possession of the defendant, or those under whom he claims, of the premises claimed, is valid against every one except a plaintiff proving a superior title.<sup>96</sup>

**§ 1170. Same—When verdict for plaintiff dependent on correctness of measurements**

The jury are instructed that, if you find from the evidence that such original government monument, commonly known as the initial point, can be definitely ascertained, then, in this case, you will ascertain from the evidence as to whether or not the measurements as testified to by the witnesses for the plaintiff are correct, and, if you so find, then your verdict will be for the plaintiff.<sup>97</sup>

**D. ACTION FOR PENALTY FOR REMOVING LANDMARK**

**§ 1171. What is landmark**

You are instructed that a landmark is defined to be “a mark to designate the boundary of land; any mark or fixed object by which the limits of a farm, a town, or other portion of territory may be known and preserved.”<sup>98</sup>

**§ 1172. Issues involved.**

You are instructed that the sole question for your determination is whether the defendant removed a landmark to the wrong or injury of the plaintiff. The matter of boundary lines or title rights to land are not on trial before you in this case, only in aiding you in determining whether the post was a landmark, and that it has been

<sup>94</sup> Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.

<sup>95</sup> Holden v. Cantrell, 84 S. E. 826, 100 S. C. 265.

<sup>96</sup> Bradshaw v. Booth, 105 S. E. 555.

<sup>97</sup> Independent Asphalt Paving Co. v. Hein, 131 P. 471, 73 Wash. 127.

<sup>98</sup> Collins v. Brittingham (Del.) 90 A. 420, 5 Boyce, 89.



removed. You want, first, to ascertain whether the post or object removed was a landmark, and that fact being established it is for you to determine whether the defendant removed the landmark. Unless you are satisfied by the preponderance of the evidence that a landmark was removed and that it was removed by the defendant, you cannot render a verdict for the plaintiff.<sup>99</sup>

**§ 1173. Sufficiency of evidence**

You are instructed that in civil cases, suits between individuals, the proof of the case is dependent upon the preponderance of the evidence, which means the greater weight of the evidence, so when you take this case to your room you are to weigh and consider the evidence as it has been adduced from the stand, and you are to give the verdict to that side which has produced the stronger evidence, the preponderating testimony.<sup>100</sup>

<sup>99</sup> Collins v. Brittingham (Del.) 90 A. 420, 5 Boyce, 89.

<sup>100</sup> Collins v. Brittingham (Del.) 90 A. 420, 5 Boyce, 89.

## CHAPTER LXXV

## BREACH OF PROMISE TO MARRY

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1197(1). Iowa.

1197(2). Michigan.

1197(3). Utah.

## A. IN GENERAL

## § 1174. Elements of cause of action

## § 1174(1). Michigan

You are instructed that, in order to entitle the plaintiff to a verdict in this case, she must satisfy you by a preponderance of evidence, first, that a contract or engagement of marriage was made and entered into by herself and the defendant, and that the defendant broke off that engagement, and refused to carry out the contract, without just cause.<sup>1</sup>

You are instructed that if you believe, from the evidence, that the defendant and the plaintiff did mutually promise and agree to marry, and that such promise and agreement was made in the spring of ———, and that the defendant afterwards refused to carry out such agreement and fulfill his promise, without the consent and against the will of the said plaintiff, then she is entitled to recover.<sup>2</sup>

## § 1174(2). Missouri

You are instructed that if the jury find from the evidence that on or about the ——— day of ———, plaintiff was single and unmarried, and that at such time defendant proposed marriage to plaintiff, and that plaintiff accepted such proposal, no definite time having been fixed for such marriage; that thereafter defendant failed and refused to marry plaintiff, abandoned her, and declared to her that he did not intend to marry her, and denied, and still denies, that he made such proposal—then you shall find for the plaintiff.<sup>3</sup>

## § 1175. Essentials of contract

## § 1175(1). Michigan

You are instructed that there is no form of words prescribed which must be used on an occasion of this kind; but in this case it is claimed that certain things were said, and it is to that conver-

<sup>1</sup> Miller v. Rosler, 31 Mich. 475.<sup>2</sup> Miller v. Rosler, 31 Mich. 475.<sup>3</sup> Broyhill v. Norton, 74 S. W. 1024, 175 Mo. 190.

sation and that transaction there that your attention is directed, because it is claimed that then and there the contract was made. And I say to you further, in that regard, that if the defendant proposed to Miss ———, saying in substance that he had regard for her, and she did not answer him, and did not accept, then, that would be no contract, because, as you will see from what I have already said, it lacks the element of agreement; but if you find that the plaintiff, in reply to the defendant's proposition of marriage to her, said, "All right; then we will get married," or that in substance, and that the defendant heard and understood it, that in law would constitute a contract of marriage. So, as to that point, gentlemen, you see where the issue lies, and I have given you upon that point all the help or instruction that I can. Taking into account what I have said and what has been given you bearing upon that subject during the courtship and after the time it is claimed that the contract was made, which has been allowed to go to you as bearing upon the proposition of her acceptance and the forming of a contract, looking the whole situation of the parties over in connection with all the evidence here, you are to determine who is right in that contention.<sup>4</sup>

You are instructed that the contract or promise of marriage, in order to be binding on the parties, must have been mutual; that is, they must have both assented or agreed to it at the same time.<sup>5</sup>

**§ 1175(2). Missouri**

The court instructs the jury that, unless the jury can first find from the evidence that the defendant actually promised to marry the plaintiff, and that she, in earnest, accepted said promise, and that the plaintiff actually and in earnest promised to marry the defendant, and he received her promise in earnest, and unless the jury first find that such mutual promises were so given and received, then the jury must find the issues for the defendant; and in such case it makes no difference whether or not plaintiff and defendant had sexual intercourse with each other.<sup>6</sup>

**§ 1175(3). Nebraska**

The jury are instructed that, to constitute a contract to marry, there must be a meeting of the minds of the contracting parties; that is, there must be an offer on the part of one and an acceptance on the part of the other. Such contract may be unspoken or unwritten, but enough must appear to show that the minds of the

<sup>4</sup> Rutter v. Collins, 61 N. W. 267, 103 Mich. 143.

<sup>5</sup> Miller v. Rosier, 81 Mich. 475.

<sup>6</sup> Broyhill v. Norton, 74 S. W. 1024, 175 Mo. 190.

parties met, and to fix the fact that the parties are to marry as clearly as if put in formal words of offer and acceptance.<sup>7</sup>

§ 1175(4). **Oregon**

I instruct you that the mutual promises of a man and woman to marry each other, where they are each of marriagable age and capacity, constitutes a valid contract to marry. No particular words are necessary to give rise to a contract to marry; it is sufficient that the minds of the parties have met, and that the engagement to marry is mutually agreed on. And if you find from the evidence in this case that plaintiff and defendant mutually promised and agreed to marry each other as alleged in plaintiff's complaint, and that the plaintiff prior to the commencement of this action requested defendant to marry her, and offered to marry defendant and that defendant repudiated his said promise, if any, to marry the plaintiff, and refused to marry plaintiff, and notified her that he would not marry her at all as alleged, then you should find for plaintiff in such sum, if any, as you find she has been damaged thereby.<sup>8</sup>

§ 1176. **Agreement to marry if plaintiff would submit to sexual intercourse**

§ 1176(1). **Arkansas**

The jury are instructed that, if you find from the evidence that the defendant promised to marry the plaintiff solely on consideration that she should permit him to have sexual intercourse with her, and as a result of such intercourse she became pregnant, such promise is illegal and cannot be enforced in law; and in this case, if you find from the evidence that the defendant did promise to marry the plaintiff upon the consideration that she allow him to have sexual intercourse with her, and that there was no other consideration for such promise, then your verdict will be for the defendant.<sup>9</sup>

§ 1176(2). **Missouri**

The court instructs the jury that although you may find and believe from the evidence that the first time the defendant had sexual intercourse with the plaintiff, it was under an agreement that if she would yield he would marry her, yet if the jury further find from the evidence that afterwards there was an understanding and agreement between the plaintiff and defendant, independent of such act of intercourse, that they would marry each other, and at said time both were single and unmarried, and that defendant

<sup>7</sup> *Hinckley v. Jewett*, 125 N. W. 1086, 86 Neb. 464.

<sup>8</sup> *Stamm v. Wood*, 168 P. 69, 86 Or. 174.

<sup>9</sup> *Davie v. Padgett*, 176 S. W. 333, 117 Ark. 544.

refused to carry out such agreement to marry plaintiff, then the finding in this case should be in favor of the plaintiff, but she should not be allowed any damages for seduction.<sup>10</sup>

**§ 1177. Time of performance of agreement—Obligation where time not specified**

The court instructs the jury that if you find and believe from the evidence that the plaintiff and defendant, on or about ———, were each single and unmarried, and about said time they mutually agreed to marry each other, and that in said agreement no time was fixed for its consummation, then the law contemplates that the same was to be consummated within a reasonable time; and if you find that afterwards and within such reasonable time the defendant refused to consummate such agreement, and that the plaintiff was at all times ready and willing to marry the defendant, then the finding should be for the plaintiff.<sup>11</sup>

**§ 1178. Promise to marry upon request—Effect of request by other than plaintiff**

You are instructed that under a declaration charging a promise to marry upon request, or within a reasonable time, such request need not necessarily be made by the plaintiff herself, and in this case, if you find from the evidence that there was a valid subsisting contract of marriage between the plaintiff and defendant, and that no definite time was fixed by the parties in the contract, then the law would presume a contract to marry within a reasonable time; and if you further believe from the evidence that after a reasonable time from the making of said contract, and before the commencement of this suit, the plaintiff herself, or any one authorized by her for that purpose, called upon the defendant, and requested him to marry the plaintiff, and that he refused and neglected to do so, then you should find the issues for the plaintiff.<sup>12</sup>

**§ 1179. Effect of marriage to another woman**

You are instructed that the defendant contends that he never contracted to marry plaintiff, and if you believe from the evidence that the parties made a marriage contract, then the fact of the marriage of defendant to another woman, as shown by his express admissions, would constitute a breach of such contract, and would entitle plaintiff to recover.<sup>13</sup>

<sup>10</sup> Erwin v. Jones, 180 S. W. 428, 192 Mo. App. 326.

<sup>11</sup> Erwin v. Jones, 180 S. W. 428, 192 Mo. App. 326.

<sup>12</sup> Judy v. Sterrett, 38 S. E. 633, 153 Ill. 94.

<sup>13</sup> Robinson v. Craver, 55 N. W. 492, 88 Iowa, 381.

## B. DEFENSES, OR EXCUSES FOR FAILURE TO CARRY OUT AGREEMENT

See, also, post, § 1191.

### § 1180. Ill health or diseased condition of plaintiff

#### § 1180(1). Illinois

The jury are instructed that, if you believe from the evidence that defendant promised to marry plaintiff, yet if the jury further believe, from the evidence, that at the time such promise was made the plaintiff was apparently in good health and defendant had no reason to believe, and did not know, that plaintiff was subject to a venereal disease, but that the defendant afterwards discovered that the plaintiff was subject to a venereal disease, commonly called syphilis, then the jury are instructed that under such circumstances the defendant might lawfully refuse to marry plaintiff.<sup>14</sup>

#### § 1180(2). Iowa

The jury are instructed that a person is always excusable for declining to carry out his promise of marriage to one afflicted with syphilis, unless such promise was made with knowledge of this condition.<sup>15</sup>

#### § 1180(3). Washington

The court instructs the jury that if, after plaintiff and defendant became engaged the plaintiff became too ill to enter into the marriage relation, the defendant would not be required to wait an unreasonable length of time for her to recover, and if you find from the evidence that she was thus ill, and that defendant waited as long as was reasonable under all the circumstances for her to recover, and she had not recovered, then he had a perfect right to withdraw from the engagement, and your verdict should be for the defendant.<sup>16</sup>

### § 1181. Illicit intercourse with defendant

You are instructed that, if you find that such proposal of marriage was made by defendant and accepted by plaintiff, then any illicit relations that may thereafter have occurred between plaintiff and defendant, induced by such promise, cannot justify defendant in refusing to consummate such marriage.<sup>17</sup>

### § 1182. Defendant already married at time of making promise

The jury are instructed that the relations which existed between the defendant and his reputed wife, and which incapacitated him

<sup>14</sup> Kantzler v. Grant, 2 Ill. App. 236.

<sup>15</sup> Beans v. Denny, 117 N. W. 1091, 141 Iowa, 52.

<sup>16</sup> Travis v. Schnebly, 122 P. 316, 68 Wash. 1, 40 L. R. A. (N. S.) 585, Ann. Cas. 1913E, 914.

<sup>17</sup> Broyhill v. Norton, 74 S. W. 1024, 175 Mo. 190.



from making a valid and binding contract of marriage on his part, do not necessarily relieve him from the consequences of any marriage contract that he may have made with the plaintiff in this case, if you believe from all the evidence that she, when such alleged promise was made, was honestly and in good faith of the opinion and belief that the defendant was free to contract a lawful matrimonial alliance, and that such belief was induced by the misrepresentations of the defendant.<sup>18</sup>

The court instructs you that a mistake or ignorance of the law happens when a person, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect; and if you believe from the evidence in this case that the plaintiff was in full possession of all the facts which have been brought out in evidence with reference to the relations existing between the defendant and his reputed wife, and that such erroneous conclusion, as to the legal effect of such relations, was brought about by the fraud or imposition or misrepresentations of the defendant, and if you further find and believe that the defendant knew the legal effect of the relations which existed between him and his reputed wife, which would incapacitate him from making a lawful marriage contract with the plaintiff, and that he took advantage of her ignorance of such legal effect of the facts known to her, and induced her to believe that he could legally marry her, and that she honestly and in good faith believed in the false and fraudulent statements thus made to her, and that she was ignorant of the legal effect of the facts which were known to her, in that event you should find for the plaintiff.<sup>19</sup>

### § 1183. Waiver of breach of agreement

The court instructs the jury that if the plaintiff and the defendant entered into a contract of marriage in ———, and the date for such marriage was afterwards fixed for ———, and such marriage was not consummated at such time through the fault of the defendant or on account of circumstances over which he had no control, the plaintiff cannot continue after said date to treat said marriage contract as still in existence and negotiate with the defendant for the setting of a future date, and then afterwards elect to treat said contract as having been broken by the postponement of the marriage on the original date.<sup>20</sup>

<sup>18</sup> Davis v. Pryor, 58 S. W. 660, 3 Ind. T. 396.

<sup>19</sup> Davis v. Pryor, 58 S. W. 660, 3 Ind. T. 396.

<sup>20</sup> Falk v. Burke, 143 P. 498, 93 Kan. 93, L. R. A. 1915B, 279.

### C. EVIDENCE

#### § 1184. Burden of proof

You are instructed that the burden of proof is on the plaintiff, and she must prove her case, as charged in her petition, by a preponderance of the evidence; and, if the jury find from the evidence that she has failed to do so, they must find the issues for the defendant.<sup>21</sup>

#### § 1185. Presumption from failure to produce evidence

The court instructs the jury that you are to try and determine this case according to the evidence produced and submitted to you in open court on the trial, and the law as given you in charge by the court in these instructions, and upon nothing else. You will not indulge in any speculation or suppositions concerning what any witness or witnesses might have testified to had they been permitted to testify, when they were not, but you will consider the testimony as it is and only as it is in the record.<sup>22</sup>

#### § 1186. Consideration of character of defendant on issue of making promise

You are instructed that the character of the defendant in this case is not directly at issue. The character of the defendant is known to this jury because it is in evidence. The jury is not here to impose any penalty or bring in any verdict against the defendant on account of his character, but you have a right to consider and should consider his character, as you know it from this evidence, in connection with the question of the probability of this contract and as having possibly some bearing in deciding whether or not he was likely to make such a contract as is charged against him.<sup>23</sup>

#### § 1187. Evidence on issue of sexual intercourse

The jury are instructed that mere opportunity to have sexual intercourse would not warrant a finding that it occurred, nor would it be enough, as corroborative evidence to establish the same, if the parties were equally credible as witnesses; but it may be considered, in connection with all the other evidence, in determining whether the parties had indulged in illicit intercourse.<sup>24</sup>

<sup>21</sup> Broyhill v. Norton, 74 S. W. 1024, 175 Mo. 190.

<sup>22</sup> Lauer v. Banning, 131 N. W. 783, 152 Iowa. 99.

<sup>23</sup> Young v. Corrigan (D. C. N. D. Ohio) 208 F. 431.

<sup>24</sup> Beaus v. Denny, 117 N. W. 1091, 141 Iowa, 52.

**§ 1188. Sufficiency of evidence of promise****§ 1188(1). Michigan**

You are instructed that a promise to marry may be inferred, and an engagement to marry may be proved, by the conduct of the parties, and by those circumstances which usually accompany such a connection; and if the behavior of the parties is such as to countenance the belief that an engagement has taken place, that is evidence tending to prove the promise.<sup>25</sup>

**§ 1188(2). Missouri**

The court instructs the jury that if the jury find from the evidence that the attentions, if any, which defendant showed plaintiff, were merely such attentions as might be expected in a case of illicit intercourse between a man and a woman, where one or both wished a prolongation of the same, and were seeking opportunities for sexual gratification, and were not prompted by those feelings of affection which usually follow a marriage engagement, then they must find the issues for the defendant.<sup>26</sup>

You are instructed that the mere fact that an unmarried man is gallant to women, and shows to unmarried women courtesies and attentions, is, taken alone, no sufficient proof that he has marriage in his purpose, nor that he is engaged to be married. If, therefore, the jury find from the evidence that defendant was gallant in his conduct to plaintiff, and showed her courtesies and attentions, whether from a spirit of gallantry, or from the motive indicated in instruction No. ——— in defendant's series of instructions, but not for the purpose of marriage, nor from the feelings of marriage engagement, then you must find the issues for the defendant.<sup>27</sup>

**D. DAMAGES****§ 1189. Discretion of jury**

You are instructed that, if you find the plaintiff is entitled to recover in this action, then it will be your duty to say how much or how large a sum you will allow her, and upon this point the matter rests almost entirely with you, as in this class of cases it is almost impossible to measure the damages as we would in ordinary cases of contract, as no money standard can be fixed by which to measure the value of the injury sustained, and every case must rest, as to the amount to be awarded as damages, upon its own peculiar circumstances.<sup>28</sup>

<sup>25</sup> Miller v. Rosier, 31 Mich. 475.

<sup>26</sup> Broyhill v. Norton, 74 S. W. 1024, 175 Mo. 190.

<sup>27</sup> Broyhill v. Norton, 74 S. W. 1024, 175 Mo. 190.

<sup>28</sup> Miller v. Rosier, 31 Mich. 475.

**§ 1190. Matters considered in assessing damages****§ 1190(1). Iowa**

You are instructed that you may take into consideration the length of time the plaintiff and defendant kept company with each other; to what extent to the exclusion of others; the degree of intimacy existing between them, so far as shown; and all injuries shown to have been sustained by plaintiff, whether from sorrow or anguish of mind, or mortification to her feelings, blighted affection, or disappointed hopes; also, expenses incurred, if any, by reason of said marriage contract and preparation for the expected, coming marriage, if any shown.<sup>29</sup>

The jury are instructed that, if plaintiff's affections were in fact implicated, and she had become attached to the defendant, the wound and injury to her affections should be compensated for.<sup>30</sup>

**§ 1190(2). Michigan**

You are instructed that, if you find for the plaintiff, then she is entitled to recover not merely an indemnity for her pecuniary loss and the disappointment of her reasonable expectations of material and worldly advantages resulting from the intended marriage, but also compensation for wounded feelings and the mortification and pain she has wrongfully been compelled to undergo, and for the harm that has been done to her prospects in life.<sup>31</sup>

You are instructed that if you find for the plaintiff, and also find that the defendant wantonly, willfully, and causelessly broke his engagement to marry the plaintiff, you may, in your estimation of damages, consider the injury to the plaintiff's feelings and reputation, and any circumstances of indignity under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act and tending to the plaintiff's discomfort.<sup>32</sup>

You are instructed that, in the estimation of damages, you may also take into consideration the age of the plaintiff, the probability of her forming a similar connection, or the fact as to whether she has a home of her own, or is comparatively alone in the world, and is compelled to reside with her friends.<sup>33</sup>

You are instructed that, if you find for the plaintiff, in estimating the plaintiff's damages you may take into consideration the length of time the engagement had subsisted between the parties.<sup>34</sup>

You are instructed that you may also consider, in estimating the

<sup>29</sup> *Olmstead v. Hoy*, 83 N. W. 1056, 112 Iowa, 349.

<sup>30</sup> *Stewart v. Anderson*, 82 N. W. 770, 111 Iowa, 329.

<sup>31</sup> *Miller v. Rosier*, 31 Mich. 475.

<sup>32</sup> *Miller v. Rosier*, 31 Mich. 475.

<sup>33</sup> *Miller v. Rosier*, 31 Mich. 475.

<sup>34</sup> *Miller v. Rosier*, 31 Mich. 475.

damages, whether the engagement was generally known among the friends and families of the parties, and whether the defendant, as the promised husband of the plaintiff, was treated by herself and by her friends in a manner tending to show their expectation of marriage.<sup>35</sup>

You are instructed that you may consider whether, in company with plaintiff, he frequently visited her relatives and friends, and was by them treated as one of the family, and any other fact tending to show the constancy of the plaintiff, her firm faith in the defendant, and the consequent torture of her feelings by his failure to perform his contract and live up to his promises.<sup>36</sup>

You are instructed that you may also consider her anguish of mind, and, if the engagement was renewed more than once, you may take into account the added insult and indignity to her feelings, the mortification occasioned by the publicity of the affair, and the plaintiff's wounded pride, as well as the loss of marriage.<sup>37</sup>

You are instructed that if you find for the plaintiff, and find that the defendant commenced paying his attentions to the plaintiff in ———, that the parties became engaged in or about ———; that the defendant shortly after broke this engagement, and again engaged himself to the plaintiff; that he broke this engagement in ——— or ——— following; that at his instance the engagement was again renewed in or about the month of ———; and that he, in ———, again refused to fulfill his contract—all these facts may be considered by the jury in determining the amount of damages to be awarded to the plaintiff.<sup>38</sup>

The court instructs the jury that if you find a verdict in favor of the plaintiff, then in assessing her damages you may take into consideration, as it may appear from the evidence, her lack of independent means, her mortification and injured feelings, if any, caused by the defendant's refusal to marry her; her loss of marriage; and her altered social position, if any, caused by defendant's conduct; and the support and maintenance of said child, if you find that the child was defendant's, as well as the financial ability of the defendant; and assess her damages at such sum as you may believe will compensate her, not to exceed the sum of \$———. <sup>39</sup>

**§ 1190(3). Missouri**

The jury are instructed that, if you find for the plaintiff, you may, in determining the amount of damages she has sustained, take into consideration, as may appear from the evidence in the

<sup>35</sup> Miller v. Rosler, 31 Mich. 475.

<sup>36</sup> Miller v. Rosler, 31 Mich. 475.

<sup>37</sup> Miller v. Rosler, 31 Mich. 475.

<sup>38</sup> Miller v. Rosler, 31 Mich. 475.

<sup>39</sup> Erwin v. Jones, 180 S. W. 428, 192 Mo. App. 326.

case, her mortification, injured feelings and affections, wounded pride, length of the engagement, the depth of her devotion to defendant, her lack of independent means, the defendant's wealth, and the consequent loss of the marriage to plaintiff, and her altered social position, caused by the conduct of defendant.<sup>40</sup>

§ 1190(4). Oregon

I instruct that if you find that the promise of marriage existed it will then become your duty to assess damages, and you may take into consideration in assessing the damages all the circumstances that have been laid before you on the trial. Consider the parties, their ages, their standing in society, their pecuniary condition, the loss which the plaintiff sustains in worldly emoluments by the breach of the contract, the injury to her feelings, her prospects in life, the interruption which this contract of marriage has been, if any, to her profession, by which she might have improved her affairs, all these circumstances may be taken into consideration by you.<sup>41</sup>

§ 1190(5). Texas

The court instructs the jury that if, from the evidence and under the charges given you, you find a verdict for the plaintiff, then it will become your duty to assess the amount of damage to which she is entitled. In fixing such damage, if any, you are authorized to take into consideration any mental anguish or distress suffered by the plaintiff as result of such breach of marriage promise, if any, upon the part of the defendant, and also any advantage which would have resulted to the plaintiff by reason of a marriage with the defendant. And if you further find that, under and by reason of a marriage agreement between the plaintiff and the defendant, the defendant seduced plaintiff and thereby begot her with child, this fact or condition may be taken into consideration by you in fixing the amount of damage, if any, sustained by her. The amount of damage, if any, to which plaintiff may be entitled will be such a sum as would, if paid now, fairly and reasonably compensate her for the injuries sustained by her on account of defendant's breach of his promise, if any, to marry her, taking into consideration only such elements of damage as you are hereinabove authorized to consider.<sup>42</sup>

§ 1190(6). Utah

You are instructed that in this action, if your verdict is for the plaintiff, you should assess her damages at such a sum within the

<sup>40</sup> Fisher v. Oliver, 154 S. W. 453, 172 Mo. App. 18.

<sup>41</sup> Stamm v. Wood, 168 P. 69, 86 Or. 174.

<sup>42</sup> Welge v. Jenkins (Civ. App.) 195 S. W. 272.

limits prayed for in the complaint as you find from all the evidence will, in your judgment, compensate her for her loss by reason of the breach, and in such event the plaintiff is entitled to a verdict not only for such pecuniary loss as the evidence may show she sustained, but she is entitled to damages for the disappointment of such reasonable expectations of an advantageous settlement in life as the evidence may show she sustained, and also for damages to compensate her for injury to her feelings and affections, and for the mental sufferings, humiliation, and mortification, if any, she has undergone.<sup>43</sup>

**§ 1191. Mitigation of damages**

**§ 1191(1). Illinois**

The jury are instructed that, if you find from the evidence that defendant withdrew his affections from plaintiff and refused to marry her, such withdrawal on his part is no defense to the action and affords no justification to the defendant for such refusal to marry the plaintiff, if proved, and does not mitigate or lessen the damages to which plaintiff would be entitled for such breach of promise.<sup>44</sup>

**§ 1191(2). Minnesota**

The jury are instructed that, if the plaintiff led an impure life prior to the alleged promise of marriage, it would not be a defense, but could be considered only as bearing on the credibility of her evidence and in mitigation of damages.<sup>45</sup>

**§ 1191(3). West Virginia**

The court instructs the jury that if they believe from the evidence in this case, that plaintiff and defendant entered into a contract whereby the said defendant contracted with and promised to marry the plaintiff, as alleged by her, and that said defendant refused to marry plaintiff prior to the institution of this action, it was an absolute repudiation of the contract, and that plaintiff was justified in treating it as having been violated and suing for damages for the breach thereof; that plaintiff was no longer bound to perform the contract after refusal of performance, by the defendant, and that a subsequent offer of performance, by the defendant after the plaintiff (the injured party) had signified her intention to terminate it, constitutes no defense to this action for the breach of said contract; that said offer, if made after this action was brought, is not ground for mitigation of damages; and the jury should find

<sup>43</sup> *Arbon v. Blyth*, 179 P. 979, 54 Utah, 153.

<sup>44</sup> *Richmond v. Roberts*, 98 Ill. 472.

<sup>45</sup> *Cox v. Edward*, 139 N. W. 1070, 120 Minn. 512. In this case the

promise of marriage was denied by the defendant, and no attempt was made to plead any ground for avoiding the promise, if made, or excusing a breach thereof.



for the plaintiff such damages as they adjudge right not exceeding the amount sued for.<sup>46</sup>

**§ 1192. Effect of good faith of defendant in seeking postponement of marriage**

You are instructed that while the defendant, therefore, must pay some damages for the admitted breach of contract, the amount which he ought to pay depends very much upon the circumstances of the case; and the testimony as to his physical condition ought to be carefully considered. He says his condition was such in ——— that marriage at that time would have been hazardous to his life, and that all he asked of the plaintiff was a postponement of the marriage until his health would permit him to marry with safety; and he says that he regarded the engagement as subsisting up to the time this suit was brought. If the evidence convinces you that that is the situation; if you believe that the defendant merely sought a postponement in good faith until a more convenient season, and that a reasonable woman would have consented to such postponement; and especially if you believe that when this suit was brought, in ——— last, the defendant still regarded the engagement as subsisting, and was still ready and willing to marry the plaintiff at a suitable time—then the damages you award the plaintiff for the technical breach of contract ought to be very small, perhaps even nominal only.<sup>47</sup>

**§ 1193. Character or reputation of plaintiff**

**§ 1193(1). United States**

You are instructed that to some extent, as you have already seen, the character of the plaintiff is proper for you to know in determining whether or not there was a contract. It is also essential in meting out justice between the parties to this case, if you get to the point where you think you should award damages to the plaintiff against the defendant, that you should know both the character and reputation of the plaintiff, the woman, at or about the time of the alleged breach of contract, because damages in a case of this kind depend in some measure upon the relation which the plaintiff sustained in the community in which she lived and depend in some measure upon her capacity to suffer from the affront which a breach would bring to her. You will observe that character is what a person actually is. Reputation is what the community in which that person lives thinks such a person is—the estimate that the community places upon such a person. In a breach of promise case the woman may be damaged in her character by the breach and she

<sup>46</sup>Kendall v. Dunn, 76 S. E. 454, 71 W. Va. 262, 43 L. R. A. (N. S.) 556.

<sup>47</sup>Smith v. Compton, 52 A. 386, 67 N. J. Law, 548, 58 L. R. A. 480.

may be damaged in her reputation, and you cannot know the extent of damage to either character or reputation until you know what they were before the breach.<sup>48</sup>

**§ 1193(2). Illinois**

The jury are instructed that, even if the jury should believe from the evidence that the alleged contract of marriage is subsisting, yet the jury will take into consideration the character and habits of the plaintiff, and if you believe from the evidence that she was addicted to lewdness, this circumstance should be considered in estimating the damages, and no person guilty of such practices ought to recover as much damages as a pure-minded and virtuous person.<sup>49</sup>

**§ 1194. Consideration of fact of seduction**

**§ 1194(1). United States**

Now, gentlemen of the jury, I am not instructed as to what course the federal courts would pursue upon the question of whether or not seduction should be considered in aggravation of damages by any precedent that has come to my attention. In some states that question is not to be considered at all, but I think the current of authority is, and I shall adopt it for your instruction here, that in a case where a breach of promise of marriage is at issue, in which seduction has followed the making of the contract, that fact is proper to be considered by the jury by way of enhancing or enlarging damages. So, as there is something of that sort claimed in this case, I want this jury to go out of the box with a very clear understanding of what seduction is. It is not sexual intercourse merely between a woman theretofore chaste and a man. It is not merely the despoiling of a woman's virginity, not merely the dragging the woman down from a life of chastity to unchastity, but it is the despoiling of a woman's virtue against her will, yielding to seductive influences on the part of the man which she cannot fairly withstand. A girl theretofore pure in act, then unspoiled in fact, but coming to the sexual act willingly, consciously, and in that mind participating, is not seduced. So you may go to the circumstances which preceded the going of the plaintiff to ———; you may consider the degree of intimacy between the parties prior to her going there, the brief association they had together, and the places in which and the circumstances under which they associated in ——— before she went to ———, whatever those places and circumstances you find to have been; you may consider the manner in which she was procured to go to ———; you may consider her confessed de-

<sup>48</sup> Young v. Corrigan (D. C. N. D. Ohio) 208 F. 431.

<sup>49</sup> Kantzler v. Grant, 2 Ill. App. 236.

ception of her mother, the distance she had to go, the knowledge of conditions when she got there, where she was and how she was surrounded by these men who were (one of them at least) a total stranger and the other of brief acquaintance, and then, gentlemen of the jury, you are permitted to draw from those circumstances and any other circumstances that in your judgment illuminate her mind and disposition such inferences as appeal to your judgment and determine whether the first act of sexual intercourse which she had with the defendant was an act of seduction or was an act which she could reasonably have anticipated would be one of the fruits of her trip to ———, and if you find it was the latter, if you find it was one which she could have and should have reasonably anticipated, with what knowledge of the defendant she had as you find it in this testimony, I say to you that that was not a seduction, no matter whether she had theretofore been pure or not.<sup>50</sup>

§ 1194(2). Iowa

In relation to the measure of plaintiff's recovery you are further instructed if you find she is entitled to recover for breach of promise of marriage, as hereinbefore instructed, then, in that event, you will determine whether she is entitled to recover enhanced or additional damages on account of seduction, as alleged by her in her petition; and in relation thereto you are instructed that if you further find from the evidence, by a preponderance thereof, that while the plaintiff and defendant were mutually promised in marriage, if they were so promised, and intending and expecting marriage, the defendant solicited, in consideration of such intention and expectation, and the plaintiff permitted in consideration of such expectation and intention, sexual intercourse with her, such facts may be considered by you in connection with the facts shown in relation to the plaintiff's character, in computing the damages in this case in so far as they tend, if they do tend, to aggravate and increase the disgrace, mortification, pain or distress of mind, which she has suffered by reason of the defendant's breach of contract for marriage alleged by the plaintiff in her petition; provided, however, that the plaintiff cannot, in any event, recover of the defendant damages for seduction unless she was, at the time of such seduction, an unmarried woman of previously chaste character.<sup>51</sup>

The court instructs the jury that seduction is the carnal knowledge by a man of an unmarried woman of a previously chaste char-

<sup>50</sup> Young v. Corrigan (D. C. N. D. Ohio) 208 F. 431.

<sup>51</sup> Lauer v. Banning, 131 N. W. 783, 152 Iowa, 99. In connection with this instruction the jury should be given

to understand that, to constitute seduction, the intercourse must have been by reason of the promise of marriage or other artifice.

acter, accomplished by means of some false promise, artifice, flattery or deception. It is not sufficient that plaintiff alone show that defendant had sexual intercourse with her, but it must appear that the plaintiff was then an unmarried woman of previously chaste character, and that the defendant accomplished his purpose by some false promise or artifice, or that she was induced to yield to his embraces by flattery or deception. If the plaintiff was not then an unmarried woman of previously chaste character, or if without being deceived, or without any false promise, deceit or artifice, she voluntarily submitted to the defendant's embraces, the law affords her no remedy in a civil action for damages.<sup>53</sup>

**§ 1194(3). Texas**

You are instructed that, if you find from the evidence that, under and by reason of a marriage agreement between the plaintiff and the defendant, the defendant seduced plaintiff, and thereby begot her with child, this fact or condition may be taken into consideration by you in fixing the amount of damage, if any, sustained by her.<sup>53</sup>

The court instructs the jury that, if you believe from the evidence that plaintiff and defendant mutually contracted and agreed to marry each other and to become husband and wife, and if you believe that during the existence of such agreement to marry, if any, the defendant induced plaintiff, because of said promise and agreement to marry, if any, to yield her person to him and to have sexual intercourse with him, and that because of such sexual intercourse, if any, plaintiff became pregnant and gave birth to a child, then and in that event you are instructed that you may consider same in estimating plaintiff's damages for the breach of said agreement and contract to marry, if any. But if you find from the evidence that the defendant did have sexual intercourse with plaintiff and that she became pregnant because thereof, yet the defendant would not be liable for damages for sexual intercourse, if any, and pregnancy unless defendant had promised and agreed to marry plaintiff and that such sexual intercourse, if any, was had during the existence of and because of such agreement and contract to marry, if any.<sup>54</sup>

**§ 1195. Stories circulated by defendant concerning plaintiff**

The court further instructs you that if you find from the evidence that the defendant made a contract for marriage with the

<sup>53</sup> Lauer v. Banning, 131 N. W. 783, 152 Iowa, 99.

<sup>53</sup> Welge v. Jenkins (Civ. App.) 195 S. W. 272. If there is any error in this instruction, it is one of omis-

sion, in failing to charge that no recovery can be had for the support of the bastard child.

<sup>54</sup> Freeman v. Bennett (Civ. App.) 195 S. W. 238.

plaintiff, as set forth in these instructions, and afterwards refused to carry out the same, and after such refusal circulated the fact of his seduction of the plaintiff, and of his relations with her, you may take such conduct on the part of the defendant into consideration in determining the measure of damages to be awarded plaintiff.<sup>55</sup>

**§ 1196. Effect of making false charge of want of chastity**

**§ 1196(1). Missouri**

You are instructed that, if you find for the plaintiff, you shall take into consideration, as may appear by the evidence, the length of the engagement; the depth of plaintiff's devotion, if any; her lack of independent means; her mortification and injured feelings and affections, if any; her loss of marriage; her altered social condition, if any, caused by defendant's conduct; and if you believe from the evidence that defendant's attempt to prove unchaste or improper conduct with others on the part of plaintiff was made without reasonable cause to believe that such charge could be proven, and you are satisfied that plaintiff is innocent of such charge, that fact shall be taken into consideration by the jury in aggravation of plaintiff's damages; and you shall assess her damages at such amount as you believe she should recover, not exceeding ——— dollars.<sup>56</sup>

**§ 1196(2). Oregon**

In this connection the court instructs the jury that the defendant in a case of this kind may allege the bad character and bad conduct of the plaintiff, but he does so always at his peril. What I mean by that is that he may assert it and prove it. He may claim that plaintiff had a bad character and bad reputation, and he may prove it, if he can; but, if he fails to prove it, it may be taken as a repetition of the charge of unchastity, and may be considered by the jury in connection with all the rest of the testimony in aggravation of damages. In other words, it is a worse case than if there had been a simple denial of the contract of marriage, and the action had proceeded on the simple allegations and denials.<sup>57</sup>

The court instructs the jury that if the defendant made the charges set up in the answer in good faith, believing that there were grounds therefor, and the conduct of the plaintiff had been so imprudent as to furnish him grounds therefor, and this conduct had come to his knowledge after he renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of

<sup>55</sup> *Davis v. Pryor*, 58 S. W. 660, 3 Ind. T. 396.

<sup>56</sup> *Broyhill v. Norton*, 74 S. W. 1024, 175 Mo. 190.

<sup>57</sup> *Osmun v. Winters*, 46 P. 780, 30 Or. 177.

this belief that he had entertained, then you should not allow the circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously; but you will take the circumstances all into view, and inquire, how has he made the charge? Has it been a reckless, a wanton, malicious charge, or has it been made in good faith? You will determine the questions of the manner and animus of this defense as well as the question of the amount of damages.<sup>58</sup>

**§ 1197. Condition in life or financial circumstances of defendant**

**§ 1197(1). Iowa**

The jury are instructed that, if you find for the plaintiff, you may, upon the question of damages, consider the pecuniary advantage to the plaintiff of the marriage; the money value or worldly advantage that the marriage would have given to the plaintiff, and the advantage of such a domestic establishment as would be suitable to plaintiff as the wife of a person of the defendant's estate and station in life.<sup>59</sup>

**§ 1197(2). Michigan**

You are instructed that the actual circumstances of the defendant may be considered by the jury, so far as they show the condition in life the plaintiff would have secured by the consummation of the marriage.<sup>60</sup>

You are instructed that the question whether the defendant will, in view of his pecuniary circumstances, be able to pay the damages awarded, should have no influence with the jury in estimating their amount.<sup>61</sup>

**§ 1197(3). Utah**

If, under the evidence and instructions of the court, you find a verdict for plaintiff, in assessing her damages you should take into consideration any evidence which has been introduced as to defendant's financial condition as tending to show, if it does so show, the advantage that would have accrued to plaintiff, if the contract, if any, had been completed by a marriage.<sup>62</sup>

<sup>58</sup> Kelley v. Highfield, 14 P. 744, 15 Or. 277.

<sup>59</sup> McKenzie v. Gray, 120 N. W. 71, 143 Iowa, 112.

<sup>60</sup> Miller v. Rosier, 31 Mich. 475.

<sup>61</sup> Miller v. Rosier, 31 Mich. 475.

<sup>62</sup> Arbon v. Blyth, 179 P. 979, 54 Utah, 153.

## CHAPTER LXXVI

## BREACH OF THE PEACE

§ 1198. What constitutes.

1199. Defenses.

1200. Liability on bond to keep the peace—Defenses.

§ 1198. What constitutes

I instruct you, as a matter of law, that a person who, on the public streets of a city, in the presence of several persons, applies to another vile epithets, with the intention of annoying, offending, and disturbing such person, commits a breach of the peace.<sup>1</sup>

§ 1199. Defenses

The jury are instructed that violent or abusive language on the part of the ——— would not justify the defendant in cursing him, but that such language can be considered in mitigation of the penalty, in case you find the defendant guilty.<sup>2</sup>

§ 1200. Liability on bond to keep the peace—Defenses

You are instructed that, if the act of ——— in assaulting the party, which is admitted to constitute a breach of the bond, was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequence of that act, and which, overpowering his will, irresistibly forced him to its commission, then he is not legally answerable therefor; but if you believe, from all the evidence and circumstances, that he was in possession of a rational intellect and sound mind, and allowed his passions to escape control, then, though passion may for the time being have driven reason from her seat and usurped it, and have urged him with a force at the moment irresistible to desperate acts, he cannot claim for such acts the protection of insanity.<sup>3</sup>

<sup>1</sup> State v. Appleton, 78 P. 445, 70 Kan. 217.

<sup>2</sup> Watkins v. State (Tex. Cr. App.) 44 S. W. 507.

<sup>3</sup> State v. Geddis, 42 Iowa, 264.



## CHAPTER LXXVII

## BRIBERY

- § 1201. Elements of offense.  
1202. Necessity of showing that offered bribe influenced official action.  
1203. Authority of agent to bind defendant by receiving bribe.  
1204. Bribery of peace officer.  
1205. Inducing appointment to official position.  
1206. Taking of money by official to influence action of other officers.

## § 1201. Elements of offense

You are instructed that, before you can find the defendant guilty, you must find from the evidence, beyond reasonable doubt, that the accused, with corrupt intent, at the time and place charged, accepted from the brewing company a check for \$——; that it was a thing of value; that it was given and received under an express or implied agreement or understanding, to influence him in his official action upon the application for a permit to construct the building in question.<sup>1</sup>

## § 1202. Necessity of showing that offered bribe influenced official action

As a general proposition to direct you in this, I will say that the respondent cannot be convicted unless you find beyond a reasonable doubt that, at the time claimed by the people, the money was given to ——, by or through the agency of the respondent, with the corrupt intention and for the purpose of corrupting him and influencing his official action in issuing fraudulent certificates mentioned in the information. As I said to you before, that must have been the purpose, and whether or not —— ever issued them would make no difference, if he received the money. If he had then said, "I won't issue any certificates," the crime would be just as complete as it would be if he had issued them, if it was paid to him with the corrupt intention of influencing him in his official action.<sup>2</sup>

## § 1203. Authority of agent to bind defendant by receiving bribe

The jury are instructed that it is the law generally that any act of an assumed agent, and a recognition of his authority by the alleged principal, may, in a proper case, prove the agency to do other similar acts. And if you find in this case that C. was authorized or directed by defendant to collect in his behalf money

<sup>1</sup> Dunn v. State, 102 N. W. 935, 125 Wis. 181.

<sup>2</sup> People v. Gorsline, 94 N. W. 16, 132 Mich. 549.

from one or more of these women, other than A., such fact is proper to be considered in determining whether or not defendant authorized C. to collect money from her. Indeed, if you find that C. had general authority to collect protection money from abandoned women, or from a certain class of them, which included A., then you would be justified in finding that in receiving money from A., if in fact he received it, he received the same for the defendant, and in that event will find that he himself received the money.<sup>3</sup>

#### § 1204. Bribery of peace officer

You are instructed that by the term "bribe," as herein used, is meant any gift, emolument, money, or thing of value, or the promise of either, bestowed or promised for the purpose of influencing a peace officer in the performance of any duty, public or official, or as an inducement to favor the person offering the same.<sup>4</sup>

You are instructed that the actual tender of a bribe is not necessary to perfect the offense of offering a bribe as contemplated by statute. Any expression of an ability to produce a bribe, as a gift to the officer to induce him to release the person, is all that is necessary to perfect the crime charged in the indictment.<sup>5</sup>

You are instructed that a policeman of any incorporated town or city is a peace officer within the meaning of the term as used in this charge.<sup>6</sup>

#### § 1205. Inducing appointment to official position

You are instructed that, in order to convict defendant in this case, it devolves upon the state to prove affirmatively, and by competent evidence, that defendant, within ——— years prior to the finding of the indictment, offered to pay, or did actually pay to ——— money, gratuity, reward, or some other valuable consideration, with the intent to induce or procure him, the said ———, to appoint defendant to the office of ——— of the city of ———, and that, at the time of paying such money, gratuity, reward, or other consideration, the said ——— was an officer of the city of ———, and authorized to make such appointment.<sup>7</sup>

<sup>3</sup> State v. Ames, 96 N. W. 330, 90 Minn. 183.

<sup>4</sup> Lee v. State, 85 S. W. 804, 47 Tex. Cr. R. 620.

<sup>5</sup> Lee v. State, 85 S. W. 804, 47 Tex. Cr. R. 620.

<sup>6</sup> Lee v. State, 85 S. W. 804, 47 Tex. Cr. R. 620.

<sup>7</sup> State v. Graham, 8 S. W. 911, 96 Mo. 120.

**§ 1206. Taking of money by official to influence action of other officers**

The court charges the jury that it was immaterial whether defendant's own vote was to be affected by the bribe or not; if he asked for the money, intending and understanding that he would take the money, and use it for the purpose of influencing the action of other members of the council, and corruptly obtaining the contract for these people (——— & Co.), then he would be guilty of the crime charged in the indictment.\*

\* State v. Durnam, 75 N. W. 1127, 73 Minn. 150.

## CHAPTER LXXVIII

## BRIDGES

## A. CONSTRUCTION AND MAINTENANCE

- 1207. Duty of county with respect to bridge on state line.
- 1208. Duty of town with respect to bridge on town line.
- 1209. Criminal liability for destruction of bridge.

## B. DRAWBRIDGES

- 1210. Management—Liability for injuries to boat from refusal to open draw.

## C. LIABILITY FOR INJURIES RESULTING FROM DEFECTS IN, OR INSUFFICIENCY OF, BRIDGE

- 1211. Degree of care required in general.
  - 1211(1). Georgia.
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- 1212. Liability for defects in original construction.
- 1213. Care required as to plan of bridge.
- 1214. Duty to keep in repair.
  - 1214(1). Indiana.
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- 1215. Duty of inspection.
- 1216. Duty to furnish guard rails.
  - 1216(1). Georgia.
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- 1217. Latent defects.
- 1218. Capacity of bridge for heavy or extraordinary loads.
- 1219. Liability for injuries to lower riparian owner by washing away of bridge.
- 1220. Negligence with respect to maintenance or operation of drawbridges.
  - 1220(1). Indiana.
  - 1220(2). Wisconsin.
- 1221. Duty of municipality as to bridge built by private person.
- 1222. Duty with respect to temporary bridge.
- 1223. Notice to county of defects.
  - 1223(1). Indiana.
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- 1224. Constructive notice of defects.
  - 1224(1). Indiana.
  - 1224(2). Michigan.
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- 1225. Right of municipality to opportunity to repair bridge.
- 1226. Contributory negligence of traveler.
- 1227. Same—Use of bridge with knowledge of unsafe condition.
  - 1227(1). Iowa.
  - 1227(2). Michigan.
  - 1227(3). Nebraska.
- 1228. Same—Care required as dependent upon load sought to be imposed upon bridge.
- 1229. Proximate cause.

**A. CONSTRUCTION AND MAINTENANCE****§ 1207. Duty of county with respect to bridge on state line**

The court instructs the jury that if you find from the evidence in this case that the bridge in controversy was upon a part of a public highway, located upon the line between \_\_\_\_\_ county, state of \_\_\_\_\_ on the north, and the state of \_\_\_\_\_ on the south, part of said public highway being north of said interstate line and part of said highway being south of said state line, and that the said bridge in controversy was located partly north of said state line and partly south thereof, then and in that event you are instructed that the said defendant was under obligation to maintain and keep the said bridge in reasonable repair and in a reasonably safe condition, the same as if the said bridge and highway were located entirely within the said county of \_\_\_\_\_ and that the liability of the defendant for damages resulting from the defective, insufficient, and unsafe condition of said bridge is the same as it would have been had the said bridge and highway been entirely within the said county of \_\_\_\_\_.<sup>1</sup>

**§ 1208. Duty of town with respect to bridge on town line**

The court instructs the jury that the statute of this state does not confer authority upon the commissioners of highways of one town to compel the commissioners of an adjoining town to repair or erect a bridge upon the town line or pay one-half of the cost of such bridge after it has been constructed or repaired.<sup>2</sup>

**§ 1209. Criminal liability for destruction of bridge**

The jury are instructed that, before you can convict you must be satisfied from the evidence beyond a reasonable doubt that the bridge in question was a public bridge, that the road upon which it was placed was a public road at the time of the alleged destruction, that the said road was properly established by the proper legal authorities, or was a public road by user, and was such public road at the time of the alleged destruction, and that the defendant willfully, unlawfully and maliciously did cut and destroy the said bridge with intent to injure the same.<sup>3</sup>

The jury are instructed that, in endeavoring to learn whether or not the defendant knew the bridge in question was a public one, and located upon a properly established public road, you may consider the fact that the defendant received damages from the county

<sup>1</sup> Bethel v. Pawnee County, 145 N. W. 363, 95 Neb. 203.

<sup>2</sup> Tonti Township v. Foster Township, 152 Ill. App. 536.

<sup>3</sup> O'Dea v. State, 20 N. W. 299, 16 Neb. 241.

of ——— for the land taken to constitute the part of the road upon which the bridge was located.<sup>4</sup>

### B. DRAWBRIDGES

Negligence with respect to maintenance and operation of drawbridge, see post, § 1220.

#### § 1210. Management—Liability for injuries to boat from refusal to open draw

You are instructed that it was the duty of the defendant company to open the draw to allow the boat to pass through unless the doing so would, under the circumstances, have endangered the lives of those undertaking to operate it, or have endangered the operation of its trains, or have created a reasonable apprehension thereof, on account of the storm prevailing at the time, if any.<sup>5</sup>

You are instructed that if you believe from the evidence that the defendant's agents and servants failed or refused to open the draw to allow the boat to pass through when duly signaled, though the same might have been done without endangering the lives of those operating the draw or the maintenance of defendant's line of railway for the safe passage of trains, or without reasonable apprehension thereof, and that in consequence thereof in the natural course of events, from conditions then existing and known to such agents and servants, the vessel was damaged and wrecked, then the plaintiffs are entitled to recover. But if the attempt to open the draw at the time would have endangered the safety of those undertaking to operate it, or the maintenance of defendant's line of railway for the safe passage of trains or created a reasonable apprehension thereof, then the defendant is entitled to your verdict.<sup>6</sup>

### C. LIABILITY FOR INJURIES RESULTING FROM DEFECTS IN, OR INSUFFICIENCY OF, BRIDGE

#### § 1211. Degree of care required in general

##### § 1211(1). Georgia

You are instructed that, if you believe from the evidence that the defendant did construct this bridge since ———, and did so build it that it was in a reasonably safe condition for travelers to pass over it without danger, then you would be authorized to find for the defendant.<sup>7</sup>

<sup>4</sup> O'Dea v. State, 20 N. W. 299, 16 Neb. 241.

<sup>5</sup> West v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 196 S. W. 343.

<sup>6</sup> West v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 196 S. W. 343.

<sup>7</sup> Bibb County v. Ham, 35 S. E. 656, 110 Ga. 340.

§ 1211(2). *Indiana*

The jury are instructed that the board of commissioners of the defendant county are chargeable with knowledge of the tendency of timbers to decay, and it is incumbent upon the commissioners to use ordinary care in providing against the timbers in a bridge becoming unsafe because of the decay incident to age and long use.<sup>8</sup>

§ 1211(3). *Michigan*

You are instructed that, if the jury find that the bridge in question was not in good repair, and in a condition reasonably safe for public travel at the time of the accident, on which account the injury occurred, and the plaintiff was not in fault in going or driving his engine upon it, and the defendant ought to have known of the unsafe condition of the bridge, then the plaintiff would be entitled to recover just damages.<sup>9</sup>

§ 1211(4). *Nebraska*

The court instructs the jury that, if you find from the evidence in this case that the bridge in controversy was upon and a part of a public highway in the county of ———, in the state of ———, and was a bridge which the said county was liable to maintain and keep in a suitable state of repair, and was out of repair at the time of the accident, and was defective and unsafe, and that because of said defective and unsafe condition the bridge gave way and caused the injury to the said ———, from which he soon thereafter died, without his fault, and that such defective and dangerous condition of said bridge was such that it could have been discovered or detected by reasonable inspection and examination of the bridge in time to have repaired the same, then you are instructed that this defendant would be liable because of such condition of said bridge.<sup>10</sup>

The jury are instructed that a county cannot be held as an insurer of those who have occasion to use a county bridge.<sup>11</sup>

§ 1211(5). *Virginia*

The court instructs the jury that the defendant, the city of ——— is bound to use reasonable care and precaution to keep and maintain its streets, bridges, and sidewalks in good and sufficient repair to render them reasonably safe for all persons exercising ordinary care and prudence, passing on or over the same; and if the jury believe from the evidence that the defendant, the city of ———, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair and that the injury complained of re-

<sup>8</sup> Apple v. Board of Com'rs of Marion County, 27 N. E. 166, 127 Ind. 553.

<sup>9</sup> Woodbury v. City of Owosso, 31 N. W. 130, 64 Mich. 239.

<sup>10</sup> Bethel v. Pawnee County, 145 N. W. 363, 95 Neb. 203.

<sup>11</sup> Peitzmieler v. Colfax County, 144 N. W. 248, 94 Neb. 675.



sulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby, whilst exercising such a degree of care and caution as under the circumstances might reasonably be expected from a man of reasonable care and prudence. then he is entitled to recover of the defendant in this suit such an amount as the jury may ascertain from the evidence, not exceeding \$——.<sup>12</sup>

#### § 1212. Liability for defects in original construction

You are instructed that plaintiff, in his petition, does not claim that the bridge where he claims to have been injured was negligently constructed in the first instance, but only that the defendant had been negligent in suffering it to get out of repair. You are therefore charged that, in considering whether or not the defendant was guilty of negligence under the charge of the court, you cannot consider any evidence you may believe tends to show that the bridge was negligently constructed in the first instance; and, if you believe the defendant maintained the bridge in the same condition as it was first constructed, and that if there were ever any holes or defects in the same, as alleged in plaintiff's petition, that the existence of the same was unknown to defendant, or had not existed in the bridge such a length of time that the defendant, in the exercise of ordinary care, would have learned of the same, you are directed to find for the defendant.<sup>13</sup>

#### § 1213. Care required as to plan of bridge

The jury are instructed that in the erection of county bridges it is the duty of the county to exercise ordinary and reasonable skill and care in adopting a plan, as well as in the construction of the bridge; and if you find that the defendant employed a competent and skilful engineer to prepare and draft the plan of the bridge in question, and that he did so, and recommended it as sufficient for that purpose, and the county authorities, in good faith, believing it to be sufficiently strong and safe for the purpose designed, adopted it, then this would be the exercise of care and skill with reference to the plan, even though the engineer erred in his judgment with reference thereto.<sup>14</sup>

#### § 1214. Duty to keep in repair

Duty of city with respect to approach to public bridge, see post, § 3930.

#### § 1214(1). Indiana

You are instructed that it is the duty of the board of commissioners of the county to exercise ordinary care and skill in the

<sup>12</sup> City of Charlottesville v. Jones, 97 S. E. 316, 123 Va. 682.

<sup>13</sup> Gulf, C. & S. F. Ry. Co. v. Taylor (Tex. Civ. App.) 31 S. W. 214.

<sup>14</sup> Ferguson v. Davis County, 10 N. W. 906, 57 Iowa, 601.

maintenance in a reasonable condition of repair of all bridges connected with and forming part of the legal public highways of this county.<sup>15</sup>

§ 1214 (2). **Vermont**

The jury are instructed that it was the duty of the town to keep this bridge reasonably safe for the amount and kind of travel that might fairly be expected to pass over it, and so that travelers might be reasonably safe from the consequences of such accidents as might justly be expected occasionally to happen there. This duty, as affecting the town's liability to pay damages for injuries occasioned by defects in the bridge, is not measured by the exercise of ordinary care and diligence on the part of the town in respect of keeping the bridge in repair: nor, on the other hand, is the town liable absolutely as an insurer for damages resulting by reason of its insufficiency and want of repair. The statute imposed the duty of keeping this bridge in good and sufficient repair. If the town is chargeable with any fault in respect of this duty, the liability attaches, if the plaintiff's case is otherwise made out, and the town is liable for accidents and injuries caused by reason of defects existing therein through the fault of the town, for against such accidents and injuries the town is an insurer, and this, without notice to it, or regardless of the question of neglect. If the plaintiff, being free from fault on her part that contributed thereto, or if her husband was free from fault on his part that the law will impute to the plaintiff, if, in the absence of any such fault, the plaintiff received injury that was the combined result of such an accident as might justly be expected to happen there, and the insufficiency or want of repair of the bridge, the town is liable.<sup>16</sup>

§ 1214(3). **Washington**

You are instructed that it is the duty of the county not only to construct its bridges in such a manner as that they shall be safe, but to use ordinary care in keeping them in a safe condition for travelers and all persons passing over said bridge, by removing therefrom timbers which by use have become or may have become decayed and rotten, and thus rendering the bridge unsafe and dangerous.<sup>17</sup>

§ 1215. **Duty of inspection**

The jury are instructed that the board of supervisors is charged by law with the duty of supervising and keeping the county bridg-

<sup>15</sup> Board of Com'rs of Allen County v. Bacon, 96 Ind. 31.

<sup>16</sup> Graves v. Town of Waltsfield, 69 A. 137, 81 Vt. 84.

<sup>17</sup> Robe v. Snohomish County, 77 P. 810, 85 Wash. 475.

es in repair. If the members of the board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide some one possessing such skill, and to have all county bridges under their care examined as frequently as men of ordinary prudence and care would deem necessary for the safety of the traveling public, and as experience demonstrated the necessity of examination, and if the board failed to do this, such failure would be negligence.<sup>18</sup>

The jury are instructed that, if you find from the evidence that the defendant caused said bridge to be examined at some time prior to the accident by a person who possessed reasonable and ordinary skill in such matters, and find that he reported the bridge safe for a reasonable length of time, then the defendant would not be negligent for a failure to cause it to be examined until the expiration of such time, unless some member of the board of supervisors was notified that it had become dangerous and unsafe for public travel, and had neglected thereafter within a reasonable time to make examination to ascertain its condition.<sup>19</sup>

#### § 1216. Duty to furnish guard rails

##### § 1216(1). Georgia

You are instructed that it was the duty of the defendant to construct and maintain the bridge in a reasonably safe condition for travelers to pass over it without danger, and, if necessary, to make it ordinarily safe, to put up guard rails, then it was the duty of defendant to put up such guard rails.<sup>20</sup>

##### § 1216(2). Missouri

The court instructs the jury that it was the duty of defendant, in erecting and constructing the bridge in question, over and across a public street in the city, to so erect and construct said bridge as to make the same reasonably safe for travel and use for all persons passing over the same on foot or otherwise, as well in the night as in the daytime; and, if the jury believe from the evidence that railing or bannistering or other guard was necessary on the sides of the bridge to protect foot passengers by day or by night from the danger of a fall from the bridge, then it was the duty of the defendant to cause to be provided and constructed on the sides of the bridge such railing or bannistering or other sufficient guard to give protection against such danger of falls from the bridge, and the court instructs the jury, that the question whether such railing, bannistering or other guard was necessary,

<sup>18</sup> Ferguson v. Davis County, 10 N. W. 906, 57 Iowa, 601.

<sup>19</sup> Ferguson v. Davis County, 10 N. W. 906, 57 Iowa, 601.

<sup>20</sup> Bibb County v. Ham, 35 S. E. 656, 110 Ga. 340.

is not a question for the court to decide, but a question for the sole finding and determination of the jury; and unless the jury find from the evidence that such railing, bannistering or guard was so necessary for the reasonable safety of persons passing over the bridge, and that defendant failed to provide the same, plaintiff is not entitled to recover in this action. But if the jury find from the evidence that such railing, bannistering or guard on the sides of the bridge were necessary for the reasonable safety of passengers by night or by day, and that defendant failed and neglected to provide the same; and further find that plaintiff, on the night of ———, was passing along a public street of said city, leading to and over said bridge, observing and using ordinary and reasonable care to pass and go over said bridge safely, when, through the fault and negligence of defendant in failing to have such railing or other guard along the sides of said bridge, he stepped or fell from said bridge into the ravine below and was thus greatly hurt and injured, in such a case the jury will find for plaintiff, and assess his damages in such sum as the jury may believe from the evidence he sustained by reason of such injury, not to exceed \$———. <sup>21</sup>

**§ 1217. Latent defects**

The court instructs the jury that, if the defect in a bridge from which injury and damages occur to the person using it is a latent defect, not discernible from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examinations have not been negligent in their duty in that regard, the county cannot be held liable for damages caused by such latent or undiscovered defects. <sup>22</sup>

**§ 1218. Capacity of bridge for heavy or extraordinary loads**

The jury are instructed that, in an action against a county to recover damages alleged to have been caused by the breaking down of a bridge while the plaintiff was attempting to cross it with a steam traction engine and separator, it is for the jury to determine from the evidence whether or not the bridge was properly constructed and maintained, and whether the use the plaintiff was making of it was unusual and extraordinary and such as the county was not bound to anticipate. <sup>23</sup>

The jury are instructed, that, in maintaining a bridge for public use, the county is not limited in its duty by the ordinary business use of the structure, nor is it bound to provide for the support of extraordinary or unusually heavy loads, but it is only bound to

<sup>21</sup> Loewer v. City of Sedalia, 77 Mo. 431.

<sup>22</sup> Peitzmieler v. Colfax County, 144 N. W. 248, 94 Neb. 675.

<sup>23</sup> Peitzmieler v. Colfax County, 144 N. W. 248, 94 Neb. 675.

provide what may be fairly anticipated for the proper accommodation of the public at large, in the various occupations which from time to time may be pursued in the locality where the bridge is situated. Whether or not the load which plaintiff drove on the bridge in question was an extraordinary or unusually heavy load is a question for you to determine from the evidence before you.<sup>24</sup>

The jury are instructed that, if they find that the use the plaintiff was making of the bridge was unusual and extraordinary and such as the county was not bound to anticipate, then the jury should find for the defendant.<sup>25</sup>

The court instructs the jury that whether or not the load which the deceased, ———, drove on the bridge in question was an extraordinary or unreasonably heavy load is a question for you to determine from the evidence before you.<sup>26</sup>

#### § 1219. Liability for injuries to lower riparian owner by washing away of bridge

The jury are instructed that, if you find that the bridge of the defendant above ——— was carried away by a flood on the ——— day of ———, and in passing down the stream carried away plaintiff's dam, then plaintiff is entitled to recover such sum as will compensate him for the injury sustained and loss suffered, provided the jury also find that the location, construction, or condition of the bridge was negligent, and that the carrying away of the bridge was in consequence of such negligent location, construction, or condition.<sup>27</sup>

The jury are instructed that, even if you find that the flood which carried away the bridge in question was of unusual or unprecedented height, yet if you still further find that, but for the improper and negligent location, construction, or condition of the bridge, if you find that the bridge was negligently located or constructed, or in improper condition, through the negligence of defendant, the disaster to plaintiff's property would not have occurred, then the unusual or unprecedented height of the flood is no defense.<sup>28</sup>

#### § 1220. Negligence with respect to maintenance or operation of drawbridges

##### § 1220(1). Indiana

You are instructed in this case that, if you shall find that there was time, in the exercise of ordinary care, for the bridge tender to

<sup>24</sup> Peltzmieler v. Colfax County, 144 N. W. 248, 94 Neb. 675.

<sup>25</sup> Peltzmieler v. Colfax County, 144 N. W. 248, 94 Neb. 675.

<sup>26</sup> Seyfer v. Otoe County, 92 N. W. 756, 68 Neb. 566.

<sup>27</sup> County Commissioners of Hartford County v. Wise, 18 A. 31, 71 Md. 43.

<sup>28</sup> County Commissioners of Hartford County v. Wise, 18 A. 31, 71 Md. 43.

have stopped and lowered the bridge, after seeing, or after he was bound to see in the exercise of ordinary care, the dangerous position of plaintiff upon the bridge, if you find he was in such dangerous position, and that the bridge tender failed to exercise such care to stop or lower such bridge, but continued to raise the same while the plaintiff was thereon, and injured him, as alleged in the complaint, then you are at liberty to find that the defendant was guilty of negligence in the premises.<sup>29</sup>

**§ 1220(2). Wisconsin**

The court instructs you that the fact that the defendant might have covered this crack with an apron is not established by the evidence in the case; there is no evidence as to the conditions where such other bridges and cracks had such protection; and you are not permitted to find the defendant to have been guilty of actionable negligence by reason of the absence of such a covering over the crack in question; and the court further instructs you that if you find that there was no more of an opening or crack at the place of the accident than was necessary for the operation of the drawbridge, then you will acquit the defendant of negligence in that regard.<sup>30</sup>

**§ 1221. Duty of municipality as to bridge built by private person**

The jury are instructed that, even if such bridge was in the public street, it must be conceded that it was built by private individuals, and was maintained by private individuals, and that the city had refused to consider the bridge a public structure; and, although built in the public street, if it was simply and solely an appendage to H.'s mills, and only useful as connected with H.'s mills, and to the public only as dealing with H.'s mills, and was not, during the time it has stood there and up to the time of the accident, useful to the public generally, and used by them generally, in the course of ordinary travel along said street to and from places other than H.'s mills, then the city would not be liable for the injuries suffered by the plaintiff through the falling of said bridge. But, on the other hand, if said bridge stood in the public highway and appeared to be part thereof, and the approaches from the traveled part of the street led directly thereto, and it appeared to any one traveling along the highway to be a part of the street in ordinary use, and if it had been and was actually in use and of utility generally to the traveling public, then the city, if it had erected at or near the bridge no visible sign or monument warning the public that such bridge was not a part of the street, was under a duty, so long as it permitted the

<sup>29</sup> *Michigan City v. Werner*, 114 N. E. 636, 186 Ind. 149.

<sup>30</sup> *Schumann v. City of Kaukauna*, 158 N. W. 71, 163 Wis. 396.

bridge to remain in and as a part of the street, subject to such general use and utility, to keep the same, or see that the same was kept, in reasonable repair, so that it would be reasonably safe and convenient for public travel.<sup>21</sup>

**§ 1222. Duty with respect to temporary bridge**

The jury are instructed that, if you find from the evidence that the scow used as a part of the bridge leaked, and that the defendant failed to keep it properly pumped out, and free from water, and allowed it to become partly filled with water, and that this caused it to settle down into the water, causing, with the load driven by plaintiff's servant, the float to sink down low, so as to make the apron at the south end of the bridge so steep as to be dangerous and unsafe for travel, and that plaintiff's servant attempted to pass over at the south, and was drawing a load of reasonable weight, and was in the exercise of reasonable skill and caution in the management of the horse and load, and by reason of such unsafe condition of the apron the horse was unable to draw the load over it, and was so compelled to fall back with the load, and in so going back the wagon broke through the railing or the barrier on the side of the boat, and was drowned, and you also find that the officers of the city had notice and knowledge of the defective condition of the bridge and railing, and thereafter had reasonable time and opportunity to put the same in proper condition, and did not use reasonable diligence so to do, then the plaintiff would be entitled to your verdict.<sup>22</sup>

The jury are instructed that, if you find the fact to be that when the plaintiff's horse was being driven across the bridge, on the day in question, the passage from the scow to the approach was so steep as that it was not reasonably safe, whether the steepness was caused by the sinking of the scow, from leakage, or by the receding of the water, in the river, as shown by the evidence, but on account thereof the horse was overcome by the load, when he would not have been overcome if the incline had been more gradual, and shall also find that such incline might have been made easier, on the part of the city, by the exercise of reasonable care and skill, and that this steepness and condition caused the loss of the horse, then the city would be liable, providing the plaintiff and the driver were not guilty of a want of ordinary care in the management of the horse, and reasonable time and opportunity to put the bridge in a safe condition occurred, as I have stated.<sup>23</sup>

<sup>21</sup> *Detwiler v. City of Lansing*, 55 N. W. 381, 95 Mich. 484.

<sup>22</sup> *St. Clair Mineral Springs Co. v. City of St. Clair*, 56 N. W. 18, 96 Mich. 463.

<sup>23</sup> *St. Clair Mineral Springs Co. v. City of St. Clair*, 56 N. W. 18, 96 Mich. 463.



## § 1223. Notice to county of defects

## § 1223(1). Indiana

You are instructed that, in order to render the board of commissioners chargeable with the absence of ordinary care in the keeping of the bridge in question in repair, it is necessary that it shall be shown to your satisfaction that such board had notice or knowledge that the bridge needed, or was out of, repairs. For this purpose notice or knowledge on the part of one of the board while in office would be equivalent to notice to the board itself, but after receiving such notice such reasonable time as might be required to take the necessary steps to have the bridge repaired or travel thereon stopped would be allowed before liability would attach, and the board is chargeable with knowledge of the natural tendency of timber to rot and decay by lapse of time and exposure to the weather.<sup>84</sup>

## § 1223(2). Iowa

The jury are instructed that, if you find from the evidence that said bridge, by reason of defective construction or by age, had become rotten or dangerous, and you further find that the defendant knew such fact, or should have known the same in the exercise of ordinary care and prudence, or that it was notified thereof, then it would be the duty of the defendant, within a reasonable time thereafter, to make an examination of said bridge, or cause it to be done, and either to repair the bridge or to adopt means to prevent its use by the public, either by putting up barricades, or in some way warning the public of the dangerous condition of the bridge, and to prevent its use by the public; and if the defendant, being so notified or having such knowledge, did not so act, then the defendant would be guilty of negligence; and if such negligence caused such injury to the plaintiff, then the defendant would be liable therefor, unless you should further find from the evidence that the plaintiff was negligent, and that his negligence contributed to the said injury. Notice to any one member of the board of supervisors would be notice to the defendant.<sup>85</sup>

The jury are instructed that, if you find from the evidence that the defendant was not negligent in the original construction of said bridge, then the defendant would not be liable for any injuries caused by the same becoming out of repair and defective, unless the defendant had notice thereof or knowledge thereof through the members of the board of supervisors, or unless the defect was so notorious that the defendant was negligent in not knowing it, or unless the bridge had been built so long that in the exercise of ordi-

<sup>84</sup> Board of Com'rs of Allen County v. Bacon, 96 Ind. 31.

<sup>85</sup> Ferguson v. Davis County, 10 N. W. 906, 57 Iowa, 601.

nary care and prudence the defendant ought to have known that it would, in such time, become rotten and dangerous.<sup>36</sup>

**§ 1223(3). Nebraska**

The court instructs the jury that, for an injury caused by an unsafe and defective condition of a county bridge, a county is liable for damages, notwithstanding the fact that no actual notice of such condition had, previous to the occurrence of the accident, been given to any officer of the county concerned, where the defects are of such a nature or have existed for such a length of time that, by the exercise of ordinary diligence, they might have been discovered and repaired.<sup>37</sup>

**§ 1224. Constructive notice of defects**

See, also, ante, § 1223(3).

**§ 1224(1). Indiana**

The jury are instructed that, if you believe from the evidence that the defects in the bridge had existed for such a length of time that the defendant county, by the exercise of reasonable diligence, could have known of its defective condition, you will be justified in finding that the defendant had notice of such defects.<sup>38</sup>

**§ 1224(2). Michigan**

You are instructed that a municipality, like the city of ———, must know what is going on and must act through its officers and agents, and through them it may know of the existence of a defect in a highway or a bridge. And, when such knowledge is gained by its officers or agents, the corporation may become liable for negligence in not making repairs where repairs are needed. On the other hand, though they may not have notice and knowledge, a defect may exist and be unknown, and the corporation still be liable on the ground that the prime fault consists in being ignorant of the existence of the defect; for a want of knowledge may, under given circumstances, imply want of due care. The duty of a city is to exercise, through its officers and its agents acting for it, a reasonable and supervisory care over its highways and its bridges, and, within reasonable limits, be watchful of their condition and safety, and to see that they are kept in a reasonably safe condition for public travel. A corporation is not bound to extraordinary care or extraordinary diligence, but only an ordinary care and ordinary diligence. It is not an insurer of safety. It does not warrant or undertake against accidents and injuries. It only undertakes that the bridge which is to be crossed is reasonably or ordinarily safe

<sup>36</sup> *Ferguson v. Davis County*, 10 N. W. 906, 57 Iowa, 601.

<sup>37</sup> *Bethel v. Pawnee County*, 145 N. W. 363, 95 Neb. 203.

<sup>38</sup> *Board of Com'rs of La Porte County v. Ellsworth*, 37 N. E. 22, 9 Ind. App. 566.

for public travel. This question of want of reasonable care, or negligence, must be determined by the circumstances of each case. What circumstances would be considered a want of ordinary care when applied to one bridge in one locality would not be so considered in the case of another bridge in a different locality. A bridge of long standing would require closer and more frequent examination than a new bridge. A bridge in a densely populated community, upon a main thoroughfare, with daily heavy travel, would require more vigilance in its supervision and care than would a like bridge in a thinly settled part of a township, or in a city with only a light or occasional travel. A difference, also, in the material out of which the bridge is constructed, or on which rests the flooring of the bridge, whether the timbers used were suitable or otherwise, were of full length or shorter than they should be, and the permanency of the construction, would all have to be considered by the jury in determining the question of ordinary care, or a want of ordinary care.<sup>39</sup>

I charge you that if you find that the bridge was defectively maintained, in the manner mentioned, and on that account the injury occurred, and the plaintiff was without fault on his part, and the jury find further that this defect in the bridge had remained and been in the condition complained of such a length of time that defendant should have known of it, then the plaintiff is entitled to recover. If you find the defects complained of—that is to say, the liability of the planks and joists to move and drop off their supports by the jolting of passing teams and loads—and this rendered the bridge unsafe for travel, and might have been discovered by an examination of the position of the planks and joists, then the city could not refuse to see what others could see, and they would be chargeable with negligence for not knowing these facts; and, if the plaintiff was injured without fault on his part, he ought to recover.<sup>40</sup>

§ 1224(3). *Washington*

You are instructed that it is not necessary, in order to charge the county with negligence in suffering the bridge in question to remain out of repair, for the plaintiff to prove actual notice of it, but that such notice may be inferred if the defect in the bridge was of such a character, and had continued for such a length of time, as that the officers of the county charged with the supervision and repair of the bridges of the county might and probably would have discovered it if they had used ordinary care in the discharge of their duties.<sup>41</sup>

<sup>39</sup> *Woodbury v. City of Owosso*, 31 N. W. 130, 64 Mich. 239.

<sup>40</sup> *Woodbury v. City of Owosso*, 31 N. W. 130, 64 Mich. 239.

<sup>41</sup> *Robe v. Snohomish County*, 77 P. 810, 35 Wash. 475.

You are instructed that the law charges the county with the knowledge of the natural tendency of timber to decay, and places upon the county the duty of exercising ordinary care to detect and guard against any decay or rottenness that might exist, and that a failure to exercise such care upon the part of the county will render the county liable, although it may have no actual notice of the condition of the bridge.<sup>42</sup>

**§ 1225. Right of municipality to opportunity to repair bridge**

You are instructed that the act of ——— made it the duty of townships, villages, cities, and corporations to keep in good repair, so that they will be safe and convenient for public travel at all times, all public highways, streets, bridges, crosswalks, and culverts that are within their jurisdiction, and under their care and control, and which are open to public travel. But the statute also provides that, when an action is brought under this act, it must be shown that such township, village, city, or corporation has had reasonable time and opportunity, after such highway, street, crosswalk, or culvert became unsafe or unfit for travel, to put the same in a proper condition for use, and has not used reasonable diligence therein. That is the language of the statute which creates the duty and gives the right of action to the party injured, and this proviso is as important as any part of the act.

Before the plaintiff can recover in this case, gentlemen, you must be satisfied, by a preponderance of evidence—First, that the plaintiff has sustained an injury; second, that the injury was caused by the bridge being out of repair by reason of the defendant's neglect to keep such bridge in good repair, and in a condition reasonably safe and fit for travel; and, also, that a reasonable time and opportunity, after such bridge became out of order and unsafe and unfit for travel, if you find it out of repair, had elapsed and expired, and that the defendant did not use reasonable diligence to repair and put the same in proper condition. This negligence urged against a township or city, and its liability, can only arise after it has had notice of the unsafe condition of the bridge, or where the want of repair or bad condition of the bridge by reasonable diligence could have been discovered, and where it continued for such a length of time that the want of knowledge on the part of the city would be regarded as negligence on its part.<sup>43</sup>

<sup>42</sup> *Robe v. Snohomish County*, 77 P. S10, 35 Wash. 475.

<sup>43</sup> *Woodbury v. City of Owosso*, 31 N. W. 130, 64 Mich. 239.

**§ 1226. Contributory negligence of traveler**

The jury are instructed that the plaintiff was bound to ride her bicycle with reasonable care and caution. She was bound to observe where she was going. She was bound to take notice of obstacles that may have been in the way.<sup>44</sup>

**§ 1227. Same—Use of bridge with knowledge of unsafe condition****§ 1227(1). Iowa**

You are instructed that, if you find from the evidence that the plaintiff, at the time he drove upon the bridge, knew its unsafe condition, and that it was imprudent for him to drive upon it at the time, in consequence of its unsafe condition, then his own negligence contributed to the injury, and he cannot recover, and your verdict must be for the defendant.<sup>45</sup>

**§ 1227(2). Michigan**

The jury are instructed that it was the duty of the plaintiff, as a matter of law, to provide herself with a reasonably safe conveyance when going upon the public highway, and that she should have a reasonably gentle and safe horse, and the duty was upon her to exercise reasonable care and prudence in driving along this highway and over this bridge; and, if she failed or neglected to observe any of these precautions, she is, in law, guilty of what is known as "contributory negligence," and she cannot recover in this case. "Contributory negligence" means that by her own carelessness or negligence she has contributed to her own injury. And, if she had done that, under the law she is not entitled to recover at all, as you cannot apportion the negligence. Now, the mere fact that the plaintiff might have seen this hole in the board when she drove over it in the forenoon of that day would not of itself constitute her guilty of contributory negligence in endeavoring to pass over that bridge again that evening. You have a right to consider the fact whether, under the evidence, a reasonably careful and prudent person would have endeavored to have crossed that bridge as she did in the evening, knowing of the existence of the hole (if you find there was one, and she knew of its existence). And if you find that a reasonably careful and prudent person would not, having the knowledge she had, have offered to pass over that bridge as she did on her return, then that would amount to contributory negligence on her part. Having a knowledge (if you find she had) of the fact that there was a hole in the bridge, then it became incumbent upon her to exercise more carefulness and cau-

<sup>44</sup> *Strader v. Monroe County*, 51 A. 1100, 202 Pa. 626.

<sup>45</sup> *Homan v. Franklin County*, 57 N. W. 703, 90 Iowa, 185.

tion in crossing the bridge the second time than she would have otherwise been called upon to do. In other words, if she knew or realized there was some danger in crossing the bridge with the hole in it, then she would be expected to exercise care and caution proportionate to the risk she ran.<sup>46</sup>

**§ 1227(3). Nebraska**

You are instructed that if you find from the evidence that the bridge in question was in an unsafe condition, and if you further find that the deceased, ———, knew of such unsafe condition, or had reason to know that the stringers on said bridge were cracked or broken by a previous strain, then you are instructed that the deceased would be negligent in not examining said bridge before he drove upon it.<sup>47</sup>

**§ 1228. Same—Care required as dependent upon load sought to be imposed upon bridge**

You are instructed that the care required to be used by a traveler in passing along a highway is measured by the perils obviously to be encountered. So, in this case, knowledge of the possible insecurity of this bridge, and that the load he was purposing to put upon it was unusual in weight, will be imputed to the plaintiff. Travelers are bound to take notice of the fact, as a matter of common knowledge, that wooden bridges spanning streams will break down in case sufficient weight is put upon them. The plaintiff could not assume, and had no right under the law to assume, that this bridge would safely bear up a traction engine weighing over ——— pounds, because it had for many years safely stood the test of ordinary wagon travel over it. The plaintiff in this case must have known, and the law will impute such knowledge to him, that the weight which he was proposing to put upon the bridge in question was over two or three times greater than an ordinary loaded wagon, and that the strain upon the bridge timbers would be correspondingly greater; that there was greater danger in crossing it with this engine than there would be with a loaded wagon; and so he was bound to use a greater degree of care in crossing, or attempting to cross, than he would be bound to use in case he were attempting to cross with a loaded wagon; and the degree of care which he was bound to use must be determined by you under all of the facts and testimony in the case.<sup>48</sup>

<sup>46</sup> *Bratfisch v. Mason Tp.*, 79 N. W. 576, 120 Mich. 323.

<sup>47</sup> *Seyfer v. Otoe County*, 92 N. W. 756, 66 Neb. 566.

<sup>48</sup> *Walker v. Village of Ontario*, 95 N. W. 1086, 118 Wis. 564.

## § 1229. Proximate cause

The jury are instructed that, if you find that the backing of the horse was not occasioned by the defective condition of the bridge or apron, then it would make no difference whether the railing was sufficiently strong or not, because in that case the defendant's negligence would not be the proximate cause of the injury.<sup>49</sup>

<sup>49</sup> St. Clair Mineral Springs Co. v. City of St. Clair, 56 N. W. 18, 96 Mich. 463.



**CHAPTER LXXIX****BROKERS****A. APPOINTMENT OR EMPLOYMENT, DURATION THEREOF, AND EXTENT OF AUTHORITY**

- § 1230. In general.**
  - 1230(1). Colorado.
  - 1230(2). Texas.
  - 1230(3). Wyoming.
- 1231. Requisites of contract of employment.**
  - 1231(1). Michigan.
  - 1231(2). Missouri.
  - 1231(3). Texas.
  - 1231(4). Washington.
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  - 1232(3). Texas.
- 1233. Revocation of authority—Right to revoke.**
  - 1233(1). Iowa.
  - 1233(2). Kansas.
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- 1234. Same—Sufficiency of revocation.**
- 1235. Extent of authority conferred.**
- 1236. Authority of broker to make written contract—Ratification.**

**B. LIABILITY OF BROKER TO, AND RIGHTS OF BROKER AGAINST, PRINCIPAL**

- 1237. Liability for loss of moneys intrusted to broker for investment.**
- 1238. Duty to account for secret profits.**
- 1239. Buying and selling on margin—Recovery of advances for principal.**
- 1240. Same—Right of broker to interest.**
- 1241. Right of broker with respect to dealings in futures.**
- 1242. Status of broker with respect to stocks carried on margin.**
- 1243. Duty of customer with respect to keeping up margins on speculative buying or selling of stocks and commodities.**
- 1244. Right of broker to sell stocks because of insufficient margin.**
- 1245. Same—Waiver by broker of terms of contract of pledge.**
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- 1247. Right of broker to sell stock to reimburse himself for moneys advanced.**
- 1248. Same—Sufficiency of notice of sale.**
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- 1250. Measure of liability of broker for improperly closing account.**
- 1251. Measure of damages for wrongful sale of stock by broker.**
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**C. RIGHT TO COMMISSIONS**

- 1253. Necessity that broker act in good faith.**
  - 1253(1). Arkansas.
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- 1254. Effect of interest of broker adverse to principal.**
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  - 1255(1). Arizona.
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             1255(4). New York.  
             1255(5). Oklahoma.  
             1255(6). Texas.  
             1255(7). Virginia.
1256. Who liable for services where buyer employs broker.
1257. Rate or amount of compensation.  
      1257(1). Illinois.  
      1257(2). Maryland.  
      1257(3). Michigan.
1258. Same—Agreement to deliver stock as commission.
1259. Amount of compensation in absence of contract specifying amount.  
      1259(1). Delaware.  
      1259(2). Maryland.  
      1259(3). Texas.

**D. SUFFICIENCY OF SERVICES TO ENTITLE TO COMMISSIONS**

1260. In general.  
      1260(1). Colorado.  
      1260(2). Delaware.  
      1260(3). Iowa.  
      1260(4). Kentucky.  
      1260(5). Maryland.  
      1260(6). Michigan.  
      1260(7). Mississippi.  
      1260(8). Oklahoma.  
      1260(9). Texas.  
      1260(10). Virginia.
1261. Compliance with terms imposed by principal.  
      1261(1). Iowa.  
      1261(2). Michigan.  
      1261(3). New York.  
      1261(4). Texas.
1262. Transaction concluded by principal on other terms than those originally given broker.  
      1262(1). Delaware.  
      1262(2). Illinois.  
      1262(3). Oklahoma.
1263. Time within which transaction must be consummated.  
      1263(1). Delaware.  
      1263(2). Michigan.  
      1263(3). Missouri.  
      1263(4). Texas.
1264. Duty to procure binding contract.  
      1264(1). Michigan.  
      1264(2). Missouri.  
      1264(3). New York.  
      1264(4). Oklahoma.
1265. Readiness and ability of purchaser to comply with terms of contract.
1266. Broker as procuring cause of contract between principal and third person.  
      1266(1). United States.  
      1266(2). Arkansas.  
      1266(3). Delaware.  
      1266(4). Illinois.  
      1266(5). Maryland.  
      1266(6). Michigan.  
      1266(7). Missouri.  
      1266(8). New Mexico.

- § 1266 1266(9). North Carolina.  
1266(10). Oklahoma.  
1266(11). Texas.  
1266(12). Washington.
- 1267. Bringing parties together.
- 1268. Contract induced by misrepresentations of broker.
- 1269. Transactions closed through other agents.
- 1270. Transaction closed directly between principal and customer.  
1270(1). Delaware.  
1270(2). Iowa.  
1270(3). Missouri.  
1270(4). Oklahoma.  
1270(5). Texas.
- 1271. Transaction concluded with party introduced by broker after latter's efforts have terminated.
- 1272. Right of broker causing negotiations to be reopened after they have once been abandoned.
- 1273. Right of broker not having exclusive agency.  
1273(1). Missouri.  
1273(2). Nebraska.  
1273(3). Oklahoma.  
1273(4). Washington.
- 1274. Right of principal to act independently of broker.  
1274(1). Arkansas.  
1274(2). Delaware.  
1274(3). Indiana.
- 1275. Refusal or failure of principal to consummate transaction negotiated by broker.  
1275(1). Colorado.  
1275(2). Delaware.  
1275(3). Illinois.  
1275(4). Michigan.  
1275(5). Missouri.  
1275(6). Oklahoma.  
1275(7). Texas.  
1275(8). Virginia.  
1275(9). Washington.
- 1276. Right to commission as dependent on legality of contract procured by broker.
- 1277. Transaction not consummated because of defect in title of principal  
—Sale of invalid bonds.
- 1278. Division of commissions between brokers.
- 1279. Parties to action for commissions.
- 1280. Burden of proof.  
1280(1). Illinois.  
1280(2). Mississippi.  
1280(3). Missouri.

#### E. LIABILITY TO THIRD PERSONS

- 1281. Liability for misrepresenting price principal was to receive.

#### A. APPOINTMENT OR EMPLOYMENT, DURATION THEREOF, AND EXTENT OF AUTHORITY

##### § 1230. In general

##### § 1230(1). Colorado

The jury are instructed that to entitle the broker to commissions for his services, he must make it appear, by a fair preponderance of the evidence, that the services were rendered under an employ-

- § 1255 1255(3). Maryland.  
1255(4). New York.  
1255(5). Oklahoma.  
1255(6). Texas.  
1255(7). Virginia.
1256. Who liable for services where buyer employs broker.
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**D. SUFFICIENCY OF SERVICES TO ENTITLE TO COMMISSIONS**

1260. In general.  
1260(1). Colorado.  
1260(2). Delaware.  
1260(3). Iowa.  
1260(4). Kentucky.  
1260(5). Maryland.  
1260(6). Michigan.  
1260(7). Mississippi.  
1260(8). Oklahoma.  
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#### E. LIABILITY TO THIRD PERSONS

1281. Liability for misrepresenting price principal was to receive.

#### A. APPOINTMENT OR EMPLOYMENT, DURATION THEREOF, AND EXTENT OF AUTHORITY

##### § 1230. In general

##### § 1230(1). Colorado

The jury are instructed that to entitle the broker to commissions for his services, he must make it appear, by a fair preponderance of the evidence, that the services were rendered under an employ-

ment and retainer by the principal, or that the latter accepted his agency and ratified or adopted his acts. If he rendered the service as a mere volunteer, without any employment, express or implied, he cannot recover commissions.<sup>1</sup>

**§ 1230(2). Texas**

You are instructed that, if you believe from the evidence that the said defendant did not list his land with the plaintiffs, or that it is not the prevailing custom to pay ——— per cent. of the total sale price of the property for exchange of the same, or that the defendant did tell the plaintiffs that they were to receive \$——— net to him for his land, then and in either event you will find for the defendant, and so say by your verdict.<sup>2</sup>

**§ 1230(3). Wyoming**

You are instructed that it is the duty of the jury in this case to first determine under the evidence what the contract for commission, if any, was as between the plaintiff and defendant herein. If you find that the agreement entered into between the plaintiff and defendant was that the defendant instructed the plaintiff that he would sell his ranch property for \$——— net, and refused to pay any commission, but instructed the plaintiff that he must get his commission from some other source, then I instruct you that the plaintiff would not be a broker under the ordinary term, but that he would be acting under a special contract, and would not be entitled to and could not collect his commission claimed under his first cause of action until the defendant had been paid the \$——— in full for his property; but if you find that the plaintiff and defendant entered into an agreement whereby the defendant agreed to pay the plaintiff \$——— if he found a purchaser for the ranch lands at \$———, and that there was no agreement as to the net amount due the defendant, and no agreement as to the plaintiff receiving his commission other than from the defendant then I charge you that the law as hereinafter defined pertaining to brokers applies.<sup>3</sup>

**§ 1231. Requisites of contract of employment**

**§ 1231(1). Michigan**

Now, gentlemen, I want you to read the certificate of authority and a paper, which possibly may be called a contract, although I will not call it a contract, between the parties. Plaintiff went to work under this certificate of authority, dated the —— day of ——: "To Whom It may Concern: This is to certify that

<sup>1</sup> Duncan v. Borden, 59 P. 60, 13 Colo. App. 481.

<sup>2</sup> Blaschke v. Ferguson & Dyess (Civ. App.) 208 S. W. 727.

<sup>3</sup> Murphy v. W. & W. Live Stock Co., 187 P. 187, 26 Wyo. 455.

—— is taking orders for stock for the —— Car Company, and that the purchaser can send his check covering the number of shares desired to the —— Bank, ——, or direct to the company, and certificates will be forwarded by return mail. ——." Later this was entered into, which possibly may be called a contract, although I am not calling it a contract: "——. To Whom It may Concern: This is to certify that the bearer, ——, whose signature is herewith [and he has written in his signature], is duly authorized to receive and solicit application for a limited number of shares of stock of the —— Car Co. at the original par value of —— dollars (\$——) per share, all checks to be made payable to the said company. Very truly yours, ——." Now, by these papers that I have read to you, gentlemen, the dealings of these parties are governed, and in view of the situation of the company, as I suggested to you in the commencement of this charge, the parties ought by them to be governed.<sup>4</sup>

§ 1231(2). **Missouri**

You are instructed that, if you believe from the evidence that the witness D., as a member of the plaintiff firm, and the defendant verbally agreed that the said D. should undertake, or, if the defendant consented, that said D. should endeavor to secure a tenant for defendant, who would enter into a lease with defendant for the occupancy of the ground owned by defendant and the building to be erected thereon at the southeast corner of —— and —— streets in the city of ——, and mentioned in evidence, then such agreement in law constituted a contract of employment, and in such circumstances it was not necessary, in order to make the defendant liable to the plaintiffs, that the amount of compensation should have been mentioned or the amount agreed upon, and if you believe that the plaintiffs, acting through the witness D. in pursuance to said understanding or consent, did secure the —— Company, mentioned in evidence, as such tenant for the defendant, and that the said defendant executed the lease to the said —— Company introduced in evidence, then your verdict in this case will be for the plaintiffs for such sum as you may believe from the evidence is a reasonable compensation for the services, if any, performed by them for the defendant in said matter, not exceeding the sum of \$——.<sup>5</sup>

§ 1231(3). **Texas**

The jury are instructed that one of the essential elements of a contract is an agreement or meeting of the minds of the parties by

<sup>4</sup>Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>5</sup>Davis v. Geiger (App.) 212 S. W. 384.



an offer on the one hand and an acceptance on the other. This necessary element must be present in an implied contract as well as in an expressed contract. If it is absent in either no obligation is created, and if there was no meeting of the minds of the plaintiff and the defendant, that the plaintiff should sell the property and the defendant would pay a commission to plaintiff for making a sale, his efforts to sell said property would be voluntary, and in that event the defendant would owe plaintiff nothing, though he might have found a purchaser ready, willing, and able to buy. In this connection you are instructed that if the commission for making said sale was not particularly stated or referred to, if the services of the plaintiff in making said sale were requested by the defendant, compensation will be presumed unless the agreement is between near relatives, when the law requires an express promise to pay, although the amount may not be stated.<sup>6</sup>

**§ 1231(4). Washington**

You are instructed that, unless the minds of both parties actually meet in a present agreement, there is no contract. And I instruct you, therefore, that, unless you find from the evidence that the negotiations between the parties in this case did result in an actual present agreement, as distinguished from a proposed proposition to be considered in the future, you must find a verdict for the defendant.<sup>7</sup>

The contract which plaintiff claims was made by the defendants, to pay the plaintiff a commission, was made, if at all, orally, in conversation between the parties, and was not reduced to writing. The court instructs you in order for there to be a contract the minds of the parties must meet; that is to say, they must reach an actual present agreement to which they both in fact agreed to be then bound. It is not sufficient that they come to an understanding as to the terms of a contract which either one or both parties may be willing to enter into in the future after further consideration, nor is it even sufficient that one of them intends or understands that the arrangement is intended to be binding at that time.<sup>8</sup>

**§ 1232. Necessity of express contract of employment**

**§ 1232(1). Delaware**

You are instructed that it is not essential to the plaintiff's recovery in this action that he should have been actually requested by the defendants to bring them in touch with the ——— Com-

<sup>6</sup> Carl v. Wolcott (Civ. App.) 156 S. W. 334.

<sup>7</sup> Calhoun, Denny & Ewing v. Whitcomb, 155 P. 759, 90 Wash. 128.

<sup>8</sup> Calhoun, Denny & Ewing v. Whitcomb, 155 P. 759, 90 Wash. 128.

pany. If you believe that the plaintiff, with the consent of the defendants, brought the contracting parties together, and was thereby the procuring cause of the contract actually made between the defendants and said company, then the said plaintiff would be entitled to such commissions as he may have proved the defendants had agreed to pay him for the procuring of such contract, or, in the absence of such proof as to the payment of commissions, to such compensation as the jury may think he reasonably deserves for the procuring of such contract.<sup>9</sup>

§ 1232(2). **Kentucky**

The jury are instructed that the defendant is liable for the services of plaintiff, if they were of such character and rendered under such circumstances as would indicate to an ordinarily intelligent business man that they were not performed gratuitously and that compensation was expected therefor.<sup>10</sup>

§ 1232(3). **Texas**

You are instructed that an agent may be created by an express or an implied agreement, and when by an implied agreement the acts and conduct of the parties must be looked to in determining if there is an agency, and, if one party accepts the work and benefits arising from the efforts of a second party in a land deal, he makes the second party his agent by an implied contract. Therefore if you find from the preponderance of the evidence before you that there was either an express or an implied contract between the parties for the sale of the land in question, and that plaintiff and ——— acted either as the direct or implied agents of defendant and procured for him a buyer for his land, either through themselves or their agent ———, then you will find for the plaintiff in the sum of \$———, but, if you do not so find, then you will find for the defendant.<sup>11</sup>

§ 1233. **Revocation of authority—Right to revoke**

See, also, post, § 1263.

§ 1233(1). **Iowa**

You are instructed that where property is listed with a broker for sale, and the broker procures a customer for the purchase of said property, to whom the owner sells the property during the existence of the agency at the terms upon which it is listed with the broker, he is entitled to his compensation, and in this case it is admitted by the pleadings that the property was listed with the

<sup>9</sup> Richards v. Richman, 64 A. 238, 5 Pennewill, 558.

<sup>10</sup> Miller v. Early, 58 S. W. 789, 22 Ky. Law Rep. 825.

<sup>11</sup> McKinney v. Thedford (Civ. App.) 166 S. W. 443.

plaintiff for sale at the sum of \$——, and the uncontroverted evidence shows that the plaintiff called the attention of the —— Company through its agent, ——, to said property, and subsequently the defendant sold the property to the —— Company at the price at which it was listed with the plaintiff. But defendant claims that prior to the sale of said property by him to the —— Company, the authority of the plaintiff to sell the property was revoked and canceled, and that he negotiated the sale without aid of the plaintiff. Evidence has been introduced of the revocation of the authority to sell. But the plaintiff claims that said revocation was not intended by the defendant as a revocation of the authority, but as a subterfuge to conceal from other parties the existence of the agency, and that there at all times existed an agreement between the plaintiff and the defendant that the plaintiff should be the agent for the sale of said property. You are instructed that the burden of proof is upon the plaintiff to prove such an agreement, and that the revocation of the authority was not intended by the defendant to be a revocation, but was a subterfuge to conceal the agency of the plaintiff from other parties. And, if plaintiff has so proven to you by a preponderance of the evidence, then your verdict should be for the plaintiff.<sup>12</sup>

You are instructed that plaintiff further claims that the revocation was not in good faith, and was made for the purpose of defeating or preventing plaintiff from procuring his commission for the sale of said property. On this branch of the case you are instructed that the owner of real estate who has placed the same in the hands of a broker for sale has the right at any time prior to the procuring of a purchaser for the property by the broker to revoke and cancel the authority of the broker to sell the same, if he acts in good faith, without any intention on his part to defeat pending negotiations between the broker and the proposed customer, and thereby defeating the broker in earning a commission upon the sale. But, if the broker having authority from the owner to sell real estate has pending negotiations with a prospective purchaser, with prospects of success, and the owner subsequently carries on the negotiations started by the broker, and sells said real estate to the customer furnished by the broker upon the terms upon which it is given to the broker to sell the same, the owner cannot by so doing defeat the broker's commission earned in procuring the customer.<sup>13</sup>

You are instructed in this case that if you find from the evidence that the plaintiff procured a purchaser for this property, and

<sup>12</sup> Benton v. Brown, 124 N. W. 815,  
145 Iowa, 604.

<sup>13</sup> Benton v. Brown, 124 N. W. 815,  
145 Iowa, 604.

through the efforts of the plaintiff the purchaser was induced to purchase the property, and you find that while negotiations were pending between the proposed purchaser and the broker the defendant, for the purpose of defeating plaintiff's right to a commission, canceled his authority, and made the sale himself to the purchaser, then your verdict should be for the plaintiff. But if you find from the evidence that the negotiations between the plaintiff and the proposed purchaser had failed, and that after the failure of said negotiations the defendant revoked the authority of the plaintiff to sell said property, and said revocation was in good faith, without any intent on the part of the defendant to defeat the plaintiff in a commission, then your verdict should be for the defendant, even though after the revocation the defendant sold the property to the proposed purchaser.<sup>14</sup>

**§ 1233(2). Kansas**

You are instructed that one may become an agent of another by acting as such agent with the knowledge of the other, if such other person by his conduct and acts adopts or ratifies the agency. In this case the defendants had the right to disavow and repudiate plaintiff's authority to find them a customer for their land, but they could not knowingly adopt and approve his efforts to act for them and procure a purchaser, and, when he had done so, repudiate his authority and deal directly with the customer of plaintiff and deprive him of his commission.<sup>15</sup>

You are instructed that, where an owner has listed and placed land in the hands of a real estate agent for sale, and in doing so has reserved the right to take the land off the market or to change the price without notice to the agent, such owner has the right to withdraw the land from the market or change the price thereof without notice to the agent, at any time before the agent has procured a purchaser who is willing and able to purchase the land at the price and upon the terms which the owner has authorized the agent to sell, or at a price and upon terms which the owner is willing to accept; but you are further instructed that the owner in such a case does not have the right to withdraw the land from the market or to change the price for the purpose of avoiding liability for the commission of the agent after the agent has procured a purchaser with notice to, or the knowledge of, the owner who is willing and able to take and purchase the land at the price and upon the terms which the owner has authorized the agent to sell the

<sup>14</sup> *Benton v. Brown*, 124 N. W. 815, 145 Iowa, 604.

<sup>15</sup> *Culbertson v. Sheridan*, 144 P. 268, 93 Kan. 268.

same, or at a price and upon terms which the owner is willing to accept.<sup>16</sup>

§ 1233(3). **Michigan**

I instruct you, further, that it was in the power of defendant company to have revoked the authority of plaintiff to act for it at any time the said company so wished; but it was incumbent on said defendant to have done so plainly, and in language that could not be charged with equivocation or uncertainty.<sup>17</sup>

I instruct you that it is a principle of law that a revocation of the agent's authority, and (in this case) the authority of plaintiff, to solicit subscriptions for stock, cannot be revoked by the principal, so as to affect acts already done or commissions already earned.<sup>18</sup>

I instruct you that the plaintiff is entitled to recover his commission on all subscriptions for stock taken by him within the scope of his authority before receiving notice of revocation of his authority by the defendant company.<sup>19</sup>

I instruct you that plaintiff is entitled to recover his commissions on all subscriptions of stock taken by him before his authority to act was revoked, and which said subscriptions had checks attached to the applications, or in which the applicants had forwarded their checks direct to the company, as they had a right to do, or were forwarded or delivered to or received by defendant company, provided that said subscribers were ready, willing, and able to pay for said stock.<sup>20</sup>

You are instructed that in this case plaintiff can recover only for commissions in any case in which applications were delivered to the defendant before the plaintiff's authority was revoked.<sup>21</sup>

§ 1233(4). **Missouri**

The jury are instructed that, if you believe from the evidence in the cause that the defendant employed the plaintiff to sell his farm for him, and agreed with him, if he would sell it for ——— dollars per acre he would give him a commission of ——— per cent. on the total amount of the sale, then said plaintiff would be entitled to reasonable notice, taking into consideration the condition and situation of the parties, of the revocation of said agency, and it would be too late for the defendant to revoke it, after the negotia-

<sup>16</sup> Culbertson v. Sheridan, 144 P. 268, 93 Kan. 268.

<sup>17</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>18</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>19</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>20</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>21</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

tions with the purchaser had begun, which were finally consummated, if you so believe they were.<sup>22</sup>

The jury are instructed that, if the defendant employed plaintiff as a real estate agent to sell his lands, and agreed to pay plaintiff a certain commission, and that later, on ———, and before a purchaser ready, willing, and able had been produced to defendant, or a written contract secured by plaintiff for said sale, this defendant notified plaintiff that he would after ———, take said lands from his list, and that he need make no further effort to sell same, then you must find for the defendant.<sup>23</sup>

The jury are instructed that, if the defendant agreed to pay plaintiff a commission of ——— per cent, for selling his farm of ——— acres at \$——— per acre; that plaintiff, as defendant's agent, entered into a verbal contract with ——— and ———, about ———, to sell them the land at said price, on the terms agreed upon by plaintiff and defendant, and that afterwards, on the ———, the said ——— and ——— entered into a written contract with plaintiff to buy the land at said price on said terms; and that the said ——— and ——— were financially able to execute said contract—then the jury will find for the plaintiff in the sum of \$———, although the jury may further believe from the evidence that between the time of making said verbal contract, if any was made, and making the written contract, if any was made, the defendant notified the plaintiff that he had terminated his agency.<sup>24</sup>

#### § 1234. Same—Sufficiency of revocation

I instruct you, further, that a revocation by a principal of an agent's authority should be unequivocal, and leave no doubt as to the principal's intentions. Any ambiguity or uncertainty in such a case should be construed most strongly against the principal, in whose power it lay to prevent such a result.<sup>25</sup>

#### § 1235. Extent of authority conferred

Now, gentlemen, the defendant claims that the arrangement made with the plaintiff was for the sale of \$——— par value of the stock of the defendant company, or substantially that amount, and that when he made an arrangement with the plaintiff, and gave him a writing showing that he had authority to sell stock of the defendant company, that said writing stated that the plaintiff was entitled to sell "a limited number of shares of stock," the exact number not being fixed. It is evident that the defendant did not give the plaintiff general authority to sell an unlimited amount of stock,

<sup>22</sup> *Sallee v. McMurry*, 88 S. W. 157, 113 Mo. App. 253.

<sup>23</sup> *Kesterson v. Chevront* (App.) 70 S. W. 1091.

<sup>24</sup> *Kesterson v. Chevront* (App.) 70 S. W. 1091.

<sup>25</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

or to sell all of the stock which the defendant had on hand, but that the arrangement was for the sale of an amount of stock less than the whole amount which the defendant had on hand.<sup>26</sup>

The court instructs the jury that you have a right to consider the circumstances surrounding the parties and the verbal testimony in the case, in order to determine what was meant by the parties in the use of the term "a limited number of shares of stock" in the writing referred to. When you shall have determined what the parties meant and understood and intended by the use of the term "a limited number of shares of stock" of the defendant company, then the plaintiff is not entitled to recover for commissions upon the sale of stock in excess of the amount which the parties understood and intended to designate by the use of the term "a limited number of shares of stock," for the reason that the plaintiff had no contract or agreement covering an amount of stock in excess of that amount, and the defendant was under no obligations to sell, and had not agreed to sell, an amount of stock in excess of that amount.<sup>27</sup>

Now, gentlemen, the written authorization given by defendant to plaintiff to sell stock provided—and I have read it to you—that plaintiff should take subscriptions to be paid for by checks therefor or payable to the defendant company, and send the checks with the subscription or application for stock, or to be sent by the applicant at once to the company; but I instruct you that the fact that in some particular instances defendant did issue the stock and send the stock to a bank, with draft attached for collection, would not amount to a general authorization by defendant that plaintiff had authority to accept subscriptions generally, and insist that defendant was bound to issue the stock and send the stock to a bank, or any bank which plaintiff might designate, with draft attached, but defendant had a right to require plaintiff to have the check or draft accompany the subscription, or that it be sent to him as soon as the applicant could mail it to him, and if plaintiff failed to forward the check or draft at the time of the filing of the subscription, and the applicant failed to send any check to the defendant company, then plaintiff would not be entitled to a commission, where the check failed to accompany the subscription.<sup>28</sup>

**§ 1236. Authority of broker to make written contract—Ratification**

As you have been instructed, the plaintiff was not authorized to make a written contract for the defendant with \_\_\_\_\_. Therefore such contract was not binding upon the defendant, unless he was

<sup>26</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

<sup>27</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

<sup>28</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.



afterwards informed of it, of the terms in which it was made, and of all the facts under which it was made, and then ratified it by accepting the agency under which it was made and approving and adopting plaintiff's acts. In order to bind the defendant by ratification of the contract such ratification, if any there was, must have been made by him with the full knowledge of all the material facts.<sup>29</sup>

#### B. LIABILITY OF BROKER TO, AND RIGHTS OF BROKER AGAINST, PRINCIPAL

##### § 1237. Liability for loss of moneys intrusted to broker for investment

The jury is charged that, if you find that defendant let plaintiff have the \$——, as alleged by her, to be loaned for her, and that a loan of same was made by plaintiff by and with the consent of said defendant, then you are charged that in the loaning of same he was required to exercise the same degree of diligence that a prudent man would exercise in the same business; and if you believe that he did exercise reasonable prudence, and that said loan was reasonably well secured, then if, through some unforeseen circumstance, a condition arose that destroyed said security, then said plaintiff would not be responsible.<sup>30</sup>

##### § 1238. Duty to account for secret profits

The court instructs the jury that, if the jury believe from the evidence that plaintiff engaged the defendants as her agents to make a trade of her house and lot No. ——, in the city of ——, for farm property, and stipulated that the said house and lot was to be traded at a valuation of \$——, and that the said agents representing the said plaintiff, called upon ——, the owner of the —— farm in —— county, containing —— acres, for the purpose of attempting to trade for the plaintiff her house and lot for the farm of the said ——, and that at the time the said agents listed the farm of —— for sale, and later secured from the said —— an agreement to trade the said farm at \$—— per acre net, with the further understanding that the said agents would guarantee a sale of the house and lot of the plaintiff so as to net the said —— \$—— per acre, or \$—— for his farm, and that upon getting such agreement, the said agents failed to disclose to the plaintiff that the said —— was receiving \$—— per acre net for his farm, and, on the contrary, stated to the plaintiff that —— would not trade his farm for less than \$—— per acre, and that pursuant thereto the said plaintiff executed a deed to ——

<sup>29</sup> *Akin v. Poffenberger*, 116 S. W. 615, 53 Tex. Civ. App. 340.

<sup>30</sup> *Caruthers v. Ross* (Tex. Civ. App.) 63 S. W. 911.

conveying her aforesaid house and lot, and received from the said ——— a deed to the said farm, and that the said ——— on the same day reconveyed the said house and lot to the said agents and received as a consideration of the purchase of his farm, instead of the purchase price of \$——— per acre, \$———, the purchase price of \$——— per acre, \$———, evidenced by the note of the plaintiff secured upon the aforesaid ——— farm for \$——— and \$——— in cash paid to him by said agents, then the jury are instructed that the said agents have not dealt fairly with their principal, the plaintiff, and have failed to disclose to her and have concealed from her matters of a material nature touching the subject-matter of the agency, and have speculated with their principal's property, and are therefore responsible for the actual loss and damage suffered by the said principal by reason thereof.<sup>31</sup>

**§ 1239. Buying and selling on margin—Recovery of advances for principal**

The jury are instructed that, if the jury find from the evidence that the defendant ordered the plaintiffs, as brokers, to buy and sell stocks and other securities for him in the ——— and ——— markets, on commission, subject to the usages and rules of said markets; and if they find that in pursuance of said order the plaintiffs, by their agents, did buy and sell stocks and other securities in said markets, in accordance with the rules and usages thereof, and made reports of such purchases and sales to the defendant, and that plaintiffs, by their agents, actually received and paid for the stocks and securities so purchased and actually delivered, and were paid for those so sold, then such purchases and sales were binding upon the defendant, and he became liable to account to the plaintiff for the excess that the jury may find they paid for stocks and securities so purchased by them, over and above the amount received by them for sales so made by them, and for such commissions of plaintiffs for making said purchases and sales as the jury may find the defendant and plaintiffs agreed upon.<sup>32</sup>

The jury are instructed that, if the jury find that the defendant ordered the plaintiffs, as brokers, to buy and sell wheat for him on commission, according to the rules and customs of the market in which such orders might be executed, and if they find that in pursuance of such orders the plaintiffs, through their agents, made purchases and sales of wheat for defendant in ———, according to the rules and customs of that market, and if they find that the contracts of purchase so made, were settled in good faith, according to

<sup>31</sup> Schmidt v. Wallinger, 99 S. E. 680, 125 Va. 361.

<sup>32</sup> Stewart v. Schall, 4 A. 399, 65 Md. 289, 57 Am. Rep. 327.

the terms thereof, and the usages and customs of said market, and that the plaintiffs paid the losses resulting from such contracts, and received the profits, and duly reported the same to the defendant, then the defendant became liable to account to the plaintiffs for the excess, if any, of the losses so paid by them on said transactions, over and above the profits received by them on the same, and for such commissions of the plaintiffs for making said purchases and sales as the jury may find was agreed upon between the parties.<sup>33</sup>

The jury are instructed that, if the jury find that the defendant employed the plaintiffs as his brokers, to buy and sell, on commission, stocks, bonds, and grain for him in the markets of ———, ———, and ———, under an agreement that the defendant should secure the plaintiffs by depositing with them a margin, as testified to by defendant; and if they find that the plaintiffs, through their agents, executed said orders of the defendant in said markets, as required to be found in the plaintiffs' ——— and ——— prayers according to the custom and usages of said markets, and that plaintiffs paid all money necessary and required to be paid in the execution of such orders, and received all moneys that became receivable in the execution of said orders, and that they reported all said transactions to the defendant, and charged him with the money so paid for him, and credited him with the money so received by them for him; and if they find that the defendant failed to secure the plaintiffs by keeping up said margin when required, and that the plaintiffs thereupon sold such securities of the defendant as they had in hand, after notice to him in the manner shown in evidence, and reported said sales to defendant, then the plaintiffs are entitled to recover the loss sustained by them in the execution of the defendant's orders, as above set forth, and their commissions for executing the same.<sup>34</sup>

#### § 1240. Same—Right of broker to interest

The jury are instructed that if they find the facts stated in the plaintiffs' ———, ———, and ——— prayers, and further find that, in the execution of the orders of the defendant therein referred to, the plaintiffs paid to the brokers employed by them interest on the monthly balances due such brokers for the execution of said orders, and reported said payments, if entered, to the defendant, and if they find that the custom and usage of the business, in the markets where such orders were executed, was to charge interest on such monthly balances of accounts, then the plaintiffs are entitled

<sup>33</sup> Stewart v. Schall, 4 A. 399, 65 Md. 289, 57 Am. Rep. 327.

<sup>34</sup> Stewart v. Schall, 4 A. 399, 65 Md. 289, 57 Am. Rep. 327.

to recover the interest so paid by them on account of the defendant.<sup>35</sup>

**§ 1241. Right of broker with respect to dealings in futures**

The jury are instructed that the plaintiffs cannot recover in this case upon the dealings in grain between them and the defendant, unless the jury shall find from the evidence all the following facts: (1) That the defendant authorized said dealings; (2) that the purchases and sales authorized by him were actually and bona fide made; (3) that the grain directed by him to be bought was in fact bought by the authorized agent or agents of the plaintiffs in ———, and was in fact delivered by the seller or sellers to and accepted by said authorized agent or agents; (4) that the grain directed by the defendant to be sold was in fact sold by the authorized agent or agents of the plaintiffs in ———, and was in fact delivered by such authorized agent or agents to the purchasers thereof.<sup>36</sup>

The jury are instructed that, if the jury shall find from the evidence that, when the defendant gave to the plaintiffs the several orders offered in evidence for the purchase and sales of grain, it was mutually understood between them that the defendant was not to deliver any of the grain that he ordered to be sold, or to accept any of the grain that he ordered to be bought, but that all of said transactions were to be settled and adjusted by the payment or receipt, as the case might be, of differences between the prices at which said grain should be bought, and at which it should be sold; and if the jury shall find, further, that in pursuance of said mutual understanding the plaintiffs in their own names transmitted to their correspondents, for execution, said orders of the defendant, and that said orders were executed by the said correspondents of the plaintiffs, upon the credit of the plaintiffs, and upon security advanced by them, then the plaintiffs are not entitled to recover in this action for any services rendered or advances made by them in furthering and conducting said transactions for the defendant.<sup>37</sup>

**§ 1242. Status of broker with respect to stocks carried on margin**

The jury are instructed that the relation between the plaintiff and defendant in this case was that of pledgor and pledgee, with the right in the defendant to exercise all powers of sale of the securities mentioned in the evidence as having been sold, as are set forth in the defendant's statement of purchases, unless modified or lessen-

<sup>35</sup> Stewart v. Schall, 4 A. 399, 65 Md. 289, 57 Am. Rep. 327.

<sup>36</sup> Stewart v. Schall, 4 A. 399, 65 Md. 289, 57 Am. Rep. 327.

<sup>37</sup> Stewart v. Schall, 4 A. 399, 65 Md. 289, 57 Am. Rep. 327.

ed by the defendant's conduct or acts towards the plaintiff, as explained in subsequent instructions.<sup>38</sup>

**§ 1243. Duty of customer with respect to keeping up margins on speculative buying or selling of stocks and commodities**

The jury are instructed that if the jury find that the meaning of the word "short," used in the contract offered in evidence, in connection with a sale of gold, as established by the usage applicable to sales of gold of the kind mentioned in evidence, is that the seller has not the gold at the time of sale, but sells with the expectation of being able to buy gold for delivery at a lower price, and that by said usage a sale short of gold implies that the seller shall at all times during the running of the contract keep in the hands of the buyer, or in the hands of some third party agreed upon between seller and buyer, an amount in cash, or securities equivalent to cash, equal to the difference between the price at which the gold is sold short and its market value on any given day, and a further amount in money, or the equivalent of money, equal at all time to 5 per cent. on the market value of gold on any day, and that by said usage a sale of gold short further implies that, in the event of the failure of the seller at any time to keep in the hands of the buyer security in money, or its equivalent in securities, at a cash valuation, to the extent above stated, the buyer may purchase the gold at the best rate at which the gold can be bought, and charge the seller with the loss that may be thereby incurred. And if they shall further find that on ——— the plaintiff had failed, upon the demand of the defendants, to place in their hands money or securities to the extent of the difference between the contract price and the lowest price at which gold could have been purchased on that day in the city of ——— and 5 per cent. on the value of said gold in addition, and that the defendants thereupon purchased said gold at the lowest price they could buy the same at the time of said purchases, the plaintiff is not entitled to recover.<sup>39</sup>

The jury are instructed that, if the jury shall find that on ———, by usage and custom obligatory upon the plaintiff, the defendants had a right to call for margin, and that at said time, with the collaterals then on hand of the plaintiff at the then price of gold, the sum of \$——— was the amount of margin proper to be demanded, and that on said day the defendants demanded by letter said sum, and that before compliance could be had gold had receded in price equal to \$——— on the amount of the purchase, then the right to demand said \$——— had ceased, and that plaintiff was not in default until some new and fresh demand for margin, properly

<sup>38</sup> *Miller & Co. v. Lyons*, 74 S. E. 194, 113 Va. 275.

<sup>39</sup> *Appleman v. Fisher*, 34 Md. 540.

entitled to be made, was made by defendants of plaintiff, and that he had failed to comply therewith in a reasonable time thereafter.<sup>40</sup>

The jury are instructed that, if the jury find that the plaintiff sent to the defendants as margin on his contract with them \$—— of —— bonds, and that defendants objected to receive said bonds as margin, and that the plaintiff thereupon promised to replace said bonds with money, and failed to do so before the ——, that after such failure the plaintiff is not entitled to require the defendants to treat said bonds as available margin, provided the jury find the usage as to margin set forth in the defendants' first prayer.<sup>41</sup>

**§ 1244. Right of broker to sell stocks because of insufficient margin**

The jury are further instructed that the pledgee or defendant had the right to exact strict performance of the contract according to its terms and upon default on the part of the plaintiff to comply with its terms to sell the stock held by the defendant. But strict performance of such contract by the plaintiff may be waived by any agreement, or course of conduct on the part of the pledgee, or defendant, and, if there be any such, which reasonably led the plaintiff to believe that a sale would not be made without an opportunity being given him to increase or maintain his margin. The good faith which the laws exact from a pledgee dealing with a pledge or trust property upon a default by the pledgor in the performance of the terms of the contract under which such property is held will not permit the pledgee after having, by its acts or course of dealings, waived the forfeiture or the right to dispose of the pledge upon such default by the pledgor, to suddenly stop short and insist upon the right to dispose of said property, without notice, because of any such default, when the pledgor is unprepared to perform said terms.<sup>42</sup>

The court further instructs the jury that under all circumstances as to the sale of the stock purchased for the plaintiff an obligation rested upon the defendants to act with entire good faith and to sell the securities for the highest price that they could obtain.<sup>43</sup>

**§ 1245. Same—Waiver by broker of terms of contract of pledge**

The court tells the jury that waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. And if the plaintiff claims that the defendants waived any of the conditions of the contract of pledge, or that they waived the right to a —— point margin, the burden of proof is upon the plaintiff to prove by a preponderance of evi-

<sup>40</sup> Appleman v. Fisher, 84 Md. 540.

<sup>41</sup> Appleman v. Fisher, 34 Md. 540.

<sup>42</sup> Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.

<sup>43</sup> Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.

dence such waiver, and to prove the intent on the part of the defendant to make such waiver. Waiver need not be proved by express statement to that effect. It may be proved by the acts, conduct, or dealings of the defendants.<sup>44</sup>

**§ 1246. Same—Waiver by broker of right to sell without notice**

You are instructed that, if the jury believe that the defendant by any course of conduct in their dealings with the plaintiff in the purchase and carrying of stock upon a margin waived their right to exact strict performance of the contract, and gave the plaintiff time and indulgence in increasing and maintaining his margin, then the defendants could not recall such waiver at their own option without reasonable notice to the plaintiff, so that he might have an opportunity to protect his stock, nor could the defendants, if they made such waiver, sell the stock of the plaintiff without giving such reasonable notice to him. And if the jury further believe from the evidence that the defendants did make such waiver, and without giving such notice did sell the stock of the plaintiff complained of in the declaration, then they must find for the plaintiff, if they believe from the evidence that he has been damaged by such conduct of the defendants.<sup>45</sup>

The jury are also instructed that if they believe that in the conversation between the plaintiff and R. on ———, the said R. asked the plaintiff to put up additional margin, the plaintiff replied by asking whether it would not be satisfactory if he would put it up the next day, and, if so, that he would send the said R. \$——— the next day, and that to such inquiry the said R. replied that it would be satisfactory if he would send up that amount the next day, and that R. had power and authority from the scope of agency to make such promise, and, further, that the plaintiff did send up that amount the next day, then the defendants had no right to sell on ——— the ——— shares of ——— and ——— shares of ———, and for any such sale they are liable to the plaintiff for damages, if any, as hereinafter stated.<sup>46</sup>

The court instructs the jury that if they believe from the evidence in this case that plaintiff, in buying and selling stocks through defendants as brokers was doing what is known as a marginal business—that is, that he did not pay outright for the stocks which he bought, but put up a margin or portion of the purchase price—and that defendants furnished the balance of the money with which to purchase the stock, and charged him interest on same, and that

<sup>44</sup> Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.

<sup>45</sup> Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.

<sup>46</sup> Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.



he had notice that the defendants reserved the right to close the transactions when the margins were running out or below a certain amount without further notice to the said plaintiff and settled with him in accordance with sales made, and if they further believe at the time, to wit, on the ——— day of ———, at which the sales of the ——— shares of ——— and ——— shares of ——— stocks were sold the margin on the stock held by said plaintiff was running out or below a point contemplated by the agreement above referred to, and the said defendants sold the stocks because of the small margin at the market price then obtaining on the New York Exchange, that they must find for the defendants, unless the jury shall believe from the evidence that the defendants by their course of action waived such right to sell without notice, or do not believe from the evidence that on ——— the defendants agreed with the plaintiff that they would wait until the next day for additional margins.<sup>47</sup>

The court instructs the jury that if they believe from the evidence that when the plaintiff employed the defendants as brokers that the plaintiff contracted by the terms of the agreement between them with the defendants to deposit with them certain sums of money or securities as a margin above the market price of said stocks so purchased, and to maintain the same at all times so as to protect the said defendants against loss on account of the fluctuations in the market, then it was and became the duty of the plaintiff, without notice from the defendants, to at all times constantly watch the market so as to keep enough money or securities deposited with the said defendants to maintain said margins so as to protect the defendants against loss, unless the terms of said contract were waived by the defendants as explained in the other instructions: and, if they believe from the evidence that the said plaintiff failed to do so, that the defendants had not waived the terms of their agreement as explained in another instruction, and that the defendants sold the stock of the plaintiff set out in the declaration at a time when the plaintiff did not have enough money deposited with the defendants to maintain and keep said margin, then they must find for the defendants, provided you do not believe from the evidence that on ——— the defendants agreed with the plaintiff that they would wait until next day for additional margins.<sup>48</sup>

**§ 1247. Right of broker to sell stock to reimburse himself for mon-  
eys advanced**

The jury are instructed that, if the jury shall find from the evidence that the plaintiff was a stockbroker in ———, and that the

<sup>47</sup> Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.

<sup>48</sup> Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.

defendant, on ———, authorized him to purchase on his account ——— shares of ——— stock, and shall find that the place where said stock was ordinarily bought and sold, was at the Stock Exchange in New York, and shall further find, that the plaintiff therefore actually purchased ——— shares of said stock through his subagents, ———, stockbrokers in ———, and at a price not exceeding the price limited by the defendant, and that the defendant did not supply the plaintiff with funds to make said purchase, and that the plaintiff had funds and credit with his subagents, which were applied by them in making said purchase, and if they shall further find that the defendant, on the next day after the purchase, was informed of said purchase, and that the plaintiff notified the defendant, on the ———, by letter addressed to him at his proper post office, that he was ready to deliver to him ——— shares of ——— stock, so purchased on his account, and that, unless he came forward and paid for it, he, the plaintiff, on or after the ———, would sell said stock at the risk and cost of the defendant, and they shall further find, that the plaintiff had ready for delivery to the defendant such stock, and that he did sell on the ———, at the Public Stock Board in New York, ——— shares of said stock, for and at the risk of said defendant, and that, after applying the whole proceeds of said sale, there was a loss upon the said original purchase, which said loss the plaintiff did pay to his subagents, then the plaintiff is entitled to recover the amount of said loss, or difference in price, together with his reasonable commission for the purchase and the expenses of said resale.<sup>49</sup>

**§ 1248. Same—Sufficiency of notice of sale**

The jury are instructed that, if the jury shall find, that the defendant resided near ——— in ——— county, and the plaintiff in ———, and that there was a daily mail from ——— to ———, which was the proper post office of the defendant, and that the plaintiff deposited in the post office in ———, on ———, a letter containing the notice mentioned in the first prayer, then the said notice was sufficient, notwithstanding the fact that it was not received by the defendant until ———, and after the sale.<sup>50</sup>

**§ 1249. Burden of proof**

The court instructs the jury that, before the plaintiff can recover in this case, the burden of proof rests upon him to show by a preponderance of the evidence that he deposited as margins with said defendants such sums of money or securities as said defendants required of the said plaintiff to protect said defendants against

<sup>49</sup> Worthington v. Tormey, 34 Md. 182.

<sup>50</sup> Worthington v. Tormey, 34 Md. 182.

loss on account of the fluctuations in the market as to the stocks being carried by the defendants for the plaintiff on ———, or that the plaintiff was then or had previously been excused or relieved by the defendant from depositing such margins, and that, unless the plaintiff does so prove, the jury must find for the defendants.<sup>51</sup>

**§ 1250. Measure of liability of broker for improperly closing account**

The jury are instructed that, assuming that the defendants improperly closed the plaintiff's account by the purchase of gold on ———, at \$———, the plaintiff is only entitled to recover the difference between \$——— and interest thereon, until ———, and the lowest price at which the jury may find the defendants could have bought gold in the ——— market according to the instructions contained in the plaintiff's letter of ———, provided the jury shall find that said letter was written and received by the defendants, and provided the jury find that by the usage the defendants were bound to execute the said order of the plaintiff in said letter of ———.<sup>52</sup>

**§ 1251. Measure of damages for wrongful sale of stock by broker**

The court instructs the jury that if they believe from the evidence that the plaintiff was illegally sold out, and damaged thereby, that then the measure of his damages is the difference between the price at which the plaintiff was illegally sold out and the price at which the said stocks which were so sold could have been repurchased within a reasonable time, and that the ——— day of ———, was a reasonable time for the plaintiff to repurchase said stock under the facts and circumstances of this case, and that in ascertaining the damages, if any, which they may find the plaintiff to be entitled to, they cannot allow the plaintiff more than the difference between the price at which the ——— shares of the ——— and ——— shares of ——— stock was sold on the ——— day of ———, and the market price at which the plaintiff could have repurchased the same on ——— day of ———.<sup>53</sup>

**§ 1252. What law governs**

The jury are instructed that, if the jury shall find the facts stated in the defendant's ——— and ——— prayers, and shall further find that the plaintiffs and defendant, at the time of the transactions in question, lived in ———, in the state of ———, and that the orders for the purchase and sale of the grain mentioned in the ——— prayer, and of the stock mentioned in the ——— prayer, were given and received in said ———, and that the understanding between

<sup>51</sup> *Miller & Co. v. Lyons*, 74 S. E. 194, 113 Va. 275.

<sup>52</sup> *Appleman v. Fisher*, 34 Md. 540.

<sup>53</sup> *Miller & Co. v. Lyons*, 74 S. E. 194, 113 Va. 275.

the plaintiffs and defendant was that the said transactions were to be settled there, then the said transactions are governed by the law of ———, and the plaintiffs are not entitled to recover in this action for services rendered or advances made by them in furthering and conducting said transactions for the defendant.<sup>54</sup>

### C. RIGHT TO COMMISSIONS

#### § 1253. Necessity that broker act in good faith

See, also, post, § 1270(5).

##### § 1253(1). Arkansas

The court instructs the jury that the principal has a right to expect the entire services and best efforts of his agent, and the agent must act in entirely good faith with his principal. 'If you find in this case that plaintiff acted in bad faith, intending to aid the purchaser and in any way defraud or cheat the defendant, then you should find' for defendant.<sup>55</sup>

##### § 1253(2). Texas

You are instructed that if you find from the evidence that the plaintiff was, as he alleges, the agent of the defendants for the sale of the land described in his petition, then the court instructs you that it was his duty to act in good faith for the advancement of the interest of defendants in all dealings concerning the sale of said land, and to conceal nothing from them which might influence their action, and to make known to them every material fact which came to his knowledge, and which might influence their action in making the sale of said land, and if you find from the evidence that the plaintiff did not act in good faith for the advancement of the interests of defendants, or that he concealed any fact or facts which would have influenced them in their action in making a sale of said land, and if you further find from the evidence that the want of good faith on the part of the plaintiff, if any, or the concealment on the part of plaintiff, if any, or the failure on the part of plaintiff to make known any material facts, if any, caused the defendants to sell said land at a price less than they would have sold same if they had known such facts, then you will return a verdict for the defendants.<sup>56</sup>

##### § 1253(3). Virginia

The court instructs the jury that it is the duty of the broker or real estate agent to deal fairly with his principal, and, if in this case the jury believe from the evidence that the plaintiff corporation had

<sup>54</sup> Stewart v. Schall, 4 A. 399, 65 Md. 289. 57 Am. Rep. 327.

<sup>55</sup> Austin v. Norris, 141 S. W. 1179, 101 Ark. 180.

<sup>56</sup> Andrew v. Mace (Civ. App.) 194 S. W. 593.

a contract with the defendant whereby it would receive \_\_\_\_\_ per cent. commission upon a sale of the farm belonging to the defendant, and that while said contract was in existence the plaintiff secured a purchaser for the farm of the defendant for \$\_\_\_\_\_, and that thereupon it notified the defendant that it had a purchaser for said farm, and asked if the defendant would take \$\_\_\_\_\_ therefor, and, upon the refusal to take said price, asked him if he would take \$\_\_\_\_\_ net therefor, and that, in ignorance that the proposed purchaser had already agreed to pay \$\_\_\_\_\_ for said farm, the defendant agreed to take \$\_\_\_\_\_ net, and that thereby the plaintiff increased its compensation above that to which it would have been entitled under its original contract from \$\_\_\_\_\_ to \$\_\_\_\_\_, then the jury are instructed that the plaintiff has not dealt fairly with the defendant, and that he has not dealt with him as an agent should deal with his principal, and that it cannot recover anything in this suit, and they must find for the defendant.<sup>57</sup>

**§ 1254. Effect of interest of broker adverse to principal**

You are instructed that if you find from the evidence that the plaintiffs in any way were interested in the consideration of the transaction involved, to an extent that their interests came in conflict with the interests of the defendant in the transaction, then you should find for the defendant.<sup>58</sup>

**§ 1255. Right of broker acting for both parties to proposed contract**

**§ 1255(1). Arizona**

You are instructed that if you believe from the evidence in this case that the defendants agreed to pay the plaintiff the sum of \$\_\_\_\_\_ as compensation for bringing together and aiding in bringing together the defendants and \_\_\_\_\_ in the purchase and sale of their herd of cattle about the time charged in the complaint, and that the defendants \_\_\_\_\_ and \_\_\_\_\_ agreed to pay the plaintiff the sum of \$\_\_\_\_\_ for the services so rendered, but that, in addition to the services so rendered, the plaintiff agreed that, if he should receive and classify the cattle, he would give the defendants and the purchasers both alike a square deal in so classifying and cutting the cattle, then you are instructed that the additional services so required would not affect the contract to pay him for his service; and if you so find that the only limitation placed upon the contract or the only thing to be done was that the plaintiff, if he classed the cattle and received them, for the purchaser, would do the fair thing and give each a fair deal, the same would not af-

<sup>57</sup> *Cardozo v. Middle Atlantic Immigration Co.*, 82 S. E. 80, 116 Va. 342.

<sup>58</sup> *Heath v. Chowning*, 142 P. 1108, 43 Okl. 274.

fect the contract so entered into; and, if you should so find from a preponderance of the evidence, the plaintiff would be entitled to recover, and you will so find.<sup>59</sup>

§ 1255(2). **Colorado**

The court instructs the jury that an agent or broker cannot at the same time act for two parties whose interests are adverse, and in order to entitle such an agent or broker to a commission from either party, where the circumstances are such, the broker or agent must prove that the party from whom he claims a commission knew all the facts and circumstances and expressly agreed to pay the agent or broker a commission for his services.<sup>60</sup>

§ 1255(3). **Maryland**

The jury are instructed that, although you shall believe from the evidence that the plaintiffs were employed by the defendant to effect the sale in question, yet if you shall also believe from the evidence that, prior to the commencement of negotiations the purchaser introduced by the plaintiffs, and who bought the property, had himself employed the plaintiffs to procure the property described in the evidence, and that the plaintiffs in pursuance of this employment, commenced to treat with the defendant for the purchase of the property, or if the jury shall believe that at any time while the plaintiffs were in the employ of the defendant the said plaintiffs were, in respect to this purchase and sale, in any way in the employ, or acting as agents of, the purchaser (beyond the power or authority to bind them to a sale by memorandum), or that the plaintiffs were acting in the interest of said purchaser, then the plaintiffs are not entitled to recover.<sup>61</sup>

§ 1255(4). **New York**

The jury are instructed that, if plaintiff was employed by defendant to find a purchaser for his house upon terms and conditions to be determined by defendant when he should meet the purchaser, and the plaintiff produced such a purchaser, then the plaintiff is entitled to his stipulated commission, although you may further believe from the evidence that plaintiff also accepted employment from the purchaser to find some one who would sell a house to him upon terms and conditions which they might agree upon when they should meet, and that plaintiff failed to notify either defendant or the purchaser of his employment by the other.<sup>62</sup>

<sup>59</sup> Gibson v. McLane, 148 P. 288, 17 Ariz. 61.

<sup>60</sup> Symes Investing Co. v. De Sollar, 165 P. 985, 63 Colo. 190.

<sup>61</sup> Blake v. Stump, 20 A. 788, 73 Md. 160, 10 L. R. A. 103.

<sup>62</sup> Knauss v. Gottfried Krueger Brewing Co., 36 N. E. 867, 142 N. Y. 70.

**§ 1255(5). Oklahoma**

You are instructed that a real estate agent, acting for both parties, can recover compensation from neither.<sup>63</sup>

**§ 1255(6). Texas**

You are instructed that the plaintiff did agree with R. to receive from R. ——— per cent. additional commissions on the amount of the sale, and upon the ground of public policy the law declares such agreement illegal, and unless it is shown by a preponderance of the evidence that defendant was told of this agreement with R. to accept pay from the latter, and that defendant then consented to it, you will find for defendant on that ground, and inquire no further.<sup>64</sup>

You are instructed that if you believe that plaintiff advised or informed defendant that he was to receive ——— per cent. from R., the defendant was not obligated at once to declare his approval or disapproval of that action, nor to consent or refuse to consent thereto immediately, but he had a reasonable time in which to advise himself of his rights in the premises in view of that statement; and, if you believe he was merely silent without objection, and that he intended thereby to reserve the matter in abeyance until he could advise himself of his rights, the law will not hold him to have consented to the receipt of such per cent. from R. by his mere silence, but he had a right to a reasonable time in which to determine what he would do. If you find for plaintiff, you will find as hereinbefore instructed. If you find for defendant you will so say, and no more.<sup>65</sup>

**§ 1255(7). Virginia**

The court instructs the jury that, if they believe from the evidence that the plaintiff in conducting the negotiations between the prospective purchaser and the defendant acted in reality as the agent of both parties or in his own interest as opposed to that of his principal, then the defendant would not be bound by the contract, unless they further find from the evidence that the defendant, with knowledge of all the facts, signed the contract.<sup>66</sup>

**§ 1256. Who liable for services where buyer employs broker**

The jury are instructed that, if a party desiring to purchase property employs a broker to find property for him, he is under no obligation to pay unless he consents to take the property which the broker offers, but when he does take the property which the broker offers his obligation is to pay, unless there is some arrangement that the compensation shall be made by some other person.<sup>67</sup>

<sup>63</sup> Heath v. Chowning, 142 P. 1108, 43 Okl. 274.

<sup>64</sup> Akin v. Poffenberger, 116 S. W. 615, 53 Tex. Civ. App. 340.

<sup>65</sup> Akin v. Poffenberger, 116 S. W. 615, 53 Tex. Civ. App. 340.

<sup>66</sup> Fitzgerald v. Southern Farm Agency, 94 S. E. 761, 122 Va. 264.

<sup>67</sup> Baer v. Koch, 21 N. Y. Supp. 974.



### § 1257. Rate or amount of compensation

#### § 1257(1). Illinois

You are further instructed that it is admitted by the defendant in this case that the customary and usual commission on sales of the character of the one here in question is \_\_\_\_\_ per cent.; and you are instructed that if, under the evidence and the instructions of the court, you find for the plaintiffs, then your verdict should be for \_\_\_\_\_ per cent. on \$\_\_\_\_\_.<sup>68</sup>

#### § 1257(2). Maryland

The court instructs the jury that, if they find from the evidence that the plaintiff is entitled to recover compensation for making the sale mentioned in the evidence, the recovery shall be limited to a commission only on so much of the purchase price as represents the price paid for the property, which the evidence shows belonged to the defendant at the time he met the plaintiff, and the plaintiff shall not be entitled to any commission on the sum paid by the purchaser for the property bought by the defendant from \_\_\_\_\_ and \_\_\_\_\_ for the purpose of meeting the requirements of the \_\_\_\_\_, if they shall so find.<sup>69</sup>

#### § 1257(3). Michigan

You are instructed that this is an action of assumpsit, brought by the plaintiff against the defendant, the \_\_\_\_\_ Company, to recover for commissions claimed to be due him from defendant company. The plaintiff claims that he was employed by the defendant to solicit subscriptions for stock of the defendant company, and for all such subscriptions which he solicited and secured he was to receive a commission of \_\_\_\_\_ per cent.<sup>70</sup>

You are instructed that the only dispute is as to the amount of stock plaintiff sold for which he should recover, his claim being that he sold, according to the agreement, a certain amount of the stock, and the defendant claiming he sold a much less amount; and the question for you to determine is, How much stock did plaintiff sell upon which he is entitled to his commission at the rate of \_\_\_\_\_ per cent.? <sup>71</sup>

I instruct you that plaintiff is entitled to recover in this case his commissions on all stock subscriptions taken by him from financially responsible persons with check for same attached to the application, or to be sent in by the applicant at once, which subscriptions were forwarded by him or delivered by him to the defendant

<sup>68</sup> *Monroe v. Snow*, 23 N. E. 401, 131 Ill. 126.

<sup>69</sup> *Baltimore Car Wheel Co. v. Clark*, 104 A. 357, 131 Md. 513.

<sup>70</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

<sup>71</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

company, within the scope of an admitted authority of the company, until his authority was revoked by defendant company.<sup>72</sup>

**§ 1258. Same—Agreement to deliver stock as commission**

The court instructs you that in the year ——— the laws of the state of ——— required that capital stock of corporations formed under laws of the state must be paid up at the time of incorporation in lawful money of the United States or its equivalent. You are therefore instructed that if you find from the evidence that the defendant agreed to deliver to plaintiff \$—— full-paid stock in a corporation, in the event that plaintiff's efforts should aid the defendant in bringing about a sale of defendant's interest and stock in the ——— Company at a suitable sum and price, and further find from the evidence that the plaintiff's efforts did aid in bringing about such sale at such sum and price, the agreement of defendant to pay the plaintiff \$—— in such stock was equivalent to a promise by defendant to pay plaintiff \$—— full-paid stock in such a corporation. The jury are further instructed that the proper measure of damages for breach of contract by defendant to deliver to plaintiff \$—— of full-paid stock in a ——— corporation is the fair and reasonable value of such stock on incorporation, and you are further instructed that, in the absence of any evidence to the contrary of the value thereof, the presumption is that such stock would have been worth par.<sup>73</sup>

**§ 1259. Amount of compensation in absence of contract specifying amount**

**§ 1259(1). Delaware**

You are instructed that the declaration contains also the common counts for work and labor performed; and services rendered by the plaintiff for the defendants in and about the business aforesaid, and upon these counts, even should you believe there was no agreement upon the part of the defendants to pay the commission claimed, or any other sum, the plaintiff would be entitled to recover such sum as you believe from the evidence the services he rendered were reasonably worth to the defendants, provided you are satisfied from a preponderance of the evidence that he did render services which resulted in the defendants securing the said contract.<sup>74</sup>

**§ 1259(2). Maryland**

The jury are instructed that, if you find from the evidence that the plaintiff was engaged in the business of a property broker in

<sup>72</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

<sup>73</sup> *Moore v. King* (Mo.) 178 S. W. 124.

<sup>74</sup> *Richards v. Richman*, 64 A. 238, 5 Pennewill, 558.

the city of ———, and that defendant offered certain property for sale to the ——— commissioners of said city, and that he employed the plaintiff to aid and assist him in effecting said sale, either by previous authority or the acceptance of plaintiff's agency and the adoption of his acts, and that the plaintiff did diligently and faithfully occupy his time and render services in so aiding defendant to effect said sale, and a sale of said property to said commissioners was in a short time made and effected, and that said services were of advantage and value to defendant in effecting the said sale, then the plaintiff is entitled to recover such sum as the jury may find from the evidence to be a reasonable remuneration to plaintiff for said services, and in ascertaining what is a reasonable remuneration the jury may consider the rate of compensation which they may find from the evidence was usual and customary in said city for services of a like kind.<sup>75</sup>

§ 1259(3). Texas

You are instructed that plaintiffs bring this suit for the recovery of ——— per cent. of \$——, which they allege is due them as the procuring cause for the sale of a farm belonging to the defendant, and which the defendant had listed with plaintiffs for sale, and further allege that the defendant knew plaintiffs were in the real estate business and accustomed to receive commissions on sales made by them, and that the customary commission paid to real estate dealers for the exchange of land is ——— per cent., and that their services were reasonably worth \$——. The defendant answers by a general demurrer and general denial, and specially denies that he ever listed land with plaintiffs for sale as alleged in plaintiffs' petition, and denies that he ever agreed to pay plaintiffs any commission for making the exchange of said land to any one, and further alleges that he personally represented himself in making said real estate deal with ———, and that the plaintiffs were not entitled to any commission from him, and that he told plaintiffs to obtain \$—— net to him for said property. You are instructed that, if you believe from a preponderance of the evidence that defendant listed his land with the plaintiffs, and that it is the prevailing custom to pay real estate dealers ——— per cent. on the exchange of land, and that said exchange was made, then you will find for the plaintiffs, and assess their damages at ——— per cent. of the total value of the lands so traded or exchanged, if such is the case.<sup>76</sup>

You are further instructed in this case that although you believe from the evidence and under the law that plaintiffs are enti-

<sup>75</sup> Walker v. Rogers, 24 Md. 237.

<sup>76</sup> Blaschke v. Ferguson & Dyess (Civ. App.) 208 S. W. 727.

tled to a verdict herein, you are instructed that in no event could you render a verdict for the plaintiffs for any other sum other than for such sum as in your opinion would be reasonable compensation for the services performed for the defendant, if any were performed for him, and in arriving at what would be a reasonable amount for said services, you will take into consideration all the facts and circumstances in evidence.<sup>77</sup>

D. SUFFICIENCY OF SERVICES TO ENTITLE TO COMMISSIONS

§ 1260. In general

§ 1260(1). Colorado

The jury are instructed that if you find and believe by the preponderance or greater weight of the evidence that the defendant, in the summer of ——— did employ the plaintiff to assist him in procuring the title to said ——— lode claims for the purpose of putting said claims with others, into a consolidation, and agreed to pay plaintiff ——— per centum on the amount at which said claims might be purchased, that plaintiff agreed thereto, and immediately thereupon and thereafter did assist the defendant in procuring the title to said claims, and that defendant about ———, while plaintiff was so assisting him, did secure from ——— and ———, the owners of said lode claims, the title thereto, at a consideration of \$——— paid, and did put said claims into a consolidation with other contiguous claims, then the jury will find for the plaintiff and assess his damages at \$———, together with ——— per cent. per annum interest thereon from the time plaintiff made demand upon defendant for the payment of said sum to this date; otherwise, you will return a verdict for the defendant.<sup>78</sup>

The jury are instructed that, although the jury may find and believe from the evidence that the defendant did employ the plaintiff to assist him in securing the title to said lode claims, and did agree to pay the plaintiff ——— per cent. on the purchase price at which said lode claims should be taken into a consolidated company, and that plaintiff did render services in an attempt to procure said lode claims to be put into said consolidated company, yet if you further find and believe from the evidence that plaintiff and defendant were unable to agree with ——— and ——— in the purchase of said claims, and that other persons, not co-operating with defendant, thereafter initiated negotiations with said ——— and ——— for the purchase of said lode claims and put them into a consolidated company, you will return a verdict for the defendant, even though you may further find and believe from the evidence

<sup>77</sup> Toland v. Williams & Wiley (Civ. App.) 129 S. W. 392.

<sup>78</sup> Bailey v. Carlton, 95 P. 542, 43 Colo. 4.

that the defendant on request, contributed to the purchase of said lode claims.<sup>79</sup>

The jury are instructed that, if the principal rejects the purchaser, and the broker claims his commission, he (the broker) must show that the person furnished by him (the broker) to make the purchase was willing to accept the offer precisely as made by the principal, and that he was an eligible purchaser, and such a one as the principal was bound in good faith, as between himself and the broker, to accept.<sup>80</sup>

§ 1260(2). **Delaware**

You are instructed that a real estate broker is entitled to his compensation or commission, either on a quantum meruit, or under the express terms of the contract of agency, whenever he procures for his principal a party with whom the principal is satisfied and who actually makes a contract with the principal at a price acceptable to the principal, provided that the broker was the procuring cause.<sup>81</sup>

§ 1260(3). **Iowa**

The jury are instructed that, if you find from the evidence that said purchasers went to ——— by reason of the introduction to defendant and for the purpose of examining the lands which the said defendant had for sale, and for the purpose of dealing with him, and if you find that the said defendant participated in the conduct of the business resulting in the sales then you will find said sales were made by defendant, within the terms and meaning of the contract.<sup>82</sup>

§ 1260(4). **Kentucky**

The court instructs the jury that if they believe from the evidence that the plaintiff, doing business as ———, procured or was the means of procuring a purchaser for certain property of the defendant on ——— street in the city of ———, or was the means of bringing such purchaser and seller together, and that a reasonable commission for such services was ——— per cent. on the purchase price, which purchase price was ——— dollars, and that said defendant agreed to pay the plaintiff for his services a reasonable commission for such service, or permitted the plaintiff to render such services, if they were rendered, under such circumstances as would lead a reasonably prudent man to believe that the plaintiff expected compensation therefor, then the jury will find a verdict

<sup>79</sup> Bailey v. Carlton, 95 P. 542, 43 Colo. 4.

<sup>80</sup> Buckingham v. Harris, 15 P. 817, 10 Colo. 455.

<sup>81</sup> Richards v. Richman, 64 A. 238, 5 Pennewill, 558.

<sup>82</sup> Murphy v. Hiltibridge, 109 N. W. 471, 132 Iowa, 114.

for the plaintiff in the sum of ——— dollars, with interest from ———; otherwise, you will find a verdict for the defendant.<sup>83</sup>

§ 1260(5). **Maryland**

The jury are instructed that, if you find from the evidence that the defendant employed the plaintiff to procure a purchaser for the property spoken of by the witness, and the plaintiff did procure a purchaser for said property, and the said property was sold by the defendant to a purchaser procured by the plaintiff, then the plaintiff is entitled to recover such compensation as you may find usual and customary.<sup>84</sup>

§ 1260(6). **Michigan**

You are instructed that it is a general principle of the law that when the agent has fully completed his undertaking—the agent of any institution or company or person has fully completed his undertaking—according to its terms, he is entitled to his compensation. And if you find in this case that plaintiff did all he was bound to do under his authority to act, his right to his compensation is complete, and he cannot be deprived of it, because the principal then fails to avail himself of the benefit of the acts, or refuses to do what he had agreed to do upon performance by the agent.<sup>85</sup>

I instruct you that a signed subscription or application for shares of stock made by responsible persons, accompanied by check payable to the corporation, drawn against sufficient funds in the hands of a banker, which check should be paid by banker on presentation, is a good payment for such stock.<sup>86</sup>

I instruct you that plaintiff has performed his part of the contract under the above arrangement when he obtains the subscriptions or applications for stock, and forwards or delivers the same to the defendant company, with check for amount due attached to the application, or upon receipt of a check direct from persons who purchased the stock by the company.<sup>87</sup>

You are instructed that the plaintiff is not entitled to recover from the defendant commission for unsuccessful efforts to sell stock.<sup>88</sup>

§ 1260(7). **Mississippi**

The jury are instructed, on behalf of the plaintiff, that if they believe from the evidence that the trade made to ——— by defendant resulted from the bringing together of these parties by the

<sup>83</sup> Bullock v. Menninger, 125 S. W. 256.

<sup>84</sup> Jones v. Adler, 34 Md. 440.

<sup>85</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>86</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>87</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>88</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

plaintiff, the plaintiff is entitled to recover from defendant the reasonable value of his services in connection with such sale, and they will find a verdict accordingly, awarding plaintiff such sum as they believe from the evidence that his said services were reasonably worth, unless they further believe from the evidence that prior to said sale plaintiff had abandoned his connection therewith, or had made statements which might reasonably lead defendant to believe he had so abandoned his connection therewith.<sup>89</sup>

§ 1260(8). **Oklahoma**

You are instructed that if you find from a preponderance of the evidence that the defendant authorized the plaintiff to find a purchaser for his said land at a certain stipulated price per acre, and if you further find, from a preponderance of the evidence, that the plaintiff did furnish a purchaser, ready, willing, and able to purchase said land upon the terms and conditions proposed by the defendant, then your verdict must be for the plaintiff, and you should fix the amount of his recovery at any sum to which you think he is entitled, not exceeding the sum of \$———. <sup>90</sup>

§ 1260(9). **Texas**

You are further instructed that if you believe from the evidence that H. was the regularly constituted agent of the plaintiffs, and that same was known to the defendant at all times during the negotiations testified about, and if you further believe from the evidence that said defendant by words, acts or conduct, if any, authorized said H. to act for him, the said defendant, in procuring —— as a tenant for his theater, if you find that he did, and if you further believe from the evidence that through the acts and negotiations of said H. said —— executed said contract of lease introduced in evidence, then you are instructed that your verdict must be for the plaintiff.<sup>91</sup>

§ 1260(10). **Virginia**

The court instructs the jury that, under the writing of ——, extended by notation thereon to ——, the plaintiff, before he is entitled to recover anything in this cause, must show, by a preponderance of the evidence, either that he completed a sale of the land herein mentioned, at the price and upon the terms and conditions of said writing, or that he produced to the defendant a party who evidenced his willingness to buy at the price and upon the

<sup>89</sup> *Enochs v. Paxton*, 40 So. 14, 87 Miss. 660.

<sup>90</sup> *Thornburgh v. Haun*, 190 P. 1083, 79 Okl. 103.

<sup>91</sup> *Brady v. Richey & Casey* (Civ. App.) 202 S. W. 170.



terms and conditions of said writing, by signing a paper or proposition containing said price and terms and conditions.<sup>92</sup>

The court instructs the jury that if they believe from the evidence in this case that the defendant authorized the plaintiff to sell the tract of land mentioned in the declaration at \$——, and if so sold by plaintiff to pay plaintiff a commission of \$——, and the plaintiff sold said property to ——, of ——, and said —— was ready, able, and willing to complete said purchase, then they must find for the plaintiff.<sup>93</sup>

### § 1261. Compliance with terms imposed by principal

#### § 1261(1). Iowa

The jury are instructed that the contract for the sale of the land, executed by the defendant and delivered to the plaintiff for the purchaser's signature, contained the terms of the sale and the authority of the plaintiff, and that he had no right to sell the land upon any other terms, that if he changed the contract left with the purchaser without the knowledge or consent of the defendant by striking out the rate of interest to be paid it was a material alteration thereof, and that the sale was not made upon the terms authorized, and would not bind defendant, nor entitle plaintiff to his commission, unless it is shown that the defendant consented to such change before the execution and delivery of a deed of the land.<sup>94</sup>

#### § 1261(2). Michigan

You are instructed that the defendant claims it employed plaintiff to sell stock. In order to entitle the plaintiff to recover, he must have made sales within the limits of his contract as to time, terms, and amount.<sup>95</sup>

#### § 1261(3). New York

The jury are instructed that, to entitle the plaintiff to recover, he must establish to the satisfaction of the jury that the sale was at the price at which he was authorized to sell, or a price satisfactory to his principal under the employment which he claims was made.<sup>96</sup>

#### § 1261(4). Texas

You are instructed that there are certain facts that you will treat as proved: First, that the defendant employed the plaintiff to sell the land; second, that the correspondence between the parties, which it is the duty of the court to construe, did not authorize

<sup>92</sup> Caldwell v. Tannehill, 84 S. E. 6, 117 Va. 11.

<sup>93</sup> Middle Atlantic Immigration Co. v. Ardan, 78 S. E. 538, 115 Va. 148.

<sup>94</sup> Robertson v. Vasey, 101 N. W. 271, 125 Iowa, 526.

<sup>95</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>96</sup> Levy v. Coogan, 9 N. Y. S. 534.

plaintiff to make a written contract for the sale of the land; third, that the correspondence did not give the plaintiff the right at all events to everything he got over \$——— an acre net to defendant, but gave him only the right to his proper commissions, under a sale for a sufficient price to leave defendant clear above expenses, including commissions, at least \$——— an acre, and therefore, if you do not believe from the evidence that there was afterwards any different agreement or understanding between the parties about the commission other than is shown by the correspondence, then you will find for the defendant.<sup>97</sup>

**§ 1262. Transaction concluded by principal on other terms than those originally given broker**

**§ 1262(1). Delaware**

We further say, if you believe that the plaintiff acting as the agent of the defendant, rendered real and efficient service in the matter of the sale of the farm for a certain price, and was prevented from effecting the sale by the act of the owner in selling the farm for a lower price to the person with whom the plaintiff had been negotiating, and the plaintiff had no knowledge that the defendant was willing to sell for such price, then the plaintiff would be entitled to recover, not commissions, but such sum as his services were reasonably worth.<sup>98</sup>

**§ 1262(2). Illinois**

The jury are instructed that, if you believe from the evidence that the defendant placed his property in the hands of the plaintiff for sale at a stipulated price, and the plaintiff introduced the defendant to C., and that C made a proposition to exchange property in P. for defendant's property, which was declined by the defendant, and that negotiations between C. and defendant were then ended and definitely abandoned by the parties, and that the defendant, through the efforts of E., took in exchange for his land other lands in T. belonging to W., and that W. took property in P. belonging to C. in exchange for the land in T., the fact that the deed was made from defendant to C. would not entitle the plaintiff to recover, and you should find for the defendant, unless you further believe from the evidence that the plaintiff was the efficient cause of the trade.<sup>99</sup>

**§ 1262(3). Oklahoma**

You are instructed that the relation between a principal and a real estate agent is one of confidence, and that the principal can-

<sup>97</sup> *Akin v. Poffenberger*, 116 S. W. 615, 53 Tex. Civ. App. 340.

<sup>99</sup> *Hinds v. McIntire*, 89 Ill. App. 611.

<sup>98</sup> *Tebbo v. Weld*, 92 A. 876, 5 Boyce, 255.

not accept the services of his agent and refuse him compensation agreed to be paid, and the principal, if he so chooses, may lower his price to the purchaser if found by the agent and make the sale, but if the efforts of the agent have brought about and procured the sale this will in no wise affect the agent's right to recover the commission agreed upon. It is the duty of the principal to act fairly and in good faith with his agent, and he cannot cut him out of the commission by negotiating directly with the purchaser for the purpose of avoiding his obligations with his agent. And in this connection you are instructed that, if after fair and impartial consideration of all of the testimony in this case, you find that the plaintiffs have shown by a preponderance of the testimony that they had an express contract with the defendant to procure a purchaser for his property, and by their efforts they were the procuring cause for the sale, and through their disclosures that the purchasers were put in touch with the defendant, and the defendant afterward consummated the sale, it would be immaterial whether or not the property was sold at the price at which it was listed with the plaintiffs.<sup>1</sup>

**§ 1263. Time within which transaction must be consummated**

**§ 1263(1). Delaware**

You are instructed that, where no time is fixed by the contract, the broker is allowed a reasonable time within which to make the sale. The right to his commission is not affected by the fact that after he has found a purchaser there has been a considerable delay in completing the sale when a sale is finally made, and there is a continuous connection between the steps taken by the agent, and the agent has all along been connected with the negotiations.<sup>2</sup>

**§ 1263(2). Michigan**

You are instructed that if you shall find from the evidence that the time in which the plaintiff had authority to sell the stock of the defendant company expired before the plaintiff, or the customers of the plaintiff, tendered the money on the alleged sales sued for, then the plaintiff is not entitled to recover.<sup>3</sup>

Now, gentlemen, no time was fixed in writing in the agreement between the plaintiff and defendant during which said contract was to continue. Under the circumstances the time during which the plaintiff might sell stock for defendant rested in the option of the defendant.<sup>4</sup>

You are instructed that, when no time is agreed upon during which a broker is employed, he is entitled to a reasonable time in

<sup>1</sup> *Menten v. Richards*, 153 P. 1177, 54 Okl. 418.

<sup>2</sup> *Tebo v. Weld*, 92 A. 876, 5 Boyce, 255.

<sup>3</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

<sup>4</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

which to gain results; but the principal or employer has a right to limit or revoke the authority of the broker in good faith at any time after his employment, where no time of employment is fixed, and if the authority of the plaintiff in this case was revoked, or if a time limit was fixed to his contract by the principal, the ——— Company, in good faith, after the contract was originally made, the plaintiff cannot recover commissions on sales made thereafter.<sup>5</sup>

You are instructed that on ——— the defendant company wrote a letter in which it said: "We trust you will be able to dispose of all we have to dispose of this week, as we wish to have the matter closed up, and we judge, from the way you are disposing of it now, you will have no trouble in doing this. We thought last week would be the limit we could hold it open, but we are extending it on to this week, if you had not disposed of it before that time." The defendant claims that this letter was written extending the time given to plaintiff verbally, and if you shall find that prior to this time a limit had been placed upon the contract, this letter would operate as an advance of the time to and including the week of ———, and the plaintiff would be entitled to recover commissions on any sales actually made, consummated, and carried out during this time.<sup>6</sup>

You are instructed that the mere fact that the defendant accepted business tendered by the plaintiff after the week of ———, and accepted payment and paid plaintiff his commission thereon, would not in and of itself operate to extend the time of the contract beyond that date.<sup>7</sup>

**§ 1263(3). Missouri**

The court instructs the jury that what may not be a reasonable time in one case may be a reasonable time in another case, and if the jury believes from the evidence that during the time that elapsed from the date of employment of plaintiff by defendant to procure a purchaser, if you find he was so employed, that the plaintiff at regular intervals was interviewing and talking to the defendant and to the purchaser, A., and attempting to make a sale of the property of defendant to the said A., and that during said time the defendant never at any time notified the plaintiff that he revoked his authority for such sale, but accepted the plaintiff's services, then, notwithstanding the fact that it was three years from the time of the contract to the final sale of the property by the defendant to said A., the jury have the right to say whether such sale was

<sup>5</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

<sup>7</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

<sup>6</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 374, 204 Mich. 658.

made within a reasonable time; and if they believe from the evidence that, under all the facts and circumstances, such sale was made within a reasonable time, then they will find the issues for the plaintiff.<sup>8</sup>

**§ 1263(4). Texas**

You are instructed that, where the owner of land employs a broker to render services in matter of exchange of properties between such owner and a third person, but no definite time is agreed upon within which such broker is to perform his undertaking, the broker is entitled only to a reasonable time within which to perform his undertaking, and if he fails within a reasonable time thus to perform, the owner has the right to revoke the agency, provided such revocation be made in good faith, and not for the purpose of evading the payment of commissions to broker.<sup>9</sup>

You are instructed that, if you believe that such former negotiations of plaintiff with ——— for the sale of said property had terminated without a sale being accomplished, and that defendant, with the knowledge of plaintiff, had taken the property in question off of the market, and that thereafter, on the ——— day of ———, defendant again listed the property with plaintiff for sale within a limited time and that during said limit plaintiff failed to establish or renew negotiations with ——— for the sale of the property, and that defendant, by his own efforts, acting independently of plaintiff, negotiated and consummated the sale to ———, and that such sale was made after the expiration of the time to which plaintiff's agency was limited, then, in such case, you will find for the defendant.<sup>10</sup>

**§ 1264. Duty to procure binding contract**

**§ 1264(1). Michigan**

You are instructed that the plaintiff cannot recover a commission merely because he obtained offers in writing, or because he obtained orders for the stock. The plaintiff is not entitled to a commission when he brings a mere paper offer; but, in order to entitle the plaintiff to recover, it is necessary for him to show an actual sale of the stock, or that he produced a purchaser who tendered the money within the time limited by the contract for the sale of the stock.<sup>11</sup>

You are instructed that there is a radical difference between a contract to sell or purchase, and an actual sale or purchase. As applied to this case, the plaintiff is not entitled to recover unless he

<sup>8</sup> Turner v. Snyder, 123 S. W. 1050, 139 Mo. App. 656.

<sup>9</sup> T. A. Hill & Son v. Patton & Schwartz (Civ. App.) 160 S. W. 1155.

<sup>10</sup> Hardesty v. Cavin (Civ. App.) 149 S. W. 367.

<sup>11</sup> Lovering v. Duplex Power Car Co., 171 N. W. 874, 204 Mich. 658.

produced a purchaser ready, able, and willing to pay the money for the stock, and who tendered the money within the time fixed by the contract. In other words, the plaintiff must have done everything necessary to be done on his part, and on the part of the purchaser, so that the only thing upon the part of the defendant that remained to be done was to transfer the stock and to receive the price in cash.<sup>12</sup>

§ 1264(2). **Missouri**

The jury are instructed that, if you believe from the evidence in this cause that the defendant contracted and agreed with the plaintiff ——— that, if he would sell his farm at \$——— per acre, he would give him a commission of ——— per cent. on the amount of the sale, and if you believe that said plaintiff did so furnish a purchaser ready, able, and willing to take said land at said price, then it was not necessary that said plaintiff should negotiate the terms of said sale; it was sufficient that he produce a man who was able and willing to comply with the terms that the defendant imposed; and, if you find that he absolutely refused to make the sale, then said plaintiff was entitled to his commission, and your findings should be for the plaintiffs.<sup>13</sup>

§ 1264(3). **New York**

The jury are instructed that, if you find that the minds of these parties, ——— and ———, who were to exchange properties, did not meet on all the material conditions and terms of the bargain, then the broker cannot recover. If there was any difference between them, then their minds had not met, and they had not fully agreed, and in that case the broker would not be entitled to his commission. But if you find from all the evidence that their minds did meet, that they had fully agreed upon the terms of the exchange of their properties, then the broker is entitled to his commission, whether the contract was put in writing or not.<sup>14</sup>

§ 1264(4). **Oklahoma**

You are instructed that to entitle the plaintiff, a real estate agent, to recover a commission for the sale of real estate, he must procure and present to the seller, from a purchaser, who is ready, willing, and able to buy, an enforceable contract in writing, binding him to take the land according to the terms and conditions agreed upon, and in this connection you are instructed that if the plaintiff fails to procure such a contract between the purchaser and the seller, you should find for the defendant.<sup>15</sup>

<sup>12</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 874, 204 Mich. 658.

<sup>13</sup> *Sallee v. McMurry*, 88 S. W. 157, 113 Mo. App. 253.

<sup>14</sup> *Moses v. Helmke*, 41 N. Y. S. 557. 18 Misc. Rep. 357.

<sup>15</sup> *First Nat. Bank of Coweta v. Brumbaugh*, 154 P. 1172, 55 Okl. 506.

**§ 1265. Readiness and ability of purchaser to comply with terms of contract**

The jury are instructed that, if the plaintiffs agreed and undertook to sell the defendant's farm for a commission upon the price realized, then, in order to earn their said commission, it must appear by a preponderance of the evidence that they effected a sale of the farm to a party ready and able to perform the conditions of the sale. The mere procuring of a person to enter into a contract to purchase the land without such purchaser was ready, willing, and able to make the cash payments, and to make the mortgage therein named for the deferred payments, would not be sufficient to entitle the plaintiffs to their commission.<sup>16</sup>

The jury are instructed that, in ordinary cases the law is well settled, where a broker is employed in reference to a sale or exchange of real estate, that when he brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property on the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, then the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete his contract. Therefore I say to you, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts; when he [the broker] brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him.<sup>17</sup>

**§ 1266. Broker as procuring cause of contract between principal and third person**

See, also, post, § 1272.

**§ 1266(1). United States**

The jury are instructed that it is not necessary for the plaintiff to prove that the influence exerted by him was the sole influence, but it is necessary for him to show that by reason of something that he did an influence was brought to bear upon the French syndicate, or upon their representative, which in whole or in part induced the making of the contract which was entered into between the defendant company and ——— and his associates.<sup>18</sup>

In this case the instruction was abstract, and was properly refused, as the evidence showed that a sale was actually effected.

<sup>16</sup> Stewart v. Fowler, 15 P. 918, 37 Kan. 677.

<sup>17</sup> Kalley v. Baker, 29 N. E. 1091, 132 N. Y. 1, 28 Am. St. Rep. 542.

<sup>18</sup> Walker Mfg. Co. v. Knox (C. C. A. Ohio) 136 F. 334, 69 C. C. A. 160.



**§ 1266(2). Arkansas**

The court instructs the jury that if you find from a preponderance of the evidence that plaintiff listed his land and premises with defendant for sale or exchange and plaintiff found a purchaser therefor, and was the procuring cause of the sale or exchange being made, then you should find for plaintiff such sum as you may feel warranted in finding from all the evidence before you.<sup>19</sup>

**§ 1266(3). Delaware**

You are instructed that, to entitle one to recover commissions on the sale of real estate, he must have been the agent of the seller, and he must have effected the sale, or conducted the negotiations to such a stage as to complete the bargain for the sale, so far as it depended upon his action or efforts to accomplish the sale.<sup>20</sup>

**§ 1266(4). Illinois**

The jury are instructed that if they believe from the evidence that Mr. D., as the representative, broker, or agent of the defendant, opened negotiations with M. for the sale to him of the property in question, with the knowledge and permission of the defendant, and that the plaintiffs, being advised of Mr. D.'s employment and action, afterwards, having authority from the defendant to find a purchaser for the same property, endeavored to make a sale thereof to said M. but were not instrumental in so doing, then the plaintiffs are not entitled to compensation for their services in endeavoring to make said sale, even though the jury may further believe from the evidence that the defendant, through the instrumentality of Mr. D., acting independently of said plaintiffs, afterwards succeeded in selling said property to said M. One claiming commission for the sale of real estate cannot rightfully claim the benefit of introducing to the defendant a purchaser for his property who had already been introduced to him as such by another party, with and through whom negotiations were already in progress and were continued to a consummation of the sale.<sup>21</sup>

**§ 1266(5). Maryland**

The court instructs the jury that, to entitle the plaintiff to recover a commission for the sale of the property mentioned in the evidence, he must not only show his efforts or negotiations to accomplish the sale, but he must show that the sale was the result of such efforts or negotiations.<sup>22</sup>

The court instructs the jury that, if they shall find from the evidence that the plaintiff was employed by the defendant to make

<sup>19</sup> *Austin v. Norris*, 141 S. W. 1179, 101 Ark. 180.

<sup>20</sup> *Tebo v. Weld*, 92 A. 876, 5 Boyce, 255.

<sup>21</sup> *Fessenden v. Doane*, 58 N. E. 974, 188 Ill. 228.

<sup>22</sup> *Baltimore Car Wheel Co. v. Clark*, 104 A. 357, 131 Md. 513.

sale of its property referred to and located in ———, and that the plaintiff submitted said property to the ——— Company, and that thereby the said railroad and the defendant were put into communication about it, and that a portion of said property was thereafter sold to said railroad by the defendant, the plaintiff is entitled to recover such commissions as may have been agreed upon between the plaintiff and the defendant, if the jury shall find that any agreement was made as to the amount of commissions, or such commissions as the jury may believe to be reasonable for the services, if the jury find there was no agreement as to their amount, provided the jury shall further find that the disclosure to the said railroad by the plaintiff caused the communication by the railroad with the defendant and was the foundation upon which the negotiation was conducted, and the sale made.<sup>23</sup>

§ 1266(6). *Michigan*

You are instructed that plaintiff cannot recover against the defendant for the sale of stock in any case in which he was not the procuring cause of the sale.<sup>24</sup>

§ 1266(7). *Missouri*

The court instructs you that the burden is on the plaintiffs to prove to your reasonable satisfaction by a preponderance of the evidence that they were the efficient and procuring cause of the lease from the defendant to said ——— Company, which has been read in evidence, and if you believe and find from the evidence that plaintiffs were not the efficient and procuring cause of said ——— Company leasing the property described in said lease, but that such leasing was brought about by ——— Trust Company through the efforts and exertions of the witnesses ——— and ——— or either of them, then your verdict must be for the defendants, even though you may believe and find from the evidence that the efforts of the plaintiff to interest the witness ——— in said property and thereby induce said ——— Company to lease same, did to some extent aid in the leasing of said property.<sup>25</sup>

The court instructs the jury that if they believe and find from the evidence that the defendant gave the plaintiff his ———-acre farm near ——— together with certain personal property, for sale as his agent, and agreed with the plaintiff that if he should secure a purchaser therefor, and a sale thereof was made to such purchaser he would pay the plaintiff the sum of ——— per cent. commission on the purchase price received therefor;— and if you further find

<sup>23</sup> *Baltimore Car Wheel Co. v. Clark*, 104 A. 357, 131 Md. 513.

<sup>24</sup> *Lovering v. Duplex Power Car Co.*, 171 N. W. 874, 204 Mich. 658.

<sup>25</sup> *Mason v. James M. Carpenter Realty Co.* (App.) 179 S. W. 945.

and believe from the evidence that the plaintiff did secure a purchaser for said property, and that said purchaser bought the same, you will find the issues for the plaintiff, and assess his damages at the sum of \_\_\_\_\_ per cent. upon the amount of the purchase price, received by defendant, not to exceed the sum of \$\_\_\_\_\_.<sup>26</sup>

The jury are instructed that it was not necessary, that the plaintiff should have negotiated the terms of said sale with the purchaser, nor need he actually produce the purchaser in person, if he was the procuring cause of the purchaser being produced to the defendant; and, if you believe the purchaser so produced was able and willing to take the land and pay for it at the price and sum of \$\_\_\_\_\_ per acre, then said plaintiff was entitled to commission, provided defendant contracted with him as set forth in above instructions.<sup>27</sup>

§ 1266(8). **New Mexico**

You are instructed that, when the owner makes a sale or exchange of real estate which he has placed in the hands of a real estate agent for that purpose, before said agent is entitled to recover a commission or compensation for said sale or exchange, he must show by a preponderance of the evidence that he was the procuring cause of said sale or exchange, and I charge in this case that, if you find from the evidence that the defendant actually made the exchange of the 160 acres of land described in plaintiff's complaint with one \_\_\_\_\_ for certain lands in the state of \_\_\_\_\_, then before the plaintiff can recover compensation for said exchange, it is incumbent upon him to satisfy you by a preponderance of the evidence that he was the agent of the defendant for the sale or exchange of defendant's said land, and that he was the procuring cause of said exchange, and that said parties were brought together, and that said exchange was brought about and was the result of services actually rendered by him, or those acting for him and in his behalf, or both, and if he has established these facts by a preponderance of the evidence, then he is entitled to a verdict in his favor.<sup>28</sup>

§ 1266(9). **North Carolina**

The court instructs the jury that, if you find by the greater weight of the evidence that the plaintiff was negotiating the sale of the property to \_\_\_\_\_, and you further find that G. was the plain-

<sup>26</sup> *Ross v. Major*, 163 S. W. 880, 178 Mo. App. 431. In this case the court said that there was no magic in the words "procuring and inducing cause," and that it was not error to substitute other words having an equivalent meaning.

<sup>27</sup> *Sallee v. McMurry*, 88 S. W. 157, 113 Mo. App. 253.

<sup>28</sup> *Jackson v. Brower*, 167 P. 6, 22 N. M. 615.

tiff's agent, and as such agent acted also as the agent of the defendants in securing the loan for the buyer and procured the loan to be made, and that the procuring of this loan was the condition upon which the trade was to be consummated—that is, that the sale was to be effected on condition that the loan was made—you will find in that event that the plaintiff, nothing else appearing, was the procuring cause of the sale.<sup>29</sup>

§ 1266(10). Oklahoma

You are instructed that if, after a fair and impartial consideration of all of the testimony in this case and in compliance with the instructions hereinafter given you, you find that plaintiffs have established, by a preponderance of the testimony, that on or about the \_\_\_\_\_ day of \_\_\_\_\_, the defendant listed his property with the plaintiffs and placed it in their hands for sale, as set out in the plaintiffs' petition, and that a sale was brought about in compliance with the terms of the listing by the exertion of the plaintiffs, or if you find that a contract was entered into, as set out in the plaintiffs' petition, between the plaintiffs and defendant, and that the plaintiffs introduced or disclosed the names of the purchasers to the defendant for the purpose of the sale of the property, and through such introduction or disclosure negotiations for the sale of the property were begun and then effected by the defendant, it would be your duty to find for the plaintiffs.<sup>30</sup>

You are instructed that before one employed to negotiate a sale can recover a commission for his services, he must show that he produced the purchaser, and that he was the producing cause of the sale; that is, that the means employed by him and his efforts resulted in the sale, or were such as to find the purchaser with whom the sale was accomplished.<sup>31</sup>

§ 1266(11). Texas

You are instructed that, if you believe from the evidence that the plaintiff was the procuring cause and efficient means which induced \_\_\_\_\_ to purchase the property, the sale of which is involved in this case, and which enabled defendant to sell same to said \_\_\_\_\_ you will find for the plaintiff.<sup>32</sup>

§ 1266(12). Washington

You are instructed that, in order for the plaintiff to recover in this case, he must prove to your satisfaction by a fair preponderance of the evidence that he was employed to procure a purchaser for the

<sup>29</sup> American Trust Co. v. Goode, 83 S. E. 550, 167 N. C. 338.

<sup>30</sup> Menten v. Richards, 153 P. 1177, 54 Okl. 418.

<sup>31</sup> L. L. Tyler & Son v. Wheeler, 135

P. 351, 41 Okl. 335. In this case the contract was not for an exclusive agency.

<sup>32</sup> Hardesty v. Cavin (Civ. App.) 149 S. W. 367.

property in question, and that, pursuant thereto, he did find a purchaser ready, able, and willing to purchase, and brought such purchaser and defendants together. And in this connection you are instructed that if you believe from the evidence that the plaintiff was employed to find a purchaser for the property of the defendants, and, pursuant thereto, did find a purchaser who, through the efforts of the plaintiff, purchased defendants' property upon the terms specified in the listing contract, or as subsequently modified, or upon different terms agreed to between the defendants and such purchaser, and that the plaintiff was the procuring cause of the sale, then your verdict will be for the plaintiff.<sup>33</sup>

**§ 1267. Bringing parties together**

The court instructs the jury that the mere fact of the agent having introduced the purchaser to the seller, or disclosed the names by which they came together to treat, will not entitle him to compensation, but, if it appears that such introduction or disclosure was the foundation on which the negotiations were begun and conducted and the sale made, the agent is entitled to his compensation.<sup>34</sup>

**§ 1268. Contract induced by misrepresentations of broker**

In this connection you will inquire whether R. was induced to enter into the contract of sale by a misrepresentation of the plaintiff to him as to the net price required by the owner or seller. It is contended on the one side that plaintiff told R. that \$—— an acre was the lowest price that the seller —— would take, and that plaintiff would get nothing at that price, and that thereby R. was induced to pay plaintiff —— per cent. commission. On the other hand, it is contended that plaintiff told R. that \$—— an acre was the lowest price that R. could get the land at, and the contract in evidence shows that that was the price fixed to R.

What the representations plaintiff made to R. were upon this point is for you to determine from the evidence, and you are to determine whether plaintiff made a fraudulent misrepresentation to R. about the matter, and if you find that he did, and find such fraud or deception, if any you find there was, induced R. to enter into the contract of sale, and also contributed as material inducement to his refusal to carry out the sale, you will find for the defendant, however you may decide the other issues, and although you may find that defendant's inability to convey all the land was also an induc-

<sup>33</sup> Bagley v. Foley, 144 P. 25, 82 Wash. 222. In this case it was objected that the phrase "efficient cause," instead of "procuring cause," should have been used.

<sup>34</sup> Baltimore Car Wheel Co. v. Clark, 104 A. 357, 131 Md. 513.

ing cause for the refusal on R.'s part, or even his principal motive or reason.<sup>35</sup>

**§ 1269. Transactions closed through other agents**

The jury are instructed that, if the jury find from the evidence that plaintiff's agency was the procuring cause of the negotiations between defendant and M. which finally resulted in the sale of defendant's property to M., then the plaintiff is entitled to recover, even though the jury may further find that the negotiations were consummated through another agent, and even though said other agent has been paid by defendant.<sup>36</sup>

**§ 1270. Transaction closed directly between principal and customer**

**§ 1270(1). Delaware**

You are instructed that, even though the real estate dealer did not actually effect the sale, yet if the farm was placed in his hands by the owner for sale, and the dealer acting thereunder rendered services which were the procuring cause of the sale which is made by the owner direct—that is by himself, then the agent would be entitled to recover such sum as the jury believe those services were reasonably worth.<sup>37</sup>

**§ 1270(2). Iowa**

On this branch of the case you are further instructed that it is not necessary that plaintiff should personally take the purchaser to the defendant, or that he should personally have any part in the final closing of the deal; but the plaintiff must have been what the law designates a procuring cause, which, is to say that, if through plaintiff's efforts, and because of his efforts, a disposition of the house was made, he would be considered the procuring cause. even though he did not personally bring the purchaser to the defendant, and even though he may have had no part in arranging the details of the deal. And if you find from the testimony that plaintiff did, through his efforts to dispose of the house, present the matter to other land agents and solicit their efforts to that end, and that through their efforts, had through and because of his solicitation, a purchaser was found, plaintiff would be the procuring cause. If, however, the defendant, through other channels and independent of the plaintiff, procured such purchaser, the plaintiff would not be the procuring cause, and in that event it should fail in this action.<sup>38</sup>

<sup>35</sup> *Akin v. Poffenberger*, 116 S. W. 615, 53 Tex. Civ. App. 340.

<sup>36</sup> *McCormack v. Henderson*, 75 S. W. 171, 100 Mo. App. 647.

<sup>37</sup> *Tebo v. Weld*, 92 A. 876, 5 Boyce, 255.

<sup>38</sup> *Whittle v. Klipper*, 165 N. W. 425, 182 Iowa, 270. This instruction was

## § 1270(3). Missouri

The court instructs the jury that if they find from the evidence that the plaintiff and the defendant on or about the \_\_\_\_\_ day of \_\_\_\_\_, entered into a verbal agreement that the plaintiff should assist the defendant to bring about a sale of the defendant's interest and stock in the \_\_\_\_\_ Company for a desirable sum and price, and believe and find from the evidence that, if a sale for such sum and price was brought about by such assistance, then the defendant was to give the plaintiff \$\_\_\_\_\_ in full-paid stock of a corporation to be formed for the purpose of engaging in the general electrical supply business in \_\_\_\_\_, and further find from the evidence that, in pursuance of such agreement, the plaintiff rendered services to the defendant and worked with the defendant with a view of bringing about such sale, and that a sale was brought about and consummated for such sum and price through the assistance and efforts of the plaintiff, then your verdict must be for the plaintiff, even though the plaintiff was not present at the time the sale was made.<sup>39</sup>

The court instructs the jury that if you believe and find from the evidence that the plaintiff, under a contract, as set out in instruction No. \_\_\_\_\_, with the defendant, did secure a purchaser for the farm and personal property of the defendant, and that the purchaser did buy the same, the plaintiff will be entitled to recover his commission, even though the actual terms of the sale were negotiated between the defendant and the purchaser, and the trade finally consummated between the defendant and the purchaser without the knowledge or assistance of the plaintiff.<sup>40</sup>

The court instructs the jury that if you are satisfied from the evidence that the defendant employed the plaintiff as a real estate agent to effect an exchange of its property described in the petition for the property of \_\_\_\_\_ described in the petition, said \_\_\_\_\_ to pay in addition a sum in cash and to assume an incumbrance of \_\_\_\_\_ dollars then existing on the property of defendant, then if you further find that plaintiff entered upon such employment, and entered into active negotiations with the said \_\_\_\_\_ for the purpose of affecting such exchange, and further find that prior to the consummation of such negotiations, defendant, without the knowledge or consent of plaintiff, took said negotiations into its own hands, and without the knowledge or consent of plaintiff closed and carried out the sale or exchange with said \_\_\_\_\_ shown by the evidence, then if you are satisfied from the evidence that the

approved as abstractly correct, although not applicable to the facts.

<sup>39</sup> Moore v. King, 178 S. W. 124.

<sup>40</sup> Ross v. Major, 163 S. W. 880, 178 Mo. App. 431.



sale or exchange carried out by defendant and said ———, resulted from the efforts and negotiations of plaintiff as aforesaid, and that said efforts and negotiations were the procuring cause thereof, you will find a verdict for plaintiff on the second count of the petition in such sum as you may find from the evidence the services of the plaintiff were reasonably worth, not exceeding however the sum of ——— dollars.<sup>41</sup>

The jury are instructed that, if you believe that M. went to defendant as the purchaser's representative, and concluded a sale at a lower price than the said purchaser had offered through plaintiff, this fact would not of itself deprive plaintiff of his right to recover, if you believe from the evidence and instructions given you that plaintiff is entitled to recover.<sup>42</sup>

§ 1270(4). **Oklahoma**

The court instructs the jury that the plaintiff does not claim in his evidence, that the sale which was made was made personally by the plaintiff, but he does claim that it was through his instrumentality and under the contract which he had with the defendant that the sale was made, that he brought the parties together, and that the sale which was afterwards made was really the fruits of his own efforts, and that he is entitled to recover; and if you should find that to be the case, then, notwithstanding the same may have been closed up by the defendant in the absence of the plaintiff, and even if for a less sum than the defendant had theretofore authorized the plaintiff to make the sale for, such facts would not deprive the plaintiff of the right to recover under the contract. if you shall find, from the evidence, by a preponderance thereof, that the plaintiff did find a purchaser who was able, ready, and willing to make the purchase, and brought the parties together within the time limited, and that the trade or sale was actually consummated, although in the absence of the plaintiff, and for a less sum.<sup>43</sup>

§ 1270(5). **Texas**

You are instructed that if you find from the evidence that before the alleged employment of plaintiff to sell said land the defendant A., for himself and for the other defendants, entered into negotiations with said S. for the sale to him of the land described in plaintiff's petition, and such negotiations continued until the sale was finally effected, and further find that during such negotiations the plaintiff knew of same and did not inform defendants

<sup>41</sup> F. H. & C. B. Gerhardt Real Estate Co. v. Marjorie Real Estate Co., 129 S. W. 419, 144 Mo. App. 620.

<sup>42</sup> McCormack v. Henderson, 73 S. W. 171, 100 Mo. App. 647.

<sup>43</sup> Doub & Co. v. Taylor, 150 P. 687, 48 Okl. 713.

that he was negotiating with said S. for the sale of said land, but intentionally concealed from said defendants the fact of his negotiations, or the fact, if it be a fact, that he intended to claim a commission of defendants, he intending that defendants should sell said land to said S., and that he (plaintiff) would after such sale claim a commission on account thereof, then you will return a verdict for defendants.<sup>44</sup>

You are instructed that, if you believe from the evidence that the defendants began the negotiations which finally resulted in the sale of the land in question to the said S., before said property was listed with plaintiff, if you find from the evidence that it was listed with the plaintiff, and that the plaintiff in no way procured said sale, if any, but that said S. purchased said property of his own accord, or by reason of inducements of defendants, or any one else other than the plaintiff, or by reason of any fact or thing independent of anything done or said by the plaintiff to the said S., then you will return a verdict for the defendants.<sup>45</sup>

You are instructed that where a broker was the procuring cause of a sale of real estate, it is immaterial to his right to a commission that he did not personally conduct the negotiations, was not present when the bargain was closed, or that the principal at the time did not know that the purchaser was found by the broker.<sup>46</sup>

**§ 1271. Transaction concluded with party introduced by broker after latter's efforts have terminated**

The jury are instructed that, if you find from the evidence in any given case that the broker has failed to carry out any particular transaction, and that his efforts, although he may have introduced the parties, have terminated, and that he has not succeeded in making the trade, then the principal has a perfect right to resort to other sources for the purpose of effectuating that trade.<sup>47</sup>

**§ 1272. Right of broker causing negotiations to be reopened after they have once been abandoned**

The court instructs the jury that a broker will be deemed the procuring cause of a sale if his intervention is the foundation upon which the negotiation resulting in the sale is begun. He is the procuring cause if it appears that the sale is the result of his (the broker's) initiative. The broker may be the procuring cause of a sale, notwithstanding the fact that the owner of the property and the purchaser, prior to the broker's becoming interested in the mat-

<sup>44</sup> *Andrew v. Mace* (Civ. App.) 194 S. W. 598.

<sup>45</sup> *Andrew v. Mace* (Civ. App.) 194 S. W. 598.

<sup>46</sup> *McKinney v. Thedford* (Civ. App.) 166 S. W. 443.

<sup>47</sup> *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441.

ter, negotiated with each other in relation to the sale and purchase of the property, provided these negotiations had ceased—had been abandoned—without resulting in an understanding, and negotiations afterward initiated by the broker resulted in bringing about a sale between the owner and the party the owner had previously negotiated with. A broker cannot be said to be the procuring cause of a sale of real estate merely because he invites it to the attention of another who is already in active negotiation for its purchase; nor because he mentions to the owner as a possible purchaser one with whom the owner is already treating, when the final purchase results from a continuation of such pre-existing negotiations, unaffected by the broker's act. Under this rule of law, the plaintiff is not the procuring cause of the sale to the R. Co., if you are satisfied by the evidence that negotiations opened up by the R. Co. in ———, were not abandoned and terminated by the defendant, and the actual sale was unaffected by the plaintiff's acts. But if you find from the evidence that the defendant, on the receipt of the letter from the R. Co. dated ———, abandoned the negotiations with such company, so that the negotiations ceased to be active negotiations, without any understanding that they should be renewed in the future, then, if you also find from the evidence that the plaintiff thereafter, in ———, started negotiations through the agent, S., and set in motion negotiations, for a time conducted them with S. under defendant's instructions, which negotiations defendant and such company finally took up directly one with the other, and which negotiations thereafter finally resulted in the sale on ———, the plaintiff would be, under such state of facts, the procuring cause of the sale.<sup>48</sup>

### § 1273. Right of broker not having exclusive agency

#### § 1273(1). Missouri

The court instructs the jury that although you may believe from the evidence that defendant authorized the plaintiff to offer the ——— for sale, that defendant nevertheless had the right to authorize the sale of said property by the ——— Company at a smaller price than that at which plaintiff was authorized to sell; and if you find and believe from the evidence that the property was sold at such smaller price through the efforts of said ——— Company, and that the efforts of said ——— Company were the procuring or producing causes resulting in the sale to ———, then the plaintiff cannot recover, and your verdict must be for defendant.<sup>49</sup>

<sup>48</sup> Meldrum v. Southwick-Sellers Land Co., 147 N. W. 1086, 157 Wis. 367.

<sup>49</sup> F. H. & C. B. Gergardt Real Estate Co. v. Marjorie Real Estate Co., 129 S. W. 419, 144 Mo. App. 620.

**§ 1273(2). Nebraska**

The court instructs the jury that, where the owner of personal property authorizes or employs several agents to sell the same, but gives neither an exclusive agency, the agent or broker who actually effects the sale is entitled to a commission. The agent under such contract who negotiates with the purchaser, but does not effect the sale, cannot recover a commission; and, before the plaintiff in this cause can recover, he must show you by a preponderance of the testimony that he actually effected the sale of the automobile, and if he has failed to do so, he cannot recover.<sup>50</sup>

**§ 1273(3). Oklahoma**

You are further instructed that, where property has been listed for sale with different real estate agents, the agent who succeeds in bringing the seller and purchaser together and induces them to enter into the contract is entitled to the commission although another agent may have first brought the parties together.<sup>51</sup>

**§ 1273(4). Washington**

You are instructed that a seller is not obliged to pay two commissions where two brokers are engaged in selling his property, unless, after one has procured a purchaser ready, able and willing to purchase upon terms acceptable to him, he deals through another, or in some way colludes with him to deprive the other broker of the fruits of his labor, and in this case, if you find that the plaintiff produced a purchaser ready, able, and willing to purchase upon terms satisfactory to the defendants, and that a sale was made which you believe the plaintiff was the procuring cause thereof, the fact that the defendants may have dealt through another broker and paid him a commission does not take away the right of the plaintiff to recover in this case.<sup>52</sup>

**§ 1274. Right of principal to act independently of broker****§ 1274(1). Arkansas**

I charge you that the written contract introduced in evidence by the plaintiffs does not deprive the owner of the right to sell the lands himself without being liable to the plaintiffs for a commission, unless the plaintiffs show by a preponderance of the evidence that they were the procuring cause of the sale.<sup>53</sup>

The court instructs the jury that, if you find that the plaintiffs were not the procuring cause of this sale being made, and find that the defendant reserved the right to sell his farm, and you further

<sup>50</sup> Goodwin v. Haller, 149 N. W. 404, 97 Neb. 209.

<sup>51</sup> Menten v. Richards, 153 P. 1177, 54 Okl. 418.

<sup>52</sup> Bagley v. Foley, 144 P. 25, 82 Wash. 222.

<sup>53</sup> Harris & White v. Stone, 207 S. W. 443, 137 Ark. 23.

find that the defendant, with the help of friends, not real estate brokers, did sell this farm, then you will find for the defendant.<sup>54</sup>

The court instructs the jury that, if you find from a preponderance of the evidence that the plaintiffs were the procuring cause of the sale of defendant's farm, then you will find for the plaintiffs such sum as you may feel warranted from the evidence before you, although you may find that the defendant finally consummated the deal in person.<sup>55</sup>

**§ 1274(2). Delaware**

You are instructed that, if you are not satisfied that the plaintiff effected the sale, or that his services were the procuring cause of the sale, or that he was prevented by the defendant from making the sale after he had rendered real and efficient service in the effort to make the sale to purchaser, your verdict should be in favor of the defendant.<sup>56</sup>

You are instructed that, if the plaintiff agreed that the defendant might sell the farm himself during the time it was in the plaintiff's hands, and sale was not procured by and through services rendered by the plaintiff, then your verdict should be in favor of the defendant. And we may also say that the defendant had the right to negotiate for the sale of his farm independent of the broker with whom the farm was listed, in the absence of an agreement to the contrary; and if in the sale the service of the agent was not the procuring cause, the plaintiff could not recover.<sup>57</sup>

**§ 1274(3). Indiana**

The jury are instructed that, if you find from the evidence given to you in this cause that the defendant employed plaintiff as a real-estate broker to sell his farm, and that the plaintiff, for the purpose of aiding and assisting him in selling said farm, and for the purpose of procuring a purchaser therefor, took into his employ and service one W., and if you further find that said W., aiding and assisting said plaintiff in the sale of said farm, took to this defendant one L. as a probable purchaser for said farm, and if you further find that in the presence of said W. the said L. inquired of this defendant the selling price of said farm, and then and there informed the defendant that he desired to purchase direct from the owner, and that he had never seen or been introduced to the plaintiff, and that he would not purchase of commission men, and you further find that the defendant did not know that the sale was being made by the plaintiff, and if said W. stood by and did

<sup>54</sup> Harris & White v. Stone, 207 S. W. 443, 137 Ark. 23.

<sup>55</sup> Harris & White v. Stone, 207 S. W. 443, 137 Ark. 23.

<sup>56</sup> Tebo v. Weld, 92 A. 876, 5 Boyce. 255.

<sup>57</sup> Tebo v. Weld, 92 A. 876, 5 Boyce. 255.

not inform this defendant that the sale was being made by the plaintiff, the plaintiff would now be estopped from claiming that the said W. was acting for and on his behalf in the sale of said farm, and you should find for the defendant.<sup>58</sup>

**§ 1275. Refusal or failure of principal to consummate transaction negotiated by broker**

**§ 1275(1). Colorado**

The jury are instructed that, when an agent or broker, in good faith, has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, or as offered by the owner, he has performed his duty; and if, from any failure of the owner to enter into a binding contract, the sale is not completed, the agent may recover his commission.<sup>59</sup>

**§ 1275(2). Delaware**

You are instructed that, when the broker has brought to his employer a purchaser willing and able to purchase at the price and on the terms authorized by the employer, the broker's work is done, and he is entitled to his compensation and the employer's refusal to complete the purchase without the fault of the broker, will not prevent the recovery of his compensation.<sup>60</sup>

**§ 1275(3). Illinois**

The jury are instructed that, where a principal contracts with an agent or broker to sell for or on behalf of the principal, and the broker performs his part of the agreement by finding and introducing a purchaser therefor, which purchaser negotiates with the principal, and comes to an agreement with him respecting the price and sale, and which purchaser is ready, able, and willing to carry out such agreement with the principal, then, in such case, the principal cannot evade payment of commissions to agent by refusing to make conveyance to such purchaser; and this would be true even though the principal's title were defective, and even though he had no title at all. It would also be true, even though the agent had agreed to take his commissions out of the purchase money, and even though he agreed to charge no commissions unless a sale were actually made; for it is the law that a principal in such a case has no right to himself, arbitrarily or wrongfully, refuse to consummate such sale, and then say for that reason he will not pay commissions to the agent.<sup>61</sup>

The jury are instructed that, if the jury believe from the evidence that the plaintiffs were engaged in business as real-estate

<sup>58</sup> *Mullen v. Bower*, 53 N. E. 790, 22 Ind. App. 294.

<sup>59</sup> *Buckingham v. Harris*, 15 P. 817, 10 Colo. 455.

<sup>60</sup> *Tebo v. Weld*, 92 A. 876, 5 Boyce, 255.

<sup>61</sup> *Swigart v. Hawley*, 29 N. E. 883, 140 Ill. 186. This instruction, while

agents or brokers in ———, that defendant requested or authorized them to sell or find a purchaser for the property in question at the price of \$——— cash, and that said authority was not limited and was not revoked, and that pursuant to such request they did find such a purchaser, willing and able to buy said property on said terms, and that defendant, on being notified that such purchaser had been found and was ready to close the bargain on said terms, refused to carry out the trade, then plaintiffs have earned their commission, and are entitled to recover.<sup>62</sup>

**§ 1275(4). Michigan**

I instruct you that plaintiff was entitled to his commission when he procured a purchaser ready and willing and able to take and pay for the stock by check with the application or to be remitted at once, and his right to his commission does not depend upon the contingency of the principal's acceptance of the subscription, but rather upon plaintiff's performance of his part of the contract, and the principal cannot deprive the agent of his commission by refusing to accept the subscription or refusing to issue and deliver the stock which plaintiff's efforts have resulted in securing.<sup>63</sup>

You are instructed that an agent has earned the commission when he has procured a purchaser who is ready, willing, and able to take the stock upon the terms designated, to have check attached to his application or sent by the applicant at once, and the principal cannot defeat the agent's claim for commission by refusing to sell or deliver the stock, or by refusing to sell, except upon other and different terms, nor by ignoring the agent, nor by putting himself in a position where he cannot carry out his part of the agreement.<sup>64</sup>

**§ 1275(5). Missouri**

The jury are instructed that if you believe from the evidence in this cause that the defendant contracted and agreed with the plaintiff that, if he would sell his land for the price and sum of \$——— per acre, he would pay to him the sum of ——— per cent. commission on the total amount of the sale, and if you further believe that the plaintiff produced to him a purchaser, or was the cause of one being produced, who was ready, able, and willing to take the land at said price, but the defendant refused to perfect said sale, and if you further believe that this coplaintiff is the one-half owner of the said

correct in the abstract, may be cause for reversal in a particular case, if not accompanied by an instruction expressly submitting to the jury facts assumed therein, as for instance, whether or not the failure to complete the purchase was due to the fault of defendant.

<sup>62</sup> Monroe v. Snow, 23 N. E. 401, 131 Ill. 126.

<sup>63</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.

<sup>64</sup> Lovering v. Duplex Power Car Co., 171 N. W. 374, 204 Mich. 658.



commission, then you should find for the plaintiffs, as though said sale had been made the full amount of said ——— per cent. commission on said purchase price.<sup>65</sup>

§ 1275(6). **Oklahoma**

You are instructed that if you find, from a preponderance of the evidence in this case, that the plaintiff had an agreement with the defendant to sell ——— acres of land belonging to defendant, described as ———, and that on or about ——— the defendant listed said property with the plaintiff for sale, and agreed with plaintiff that he should find a buyer for said land at a price of \$——— per acre, net to the defendant, with the further agreement that the plaintiff was to receive as his commission any sum which he could sell said land over and above said sum of \$——— per acre, and that in pursuance of said agreement the plaintiff procured a buyer for said land on or about ———, one ———, who was ready, able, and willing to buy said land for the sum of \$——— an acre, or the total sum of \$——— for the tract, and that at the same time the said purchaser, ———, paid to plaintiff the sum of \$——— as a part payment on said land, and that this payment of \$——— was made after a telephone conversation took place between the plaintiff and defendant, and that defendant accepted said sum as part payment on the purchase price, and that said sum was paid with the knowledge and consent of the owner of the land, ———, and if you further believe from a preponderance of the evidence that the defendant instructed the plaintiff to sell the above-described land upon the terms herein set out, and that he agreed to all the terms and conditions of said sale to the purchaser, ———, and that he afterwards refused to carry out the terms of said agreement, and refused to furnish the purchaser with a deed to the land, and that upon and owing to his refusal the trade was not made, and the sale was not consummated; and if you further believe from a preponderance of the evidence that by reason of the fact that said sale was not completed the plaintiff in this case was damaged in the sum of \$———, or any other sum, then your verdict should be for the plaintiff, in any sum to which you may find he is entitled, not exceeding the sum of \$———. If, on the other hand, you believe that the plaintiff has failed by a preponderance of the evidence to make out his case, then your verdict should be for the defendant.<sup>66</sup>

§ 1275(7). **Texas**

In this connection you are instructed that, if you believe from all the testimony that the defendant did ratify the contract made with R., and consented to the carrying out of the same, and that

<sup>65</sup> *Sallee v. McMurry*, 88 S. W. 157, 113 Mo. App. 253.

<sup>66</sup> *Thornburgh v. Haun*, 190 P. 1083, 79 Okl. 103.

afterwards, the said defendant, either directly or indirectly, through his agent or attorney, made to R. such representations as to defendant's liability to convey all the land as induced R. to refuse to carry out the contract, and that defendant made such representations with the intent to induce R. to refuse to carry out the contract, and that R. did refuse to carry out the contract on account of such representations, then, unless you further find that the alleged fraudulent statement as to the price made to him by plaintiff, if you believe the same was made, in some degree contributed to R.'s refusal, the plaintiff is entitled to recover of the defendant the amount he sues for, to wit, \$——, together with interest at —— per cent. from the time the sale would have been consummated but for such refusal of R., provided you find the other facts to be such as entitle plaintiff to recover as herein submitted.<sup>67</sup>

**§ 1275(8). Virginia**

The court instructs the jury that a real estate broker, to be entitled to compensation, must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon before he is entitled to his commissions. When he has found such a purchaser, who has entered into a valid contract, his right to compensation cannot be defeated by the fault of the seller, by his misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract.<sup>68</sup>

**§ 1275(9). Washington**

You are instructed that the compensation of a broker, as a general rule, is not dependent upon the actual consummation of the contract between the parties for whom he acts as middleman. If the employer of a broker should refuse to carry out the contract which he employed the broker to obtain for him, the broker is nevertheless entitled to his commission, because that is all he engages to do. He engages to obtain for his employer the contract which he was authorized to submit; and where the employer claims that the broker was not only to find somebody willing to enter into the contract submitted to the broker, but was not to receive any compensation unless his employer should actually conclude the transaction and enter into the contract with the other party, there must be evidence that such was the condition before the broker would be deprived of his right to compensation. If from a preponderance of the evidence in this case you should be satisfied that the defendant, either by himself or through his brother, or by the adoption of a contract made by his brother with the plaintiff, employed the plaintiff to negotiate the purchase from the —— Company of the

<sup>67</sup> Akin v. Poffenberger, 116 S. W. 615, 53 Tex. Civ. App. 340.

<sup>68</sup> Caldwell v. Tannehill, 84 S. E. 6, 117 Va. 11.

—— shares of stock referred to in this written proposition, and if the plaintiff was so employed to bring about, in behalf of the defendant, the sale of this stock upon the terms and conditions set forth in this written proposition, as claimed by the plaintiff, and if you should further find from the evidence that the plaintiff did induce the said company, the owner of these —— shares of stock, to consent to this written proposition, and to agree to sell these shares of stock to the defendants upon the terms set forth in this written proposition, and if you further find from the evidence that the said company was ready, willing and able to carry out such a contract on its part, and if you further find that the defendant, through himself or his brother acting under his authority, agreed to pay the plaintiff the sum of \$—— in event he should obtain from the said company their consent to enter into such a contract as is set out in this written proposition, and if you find, as I say, that the said company was ready, able and willing to carry out such contract, then your verdict would be for the plaintiff against the defendant in the sum of \$——.<sup>69</sup>

**§ 1276. Right to commission as dependent on legality of contract procured by broker**

You are instructed that, if there appears in the case any claim that there was anything in connection with the carrying out of the written memorandum which would have involved any fraudulent or unlawful act, there are two principles of law to be remembered in this connection. One is that the law always presumes that a contract is to be carried out lawfully if a lawful performance is possible, and therefore will not adjudge a contract unlawful unless its performance necessarily involves an illegal or fraudulent act, or the evidence shows that an illegal or fraudulent act was intended, the presumption being in favor of the lawfulness and bona fides of contracts and transactions. The other principle is that a broker employed as a middleman between two parties and who renders the agreed service is entitled to his commission even though the parties to the main transaction, or either of them, contemplate a violation of the law or the commission of a fraud, unless the broker or middleman knowingly participated in some way in the illegality or fraud.<sup>70</sup>

**§ 1277. Transaction not consummated because of defect in title of principal—Sale of invalid bonds.**

You are instructed that an agent employed to sell bonds, and ignorant of the legal status of said bonds, has a right to presume

<sup>69</sup> Calhoun, Denny & Ewing v. Whitcomb, 155 P. 759, 90 Wash. 128.

<sup>70</sup> Calhoun, Denny & Ewing v. Whitcomb, 155 P. 759, 90 Wash. 128.

that the bonds so offered for sale are valid bonds, and to proceed with his negotiations with expected purchasers upon that assumption; and if he finds a purchaser who is able, ready, and willing to buy said bonds at a price and on terms entirely satisfactory to the owner of such bonds, and said sale is not consummated through no fault of the agent or proposed purchaser, but because of the invalidity of the bonds so offered for sale, then the agent procuring such proposed purchaser is entitled to his commissions precisely as if the sale had been fully carried out.<sup>71</sup>

**§ 1278. Division of commissions between brokers**

You are instructed that this is an action upon a contract. It does not make any difference what the equities are or the justice of the situation might be, because this action is brought upon what the plaintiff says was an expressed contract, which was oral in its nature, and the plaintiff claims that he performed his part of the contract and has not received his money. His claim in regard to the contract is this: That on a certain occasion in ———, he and the defendant met. The defendant said: "I have charge of certain property on ———, and I want you to help me sell it, and if you will help me sell this property I will divide my commission with you." The defendant says no such contract was ever entered into, and you, gentlemen of the jury, as judges of the facts, will have to determine whether that kind of a contract was ever actually made between the parties, the plaintiff and the defendant. Let us examine the situation and see what it was, because we are often aided in determining issues by seeing what the exact situation is and the relationship of the parties to the situation and all those things are. Now, the plaintiff at the time of the negotiations knew a man by the name of S. and had certain property belonging to S. in his hands for sale or trade. At the time in ——— that it is claimed this contract was made, the defendant had charge of certain property belonging to Mrs. H., and it is claimed by the plaintiff that they met, and that the negotiations that led up to this contract all had reference to the sale of the property by the defendant with the aid and active assistance of the plaintiff. Now, we have been told that there were certain propositions with regard to the trade of certain improved property, a flat or an apartment house, for this property. We are told that that deal fell through; we are told numerous interviews were had with the man who purchased the property subsequently with the plaintiff and the defendant, and that these negotiations either totally or in part came to an end. The plaintiff claims that he continued his efforts by offering inducements and

<sup>71</sup> Berg v. San Antonio St. Ry. Co., 42 S. W. 647, 17 Tex. Civ. App. 291.

active aid and assistance in the sale of this property of Mrs. H.'s by the defendant. The claim of the defendant on the other hand is this: That they tried to effect a deal, but the only deal they tried to bring about was a trade of the properties of Mrs. H. and S., that these negotiations came to an end in ———, that the man who subsequently purchased the property, S., forgot all about this property, that the defendant had no further negotiations concerning the sale to S., that all those negotiations were at an end, and that a year and a half afterwards S. began negotiations with Mrs. H. for the purchase of this property only because of the changed conditions, and that he (S.) was referred to the defendant by Mrs. H., who owned the property. Negotiations were carried on wholly and alone by him, unassisted by the plaintiff, and these negotiations culminated some time afterwards in the sale of the property. The defendant says he had no negotiations with the plaintiff whatsoever, except concerning the trade of the property, and he says he never told him that if he would help him or aid him in any way, materially or otherwise, in the sale of the property, that he would divide the commission. You are instructed that, should you, after an examination of all the evidence, determine that there was a contract such as the plaintiff claims under, that he was to receive half of the defendant's commission in case this property was sold, then you will have to study the evidence to determine whether or not the plaintiff did actually help, was either procuring or effective cause of what subsequently transpired. With regard to that, they dispute one another, and you should consider all of the evidence in the case. S. has told his story. He has told you what brought about his purchase of the property, what induced him to buy it, and you should take that into consideration in determining whether or not the plaintiff actually earned the commission. Now, as I said, it is unfortunate that these people do contradict one another. It is unfortunate that contracts are not all in writing, so that here can be no quibbling or misunderstanding about them; but people do not ordinarily have opportunity to put their contracts in writing, and they did not in this case see fit to do it, and you will have to find out from a study of the evidence what the truth of the controversy is with regard to the contract itself, and, if the contract did exist, whether or not the money was earned. There is no question of the fact that the defendant did obtain a ——— dollars commission; so, in case the plaintiff is entitled to recover, he is entitled to recover one-half of that with interest due from the date of the last payment, and you will have to study the evidence to determine when it was. The burden of proof is upon the plaintiff. He must establish his case by a fair preponderance of the evidence. If he has failed to prove his

case on both of these points that I have mentioned, he cannot recover. If in regard to both of them he has convinced you by a fair preponderance of the evidence, he should recover.<sup>72</sup>

**§ 1279. Parties to action for commissions**

The jury are instructed that if, in making the agreement for a commission, the plaintiff was acting for or representing his father, then plaintiff cannot recover, and in such case the verdict should be for the defendant.<sup>73</sup>

**§ 1280. Burden of proof**

**§ 1280(1). Illinois**

The jury are instructed by the court that the plaintiff in this case seeks to recover under the agreement made by the defendant ———, dated ———, which has been offered in evidence as Plaintiff's Exhibit A; that, in order to entitle him to recover, it must be shown by the plaintiff by a preponderance of the evidence that he has fully and completely carried out and performed all of his obligations in said agreement.<sup>74</sup>

**§ 1280(2). Mississippi**

The jury are instructed that the burden of proof is upon the plaintiff to prove and show to the satisfaction of the jury by a preponderance of all the evidence that the defendant agreed to give him \$——— to sell his residence for him, and that he did sell it, or render services which enabled defendant himself to sell it; and unless he has proven these facts to the satisfaction of the jury by a preponderance of all the evidence the jury must find for the defendant.<sup>75</sup>

**§ 1280(3). Missouri**

The court instructs the jury that the burden of proof is on the plaintiff to establish by a preponderance of the evidence that the plaintiff was the efficient and procuring or producing cause of the sale by defendant to ———, and unless you find that the plaintiff was the efficient and procuring or producing cause of such sale your verdict must be for defendant and against plaintiff. In this connection the court further instructs you that plaintiff cannot recover if you find that its acts were merely one of a chain of causes producing said sale or contributing in some degree thereto unless you also find that said acts of plaintiff were in themselves the efficient and procuring or producing cause thereof.<sup>76</sup>

<sup>72</sup> *Minds v. Keyes*, 155 N. W. 493, 189 Mich. 629.

<sup>73</sup> *Snyder v. Fidler*, 101 N. W. 130, 125 Iowa, 378.

<sup>74</sup> *Lawrence v. Rhodes*, 58 S. E. 910, 188 Ill. 96.

<sup>75</sup> *Enochs v. Paxton*, 40 So. 14, 87 Miss. 660.

<sup>76</sup> *F. H. & C. B. Gerhardt Real Estate Co. v. Marjorie Real Estate Co.*, 129 S. W. 419, 144 Mo. App. 620.

### E. LIABILITY TO THIRD PERSONS

#### § 1281. Liability for misrepresenting price principal was to receive

The court instructs the jury that if you believe and find from the evidence that, prior to the closing of the alleged trade between the plaintiff and A., the defendant represented to the plaintiff that he had obtained said A.'s price on his (A.'s) \_\_\_\_\_ acre farm in B. county and, without the knowledge and consent of A., falsely stated to plaintiff that said price was \$\_\_\_\_\_ per acre, when he knew that the same was in fact \$\_\_\_\_\_ per acre, and that said A. would take in part payment for his said farm the plaintiff's \_\_\_\_\_ acres of Kansas land; that before closing said trade, and after said representations, the plaintiff told the defendant that he (plaintiff) was not satisfied concerning the value of said A.'s land and the price asked, and suggested that said A. be asked to lower his said price; and that thereupon the said defendant, for the purpose of inducing the plaintiff not to question said A. concerning his price, told the plaintiff that said farm of A. was well worth the price of \$\_\_\_\_\_ asked, and falsely represented to the plaintiff that said A. was a man who, when he set a price, could not be changed, that there was no use to try to obtain said land for less money, and that it could not be bought for a dollar less than the price represented; and if you further find from the evidence that the plaintiff relied upon the representation of said defendant as to the price of said A. for said land and was induced to purchase at said price without further investigation by the false representations of said defendant as aforesaid, and that the plaintiff was ignorant of the falsity of such representations and was unacquainted with land values in B. county; and if you further find that said false representations were made by said defendant for the purpose of concealing the facts from the plaintiff and preventing him from investigating said A.'s price in order that the defendants might obtain from the plaintiff the excess above the price of \$\_\_\_\_\_ per acre actually made by said A.—then your verdict must be for the plaintiff, unless you further find under the instructions given that plaintiff's action is barred by limitation.<sup>77</sup>

The court instructs the jury that if you find and believe from the evidence that plaintiff inquired of defendants the lowest price for which the A. land might be obtained in an exchange for his Kansas land, and that defendants or either of them communicated with A., and A. told them that he would not take the Kansas land

<sup>77</sup> Hays v. Smith (Mo.) 213 S. W. 451.



at all on a trade, but would trade if defendants could get for him (A.) in a trade with the plaintiff \$—— per acre net for his land, and defendants could take the Kansas land as their commission for making a trade of this kind, and that defendants thereafter, with A.'s knowledge, after showing the A. land, negotiated a trade of such land for the Kansas land, then you must find for defendants, even though they did tell the plaintiff that \$—— was the lowest price A. would take for his land and that it would be useless to "jew him down," and did not tell the plaintiff that A. was only to receive \$—— per acre net for his land.<sup>78</sup>

<sup>78</sup> Hays v. Smith (Mo.) 213 S. W. 451.

## CHAPTER LXXX

## BUILDING AND CONSTRUCTION CONTRACTS

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#### A. REQUISITES OF CONTRACT

##### § 1282. Implied liability of owner to others than contractor

The jury are instructed that if they believe, from the evidence, that at the time of doing the work in question D. was constructing the building, either by himself or his subcontractors, and that D. was doing said work under the said special contract given in evidence, then, although the defendants, or one of them, was present at times while ——— were doing the work in question, and said work was for their benefit or the benefit of the premises, still the law will not imply an undertaking on the part of the defendants to pay for said work.<sup>1</sup>

<sup>1</sup> Campbell v. Day, 90 Ill. 363.

**B. PERFORMANCE AND BREACH OF CONTRACT****§ 1283. Duty of contractor in general**

You are instructed that it was the duty of the plaintiff, in the completion of the construction of the substructure of the bridge described in the plaintiff's petition, to use ordinary care to the end that said work should be prosecuted and conducted with reasonable skill and dispatch, and that reasonable economy should be exercised as to the employment of labor, the purchase of material, and the incurring of other expenses reasonably and properly incident thereto.<sup>2</sup>

**§ 1284. Agreement to perform to satisfaction of a reasonable man**

The jury are instructed that the defendant agreed by his contract with the plaintiff, that has been produced in the evidence, that the workmanship upon the granolithic floor to be laid should be first-class in every respect and such as would be satisfactory to a reasonable man. But they are further instructed that the burden of proving that the workmanship upon said floor was not first-class in every respect and such as would be satisfactory to a reasonable man rests upon the plaintiff. If therefore, the jury believes from the evidence that the plaintiff has failed to prove that the workmanship upon said floor was not first-class in every respect and such as would be satisfactory to a reasonable man, and if they believe, further, from the evidence that the defendant kept all of his other agreements with the plaintiff, then their verdict should be for the defendant. But the court instructs the jury that if they believe from the evidence the defendant or his agents, or any of them, was negligent in furnishing bad material for the construction of the granolithic floor, or negligent in mixing said material, or negligent in the construction of the said floor, then he violated the duty laid upon him by the contract that the workmanship should be first-class.<sup>3</sup>

**§ 1285. Substantial performance****§ 1285(1). Iowa**

The jury are instructed that, if you believe from the evidence that the plaintiff constructed the ditch in a reasonably workmanlike manner and substantially in accordance with his contract and profiles furnished by the engineer in charge, then he would be entitled to recover whatever balance appeared from the evidence to be due upon the contract price.<sup>4</sup>

<sup>2</sup> El Paso Bridge & Iron Co. v. Dunham (Tex. Civ. App.) 152 S. W. 1131.

<sup>3</sup> Lambert v. Jenkins, 71 S. E. 718, 112 Va. 376, Ann. Cas. 1913B, 758.

<sup>4</sup> Gorton v. Moeller Bros., 130 N. W. 910, 151 Iowa, 729.

The jury are instructed that, to entitle the plaintiff to recover, it is not necessary that the cap on the monument in question should be of the exact proportions or size as that upon the ——— monument. It is sufficient if it be shown to be substantially the same in style and finish, and of such proportions as to properly correspond with the monument on which it was placed. If, from the evidence, you find plaintiff has thus substantially complied with the contract, you will find for plaintiff for ——— dollars. If you do not so find you will find for the defendant.<sup>5</sup>

**§ 1285(2). Massachusetts**

You are instructed, in relation to the defendants' claim that the plaintiff willfully abandoned his contract before it was completed, and that the defendants were therefore not liable, such is the rule of law, where willfully, without cause, a party neglects to complete and abandons his contract. If the plaintiff had willfully abandoned the work, leaving the house not finished according to the contract, he could not recover; but if a party in good faith proceeds under a special contract, and doing what he reasonably supposes is required, and substantially completes it, and the other party accepts the benefit of the work, although the contractor may not have done all that was really his duty, or in the exact manner required, still he may maintain an action for his labor and materials, but he cannot necessarily recover the cost of his materials or the ordinary price of labor. The party for whom the work was done is entitled to have deducted from the contract price the difference between the value of the work as done and its value if it had been done in accordance with the contract.<sup>6</sup>

**§ 1285(3). Missouri**

The court instructs the jury that, as a matter of law, in suits on building contracts, a literal compliance with plans, specifications, and drawings by the contractor is not necessary to recover; and if you find from the evidence that the said ——— and ———, in good faith performed the contract on which recovery in this suit is sought, substantially and in all particulars, according to the terms and the plans, specifications, and drawings without a material omission or defect in such performance, that is sufficient to constitute compliance with the contract.<sup>7</sup>

**§ 1285(4). New York**

The jury are instructed that, where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects or unintentional

<sup>5</sup> *Prior v. Schmeiser*, 69 N. W. 525, 100 Iowa, 299.

<sup>6</sup> *Cunningham v. Washburn*, 119 Mass. 224.

<sup>7</sup> *Moore v. McCutchen* (App.) 190 S.

omissions, he may recover the contract price, less the damage on account of such defects; if the jury find the general purpose of the contract between the parties has been accomplished, the plaintiffs are entitled to recover upon the contract.<sup>8</sup>

The jury are instructed that the principal question is, perhaps, in relation to the compliance by the plaintiffs with the terms of their contract, in respect to this twelve-inch wall. I leave it for you to determine whether the twelve-inch wall was completed substantially as required by the terms and specifications of the contract. If you come to the conclusion that the twelve-inch wall, as built, is substantially what the contract calls for, although it may not be the one in every particular, then your verdict will be for the plaintiffs. If, on the other hand, you come to the conclusion that it is an entirely different thing, and does not do the work which was required of it, and which a wall specified in the plans would do, then I charge you the plaintiffs have not performed their contract, and cannot recover in this action. I leave that fact for you to determine.<sup>9</sup>

§ 1285(5). *Pennsylvania*

You are instructed that it is alleged that, when this contract was entered upon by the defendant, he departed from some specifications in some respects. Upon that point I do not intend to enter into any great details upon the various points exhibited in the testimony. It seems to me that the minuteness with which you have been carried through these details is not profitable to the case. If it were not for the specifications, I should think that the plaintiffs would have no claim. The work was done under their eyes, under the terms of the contract and the specifications. It may be that there were departures, more or less marked, from the exact terms of the contract. Still, when the work was done, they paid for it, and settled in full. Now, certainly, when business men enter into a contract for the doing of work to be done to their satisfaction, when they accept the work after they have seen it in progress, and after it was done, they cannot stand before a jury, with a good face, and ask to be repaid money which they have voluntarily themselves paid out to the man who did the work for them; and it seems to me that these details cannot be of any special value to you in determining the main question of the case—whether or not the wharf was constructed so as to be suitable for a period of a year for the purposes of landing only.<sup>10</sup>

W. 350. In this case it was held not to be reversible error to fail to define "substantially" or "material omission."

<sup>8</sup> Morton v. Harrison, 52 N. Y. Super. Ct. 305.

<sup>9</sup> Morton v. Harrison, 52 N. Y. Super. Ct. 305.

<sup>10</sup> Beswick v. Platt, 21 A. 306, 140 Pa. 28.

Of course, you will readily understand that, so far as the defendant departed in any respect from the precise specifications, which are embodied in the contract, with the consent and approval of the plaintiffs, they have no right to complain. It did not make any difference that he knew more about wharf building than they, if he went to them and said, as he says he did, "Now, these ties, instead of being eight feet apart, as provided in the contract, had better be ten feet, because in that way they will go opposite, and lay on the piles, and be more securely fastened;" and they said, "Very well, put them that way." They cannot complain now. He had a perfect right to do it if they consented. In reference to the difference which they complained had been made in the fenders, if he said to them, "It will be better for you, and equally severe on me, to put them 10 feet, instead of 8 feet; and at the north end of the wharf there will be a greater strain from the débris in the river, and I will put the extra fenders there;" and if that change was made with their consent, they should not complain. Apparently, they are men of sense and intelligence, and mean to do the fair thing. They say that they lost money, and they think the loss should fall on the defendant instead of them, and they look at the case from their standpoint, but you are to look at it from the honest and fair standpoint, as between the parties. That is the only proper way for the jury to look at anything.<sup>11</sup>

You are instructed that the defendant also says that in some other respects there were slight variations from the precise specifications. For instance, he said that in some cases he did not put in screw-bolts. He gives you the reason for it. He said that when the piles were driven they took such an angle that when they were cut for the clamps to be fitted to them there was not enough left to afford a hold or purchase for the bolts, and therefore he had to put one of these smaller spikes there, and then over the top of the clamps there was one of the large ones driven through a hole, bored for the purpose into the top of the pile. He says it was done in a few instances; they say more frequently. Now, gentlemen, you are not required, in a contract of this kind, absolutely, literally, positively, to exact compliance as necessary with the contract. You are to regard a fair, substantial compliance with what is required as what is necessary. You can readily understand that in the nature of things it would be impossible to drive piles down into the bed of the river so that they would stand up like balusters in a staircase, exactly parallel, exactly perpendicular. I do not suppose it would be a possible thing. I do not suppose human in-

<sup>11</sup> *Beswick v. Platt*, 21 A. 306, 140 Pa. 28.



genuity has yet devised any plan by which this can be done, and therefore the work which is to be done must be determined according to the nature of the work. The perfection of the work, the character of the work, are to be estimated according to the sort of work which is to be done. Now if, in these respects only, and for such reasons, there was a minute departure from the terms of the contract, it would hardly be fair or proper for you to say that because of such departures the defendant had broken his contract.<sup>12</sup>

**§ 1285(6). Texas**

You are instructed that, in deciding whether or not plaintiff was proceeding with said building in compliance with the contract, there must have been a substantial compliance in every material particular in each item as called for by a fair, reasonable, and practical construction of the contract, plans, and specifications, taken together; and where there is a conflict, if any, in these, this should be reconciled in a practical, workmanlike manner, so as to arrive at the fair and reasonable intention of the same.<sup>13</sup>

**§ 1286. Agreement that mechanical contrivances shall meet certain tests or have certain capacity**

The jury are instructed that by the terms of the contract offered in evidence the plaintiffs cannot recover unless the jury shall find from all the evidence in the cause that the wheels constructed by the plaintiffs, with their appurtenances and fixtures as arranged by the plaintiffs, were able, when employed by the defendants in running and driving their mill, to work up to ——— horse power with a full head of water and were capable of effecting a saving of ——— per cent. of water over the overshot wheel that was previously in use, and that the burden of proof is on the plaintiff to establish said facts.<sup>14</sup>

**§ 1287. Requirement that house should be finished ready for occupancy**

You are instructed that, in relation to the proper construction and interpretation of the contract, it is a question of law for the court to decide. The contract provides that the plaintiff should "finish the house ready for occupancy," and then proceeds to state the details as to a portion of the work. As far as the manner of doing the work and the kind of work is specified, it is to be done as thus specified; the only difficulty arises as to the work not specified, but which is required by the provision "to finish said

<sup>12</sup> *Beswick v. Platt*, 21 A. 306, 140 Pa. 28.

<sup>13</sup> *Linch v. Paris Lumber & Grain Elevator Co.*, 15 S. W. 208, 80 Tex. 23.

<sup>14</sup> *Conner v. Mount Vernon Co.*, 25 Md. 55.

house ready for occupancy." The court cannot, as a matter of law, give you the details the parties have omitted, but instructs you that the plaintiff would, under this provision of the contract, be bound to do all things that would be reasonably necessary and proper to make the house ready for occupation, taking into consideration, in determining what should be done, the character of the house he was to finish; and if the jury find that he omitted anything specified in the contract, or omitted any other thing that was reasonably required to have such house as is referred to and described in the contract ready for occupancy, then he has not performed his contract and cannot recover upon it.<sup>15</sup>

**§ 1288. Contract to dig well**

The jury are instructed that the defendant was entitled to a well that would supply a reasonable and sufficient quantity of water for the wants and needs of himself and of a farm of that character in that neighborhood.<sup>16</sup>

The jury are instructed that you must consider the condition of the parties and the circumstances surrounding the matter, the size of the farm, the probable needs of such a farm, the ordinary uses that a farm requires a well for in this neighborhood, to determine what was in the minds of the parties, what they contemplated in putting this well there.<sup>17</sup>

**§ 1289. Obligations of contractor with respect to strength of structure—Wharf**

You are instructed that when the contract was entered into it was signed. It appears that the defendant said: "I won't sign that contract as it is drawn up; you must insert these words 'that the wharf is to be for landing purposes only;'" and that was inserted, and that clause is a very material clause in determining the rights and obligations of the parties in this case. It does not need an expert, gentlemen, to tell you what that clause means. They have been called here for the purpose, but, if there had not been one of them in the case, I take it you would have no difficulty in arriving at the proper estimate of the meaning of those words. They mean just what they say. If the wharf was for the purpose of enabling goods and merchandise to be landed, and not to be stored, it is perfectly obvious that a burden deposited there upon it and remaining would be more likely to cause it to break down than if these goods and merchandise were merely transported over the structure. If you carry a ton of any kind of merchandise over

<sup>15</sup> *Cunningham v. Washburn*, 119 Mass. 224.

<sup>16</sup> *Richison v. Mead*, 80 N. W. 131, 11 S. D. 639.

<sup>17</sup> *Richison v. Mead*, 80 N. W. 131, 11 S. D. 639.

a wharf singly, one ton at a time, that is one thing; but if you put 100 tons down upon the wharf, and let it remain there, that is 100 times that thing, and the strain upon the wharf is, of course, 100 times as great. Now, it is said here—not only said, but it is the case—that all the defendant was bound to do was to construct a wharf which would stand the purposes of landing, not of storage; and the fact that the defendant had, at the very time when he signed that contract, said, “I won’t sign it unless that clause is inserted,” and it was inserted with the consent of the other parties, is important. It seems to me that it could not be made more important. The clause would have the same meaning, irrespective of the circumstances under which it came into the contract; but the circumstances punctuated the fact that the clause is there, and bring it more vividly to your attention.<sup>18</sup>

You are instructed that these matters bear upon another point of the case. The defendant undertook to construct a wharf which should stand for a year for “landing purposes only.” If he built such a wharf substantially in accordance with the contract, that is all he was bound to do. He was not bound to construct a wharf which would hold one, two, or three hundred tons of sand or other substance for the purposes of storage. That was not his duty. He did not undertake any such liability. Now the question is, what was it that destroyed that wharf? It fell within a year—within three or four months—of the time it was finished and handed over by the defendant, and paid for by the plaintiffs. They say it was not subjected to any unusual strain. They say it was not used for the purposes of storage. That is what I understand them to claim. The defendant claims that it was, and that the fact that it was so used caused the destruction of the wharf. Upon that point it will be very important—it will necessarily be very important—for you to consider what the evidence shows. You have heard the evidence of several witnesses upon it. I do not understand that any of the witnesses say there was no sand upon the wharf, or that none was lodged there. I do not mean to say to you that the circumstance that for a short period of time there might be a moderate amount on the wharf, lying there until afterwards removed, would constitute storage within the meaning of the contract; but if a boat load of sand had been thrown there, containing 100 tons of sand, and that load was deposited upon the wharf, and carts came up and began to take it away, and at the same time another boat came up and kept supplying the pile as fast as it was removed, then, of course, practically, for all purposes of strain upon the wharf, there was a storage of sand upon it.

<sup>18</sup> *Beswick v. Platt*, 21 A. 306, 140 Pa. 28.

That, it seems to me, would not have been a fair construction of the rights of the plaintiffs, as against the defendant, with reference to the test that they had a right to fall back upon. They had not a right, so far as he was concerned, to subject the wharf to any such test. If, as I have said, there was an ordinary quantity lodged there, and the wharf fell down under any such strain as that, then you might with propriety hold that the defendant did not construct such a wharf as he undertook, because he did not merely undertake to construct it according to specifications, but so that it would stand for a year for landing purposes only. There are other witnesses who testify that the quantity of sand upon the wharf was not very large. On the other hand, there are several witnesses who testify that the quantity that was stored there and remained there, and was there at the time the wharf fell, was very large, amounting to several hundred tons. Now, if the plaintiffs subjected the wharf to any such strain as that, when it was built under an express covenant that it should be for "landing purposes only," I should say, and I should take it that you would say, that they could not hold the defendant responsible for the consequences of any such injury to the wharf. I have gone over the case so far as I propose to dwell upon it. I have told you—endeavored to tell you—in a way you could comprehend, that the rights of the parties should be determined by the contract and under the contract. The defendant was bound to build a wharf according to the specifications, which would stand for a year for landing purposes only, and, if he did not comply with the specifications fairly and substantially, varying from them only to the degree which the plaintiffs themselves countenanced and approved, then, if in that he constructed a wharf which would have lasted for a year for "landing purposes only," you have nothing to do but find a verdict for the defendant. If, on the other hand, you think that the defendant did not comply with his contract, that he did vary from it in any of the particulars which have been described before you, and that the result of it was that the structure which he erected for the plaintiffs was so weak that, when it was put to the strain of landing purposes, as I have described, it fell—went into the river—then the plaintiffs are undoubtedly entitled to a verdict in their favor, for the pecuniary loss which they sustained. It will be exactly as you determine that question, as fair men, that you will determine your verdict one way or the other; and I need not tell you to do it as intelligent men, and entirely independent of any feeling of sympathy between these parties. It has no place in cases of this kind.<sup>19</sup>

<sup>19</sup> *Beswick v. Platt*, 21 A. 306, 140 Pa. 28.

**§ 1290. Defense of performance of work through others**

The court instructs the jury that, if they believe from the evidence that the plaintiff, either himself or through others employed by him, constructed the building in the declaration mentioned, in accordance with the specifications in said agreement set forth, and relying upon the contract in the declaration mentioned, then the jury shall find for the plaintiff the price therefor in said agreement stipulated to be paid by defendant to the plaintiff, although from the evidence the jury may believe that outside parties by parol agreement guarantied that the plaintiff should lose nothing by his construction of said building under said agreement, and actually advanced to the plaintiff the money necessary to pay for the material and labor employed in the construction of the said building.<sup>20</sup>

**§ 1291. Performance of work through subcontractors—Consent to subletting**

You are instructed that, although you may believe from the evidence that plaintiffs did sublet a portion of the work, and that a part of the work sued for was done by subcontractors under such subletting, yet if such subletting was done with the knowledge and consent of the defendant, by his express permission, to hasten the work, the plaintiffs are entitled to recover for all work done under said contract, so far as any defense is concerned based upon the fact of such subletting, and especially if the plaintiffs were to and did give the work their personal attention and oversight; and whether the defendant assented to such subletting or not should be determined from all the evidence, facts and circumstances in the case; and you are the sole judges of the evidence and credibility of the witnesses, and may give to each such credit as you may deem proper.<sup>21</sup>

You are instructed that, if the jury believe from the evidence that the last five miles of said contract was sublet by plaintiffs to others who did the work thereon, then the plaintiffs cannot recover in this action, unless you believe from the evidence that said subletting was by and with the knowledge and consent of defendant.<sup>22</sup>

You are instructed that, if the jury believe from the evidence that defendant was contractor to build a portion of the railroad named in the contract, and that defendant subcontracted twelve miles of it to the plaintiffs, and that the plaintiffs sublet the whole or a part of it to others, and that such subcontractors abandoned the work because the plaintiffs did not pay them, and if the jury believe from the evidence that the railroad company, with whom

<sup>20</sup> *Ferguson's Adm'r v. Wills*, 13 S. E. 392, 88 Va. 136.

<sup>21</sup> *Bean v. Miller*, 69 Mo. 384.

<sup>22</sup> *Bean v. Miller*, 69 Mo. 384.

defendant contracted, never received or accepted the work from him, and that defendant never accepted or used the work done by plaintiffs, then the plaintiffs cannot recover in this action, unless such subletting was with the knowledge and consent of defendant, and the plaintiffs were prevented from proceeding with the work in consequence of the failure of the defendant to make payment on the estimates returned or demanded, as stated in the ——— instruction of plaintiffs.<sup>23</sup>

**§ 1292. Time of performance—Delay of contractor caused by acts of owner**

**§ 1292(1). Maryland**

The court instructs the jury that if the jury find that the plaintiffs completed the building by ———, except as to the erection of the loading platform, and that the construction of said platform was postponed by request of the defendants, and was afterwards erected promptly upon request, and in the manner directed by the witness ———, acting under instructions from the defendants, then the jury may find that the building was completed ———, within the meaning of the contract.<sup>24</sup>

**§ 1292(2). New York**

The jury are instructed that, if you find that the plaintiffs have performed their contract in every respect except as to time, and you further find that the delay in completing the contract by the time specified was attributable to changes in the work from the original contract and specifications made at the request of the defendant, or those acting for him, then the plaintiff can recover, notwithstanding such delay. If the plaintiffs were proceeding to complete their contract according to its terms, and according to the specifications, and changes were made in reference to the elevator, water-closets, or in any other respects, at the request of the defendant or his agent, and such changes, or any of them, prevented the completion of the contract by ———, then the plaintiffs are excused for not completing at that date. If you find any of the facts that I have mentioned, which excused the noncompletion by ———, then the plaintiffs were bound to complete the work only within a reasonable time; what was a reasonable time is a question to be determined by the jury from the circumstances of the case.<sup>25</sup>

<sup>23</sup> Bean v. Miller, 69 Mo. 384.

<sup>24</sup> Iron Clad Mfg. Co. v. Thomas B. Stanfield & Son, 76 A. 854, 112 Md. 360.

<sup>25</sup> Morton v. Harrison, 52 N. Y. Super. Ct. 305.

**§ 1293. Waiver of delay of contractor**

I charge you that before the plaintiff can recover in this action he is bound to prove, to your satisfaction, either that he performed the agreement of ———, and finished the work there provided to be done within the time fixed by that agreement, or that the defendant has consented to or waived the performance of the agreement within the time fixed. Time was of the essence of the agreement between the parties, and the failure of the plaintiff to fully complete the work within the time limited by the contract for its completion operated to defeat his right to recover in this action, unless you find that the defendant by his own acts caused the delay complained of by him. Under this contract the plaintiff was required to have the work completed on the ——— day of ———. He did not. Then there was an obligation upon the defendant. That obligation was this. It was then the duty of the defendant to stop the plaintiff's work, or, if he allowed him to go on and work without protest, he must pay him for the work that he did. If he wished to insist upon a forfeiture, if he wished to insist upon the strict terms of the contract, it was then his duty so to insist.<sup>26</sup>

The jury are instructed that a substantial compliance only is required, and if the owner suffers the builder to go on after the time limited has expired, with knowledge of its condition, without expressing disapproval, he waives the forfeiture which he might otherwise have claimed. He was bound to express his dissatisfaction at the delay, and, if he intended to take advantage of it, should have acted with promptness at the time, instead of allowing the contractor to expend time and money in the completion of the work.<sup>27</sup>

**§ 1294. Default of owner or principal contractor as excuse for nonperformance by contractor or subcontractor**

You are instructed that, if you believe from the evidence that the plaintiffs entered upon the performance of their part of the said contract, and performed work under it, according to its terms, and if you further find that the engineer, or his assistant under his directions, made out monthly approximate estimates of the work done by plaintiffs at the end of each month, which were returned and brought to the notice of the defendant, and that the defendant, upon the request of the plaintiffs, after the expiration of fifteen days from the return of any such estimates, refused and neglected to pay plaintiffs the amount due according to any such estimates, to wit: ——— per cent. of the amount of such estimates, such failure or refusal of the defendant to pay was a breach of his part

<sup>26</sup> Dunn v. Steubing, 24 N. E. 315,  
120 N. Y. 232.

<sup>27</sup> Morton v. Harrison, 52 N. Y. Su-  
per. Ct. 305.



of the contract, and the plaintiffs were not bound to go on and complete all the work, but might suspend or quit the work until payment was made; and if you find that payment has not been made, and the work has been suspended, the plaintiffs will be entitled to recover in this suit for all work done under said contract at the rates therein stipulated.<sup>28</sup>

You are instructed that under the contract it was not the duty of the plaintiffs to procure the right of way; and if you find from the evidence that the plaintiffs entered upon the performance of their part of the contract, by grubbing, clearing, grading, etc., as therein stipulated, and that they were prevented from completing their part of the contract, because the right of way had not been obtained from the owners of the land through which the road ran, and where the work was to be done, who forbade and refused to permit the plaintiffs to enter and do the work, this would be a sufficient excuse for the failure of the plaintiffs to perform the work where such right to way had not been obtained.<sup>29</sup>

**§ 1295. Insufficiency or collapse of structure due to defects in plans**

You are instructed that this case grows out of a contract which was entered into between the plaintiffs and the defendant for the construction by the latter of a wharf for the former. I do not understand, from anything which has appeared in the case, that there is need for you to consider the confidence reposed by one in the other, whereby the rights of these parties are to be determined or affected in the slightest degree. I do not understand that there is anything in it which would justify you in the belief that the plaintiffs are the victims of misplaced confidence, or that by reason of their trust in defendant, they were induced to enter into a contract different from that which, as wise, practical men, they entered into deliberately, with their eyes wide open. It appears so far as I understand the evidence in the case—the undisputed evidence—that there was a contract made to have a wharf built. From what has appeared in the case, an old wharf existed, and the plaintiffs desired to extend it further out, and they then made up their minds in a general way what they wanted to have. It seems from the evidence that they came into communication with defendant on the subject, but I infer that defendant proposed to build the wharf in a certain way, which would involve a considerable expenditure of money, probably more than they cared for, and they modified the plans and specifications, and finally submitted to him the specifications for the wharf which they wanted built. Now, you can read-

<sup>28</sup> Bean v. Miller, 69 Mo. 384.

<sup>29</sup> Bean v. Miller, 69 Mo. 384.

ily see, as men of intelligence and common sense, that, if these were the circumstances, they have no right to blame defendant for the plans upon which it was constructed, if it broke down by reason of a defect in the plans or specifications. They are alone responsible for the work of their own hands. Nor can sympathy properly be exercised towards men who had placed themselves in such a position, and I speak of it in this way because it is possible, in view of what has been said, you will be led to consider this case sympathetically, rather than practically. It is a matter only of common sense and right between these parties, not of feelings. If the plaintiffs have suffered by breach of the contract, because the defendant did not live up to it, he should pay them; but if he did his work fairly and squarely, according to the requirements of the contract, it is no more right that he should pay them than that one of you should.<sup>30</sup>

#### § 1296. Acceptance by owner of performance

##### § 1296(1). Alabama

I charge you, gentlemen of the jury, that a mere naked occupancy or use of a building erected on the land of the owner does not itself amount to an acceptance of the work as done in compliance with the contract, unless the possession and use be coupled with some act or some language from which acceptance or acquiescence may be reasonably inferred. The owner is not bound to remove the building or abstain from using it.<sup>31</sup>

##### § 1296(2). Virginia

You are instructed that, if the jury believe from the evidence that the plaintiff in this case completed the tunnel through the ——— mountain in a workmanlike manner and substantial manner, and to the satisfaction and acceptance of the engineer of the ——— Railroad Company, and that the tunnel was accepted by said company, then the said plaintiff is entitled to recover any sum that may be due him for said work under the contract sued on, although there was a change in the method of doing the work, which said change was ordered by the ——— Railroad Company.<sup>32</sup>

#### § 1297. Rights of contractor on being obliged to rebuild because of defects in plans furnished by owner

The court instructs the jury that, in order to entitle plaintiffs to recover the cost of rebuilding the retaining wall, the burden is on them to prove by a fair preponderance of the evidence that they

<sup>30</sup> *Beswick v. Platt*, 21 A. 306, 140 Pa. 28.

<sup>31</sup> *Walstrom v. Oliver-Watts Const. Co.*, 50 So. 46, 161 Ala. 608.

<sup>32</sup> *Norfolk & W. R. Co. v. Mills*, 22 S. E. 556, 91 Va. 613.

built the same in accordance with the plans and specifications of the architect, and used such reasonable degree of care and skill and took such precautions as are ordinarily taken by contractors in doing work of this kind, and that the failure and collapse of the wall was owing to the erroneous, defective, and insufficient plan and specifications furnished by the architect, and not to the manner of its construction. They must further show, by a like preponderance of evidence, that such errors, defects, and insufficiencies in the plan and specifications for said wall as furnished by the architect were not such as to be readily discovered by the use of ordinary knowledge, skill, and care on part of plaintiffs, and that plaintiffs, exercising such skill and care, could not reasonably have foreseen that the wall would prove insufficient for the purpose intended, and would probably collapse or break down. If you find these facts so proven and that the wall was rebuilt by plaintiffs according to the original plan and specifications at the request of the superintendent of construction employed by defendant to supervise the erection of the building, then you should find for the plaintiffs for the cost of rebuilding the wall, as shown by the evidence.<sup>33</sup>

**§ 1298. Duty to give contractor opportunity to remedy defects**

**§ 1298(1). United States**

You are instructed that no one is obliged to accept defective and improper work, and if new work is so constructed as to be so defective and improper, as not in substantial performance of the contract therefor, the purchaser has a right to refuse to accept the same, and the contractor cannot, after such rejection, patch up or repair such defective and inferior work, and then compel the purchaser to accept the same; neither can he recover the contract price therefor, less the amount necessary to put such defective and improper work in proper condition.<sup>34</sup>

**§ 1298(2). Oklahoma**

You are further instructed that if you find from the evidence that the walls constructed by defendant for the plaintiff were faulty, and should further find that it was practicable to remedy such faults, and defendant offered to remedy same, but such offer was refused by plaintiff and plaintiff forbade the defendant to enter upon the premises for the purpose of remedying such defects, then your finding and verdict should be for the defendant.<sup>35</sup>

<sup>33</sup> *Pine Bluff Hotel Co. v. Monk & Ritchie*, 183 S. W. 761, 122 Ark. 308.

<sup>34</sup> *Pitcairn v. Philip Hiss Co.* (C. C. A. Pa.) 113 F. 492, 51 C. C. A. 323.

<sup>35</sup> *Spurrler Lumber Co. v. Dodson*, 120 P. 934, 30 Okl. 412.

**§ 1299. Damages recoverable by contractor for breach of contract**

The court instructs the jury that, if they find for plaintiffs, they shall assess the amount of damages at the value of the work performed by plaintiffs (to be determined by the terms of the contract), and you will add interest at \_\_\_\_\_ per cent. per annum from the time when plaintiffs demanded payment, provided the money so demanded was due at the time of the demand, and provided interest shall not be counted from an earlier date than \_\_\_\_\_; but, if no demand was ever made, then plaintiffs should recover interest only from the date of the filing of this suit; that is, from \_\_\_\_\_. The interest allowed in any event is to be added to the original indebtedness and returned in one aggregate sum.<sup>86</sup>

**§ 1300. Recovery by contractor for being prevented from performing contract—Rental value of equipment**

You are instructed that, if you believe from the preponderance of the evidence that the plaintiffs were directed by the defendant through its agent or agents to move the tools in controversy from the \_\_\_\_\_ farm on to what is called the \_\_\_\_\_ farm for the purpose of drilling the well or wells, and the plaintiffs complied with said request, and after having moved the tools on said premises the defendant requested plaintiffs to keep the tools on said premises from time to time for the purpose of drilling a well or wells thereon and the plaintiffs consented thereto with the understanding, express or implied, that the plaintiffs should be compensated therefor, and the defendant built a rig upon said premises to be used by the plaintiffs in drilling said well or wells, to which the plaintiffs moved tools and thereafter moved said rig away, and the plaintiffs were not permitted to drill said well or wells through no fault of theirs, and the plaintiffs were ready, able, and willing to drill said well or wells at all times prior to the removal of the said rig, and retained their tools at the request and direction of the defendant for that purpose, then your verdict should be for the plaintiffs for the reasonable rental value of the tools as idle tools for such period as you find from the evidence they were under such conditions as above set forth. The plaintiffs, if they recover, can only recover for the reasonable rental value of such idle tools during such period. You will not be permitted to award any damages that the tools might have earned had they been used during said period.<sup>87</sup>

<sup>86</sup> Bean v. Miller, 69 Mo. 384.

<sup>87</sup> Terrell Co. v. Davis, 188 P. 676, 77 Okl. 302.

**§ 1301. Recovery by contractor on account of delay caused by employer**

You are instructed that when an employer employs a contractor to do certain work or construction for such employer, and then the employer delays or requests the contractor to delay the performance of the work, the contractor may not acquiesce in the suspension without notice to the employer that he will claim compensation therefor, or unless the employer knew that the contractor expected compensation therefor, and then claim compensation for such time acquiesced in, but if the employer delays or requests a delay or suspension of the work, and the contractor notifies the employer that he expects compensation for such delay, or if the employer knows that the contractor expects compensation for such delay, and thereafter the employer without the knowledge or consent of the contractor abandons the work, or does not give to the contractor the right to perform said work, the contractor may recover for such delay or suspension.<sup>38</sup>

You are instructed that if you believe from the evidence that the defendant employed the plaintiffs to drill an oil or gas well, then the implication, in the absence of a specific agreement as to when the well should be commenced, would be that it should be commenced in a reasonable time and if, before the commencement of the well, the defendant requested plaintiffs to delay the commencement thereof, and plaintiffs consented to such delay without making it known to the defendant that they would ask compensation therefor, or without the defendant knowing that the plaintiffs would look to it for compensation therefor, then the plaintiffs cannot recover damages or compensation for the use or nonuse of their tools during any such delay, to which they consented or in which they acquiesced without notice to the defendant that they expected compensation for such delay, or if the defendant did not know that the plaintiffs would look to it for compensation for such delay.<sup>39</sup>

You are instructed that, if you find for the plaintiff, you cannot exceed in your verdict the sum sued for.<sup>40</sup>

**§ 1302. Damages recoverable by owner for delay****§ 1302(1). Maryland**

The jury are instructed that, even if you should find that the two wheels constructed by the plaintiffs, with their appurtenances, were able to work up to ——— horse power and were capable of

<sup>38</sup> Terrell Co. v. Davis, 188 P. 676, 77 Okl. 302.

<sup>39</sup> Terrell Co. v. Davis, 188 P. 676, 77 Okl. 302.

<sup>40</sup> Terrell Co. v. Davis, 188 P. 676, 77 Okl. 302.

effecting a saving of ——— per cent. of water, but you shall also find that said work was not completed on or before the ——— day of ———, and that the plaintiffs were not prevented from completing the same on or before said day by circumstances over which they had no control, then the defendant is entitled to a credit of ——— dollars for each and every day during which said work remained not completed after the said ——— day of ———.<sup>41</sup>

§ 1302(2). Texas

Now, as to the claim for damages in defendant's plea in reconvention for the rental value of said building, you are instructed as follows: If you shall believe from the evidence that at the time the said plaintiff assumed to carry out the said contract, as hereinbefore explained, within a period of ——— days from the ———, the defendant agreed with the said plaintiff to waive any and all claim for damages that he might have had against the said ——— Iron Works for its failure to carry out and complete said contract, then you are instructed that the defendant cannot recover anything for the rental value of said building by reason of the fact that the same was not completed within the time prescribed in said contract, and, if you so find the facts to be, you will find against the defendant on his plea in reconvention for the rental value of said building, and so state by your verdict in so many words; on the other hand, if you shall believe from the evidence that at the time said plaintiff assumed to carry out and perform said contract within said ——— days the said defendant agreed to waive said claim for damages in the event only that the said plaintiff should carry out and complete said contract within ——— days after the same had been assumed by him, then you will proceed to further consider whether the defendant is entitled to recover anything on his claim for the rental value of said building under the following instructions. If you believe from the evidence that at the time the said ——— Iron Works entered into said contract of ——— it had knowledge of the fact that one H. had entered into a contract with the said defendant for the erection and completion of his said building by the ———, then you are instructed that the defendant will be entitled to recover the reasonable rental value of said building from the time that the ——— Iron Works should have performed and completed its said contract with the defendant up to the time that the said building was in fact turned over to the said H. for completion by him, but you cannot allow the defendant any amount for the rental value of said building after the time that the said building was turned over to

<sup>41</sup> Conner v. Mount Vernon Co., 25 Md. 55.

said H. for completion by him. But in this connection you are further instructed that if there were any delays caused to the said ——— Iron Works on account of wrong measurements for material to be furnished by said iron works or on account of delay in procuring extra material for the said defendant if any, or on account of any delay on the part of any transportation company, if any, in delivering the material to be used on said contract, then any and all such delays, if any, cannot be chargeable to the plaintiff herein in computing the time for the rental value of said building, for the reason that neither the ——— Iron Works nor the plaintiff would be chargeable with such delays, if any.<sup>42</sup>

**§ 1303. Measure of recovery by owner on account of defective performance**

**§ 1303(1). Arkansas**

The court instructs the jury that, if you find from the evidence that the plan and specifications for the wall furnished by the architect were proper and sufficient, and that it gave away and fell because it was not built according to the plan and specifications so furnished, or because the plaintiffs failed to use ordinary and reasonable care for its support and protection, or for both of these reasons, combined, and if you further find that the wall again fell because of or for the reasons above enumerated, then defendants are entitled to recover the reasonable cost of repairing or replacing said wall, as shown by the evidence.<sup>43</sup>

**§ 1303(2). Illinois**

The jury are instructed that, if you find for the plaintiff, the measure of his damage is the difference between the value of the building as constructed and the value of the building as it would have been constructed, if it had been constructed according to the plans and specifications, except in so far as any of the provisions of the plans and specifications may have been waived by the plaintiff herein, if any such waiver has been shown by the evidence.<sup>44</sup>

**§ 1303(3). Texas**

You are instructed that if you believe that the contract sued on has not been complied with by the plaintiff, in substantial accordance with the terms of the same, and that the requirements of the same have not been substantially kept by the plaintiff, then you will consider, under the evidence, what damages, if any, defendant has suffered by reason of the failure of plaintiff to comply with its said contract; and in considering this question you are instructed

<sup>42</sup> Feigelson v. Brown (Civ. App.) 126 S. W. 17.

<sup>43</sup> Pine Bluff Hotel Co. v. Monk & Ritchie, 183 S. W. 761, 122 Ark. 308.

<sup>44</sup> McBride v. Seney, 192 Ill. App. 18.



that, if plaintiff failed to furnish and deliver to defendant the electric light plant in substantial accordance with the terms, requirements, and conditions of its said contract, and to comply with the terms of same, and that this was without any fault on the part of defendant, then the defendant would be entitled to recover as damages from plaintiff the difference, if any, between the value of the electric plant contracted to be completed, if the same had been completed in all respects in substantial compliance with the terms of the same, and the amount of the contract price therefor, as agreed on and fixed by said contract; and if you find that said electric light plant has not been completed in accordance with the contract, and that by reason thereof defendant is entitled to recover damages, then the form of your verdict will be: "We, the jury, find that the plaintiff is not entitled to recover of defendant on the contract, and we find damages for defendant against plaintiff in the sum of \_\_\_\_\_ dollars."<sup>45</sup>

### C. COMPENSATION OF CONTRACTOR

#### § 1304. In general

The court instructs the jury that the plaintiffs in the \_\_\_\_\_ count of the petition are here suing the defendant for an amount, with interest, alleged by plaintiffs to be due them by defendant on account of an alleged balance of \_\_\_\_\_ feet of average overhaul (out of a total claimed average overhaul of \_\_\_\_\_ feet) of \_\_\_\_\_ cubic yards of earth at \_\_\_\_\_ of a cent per cubic yard for each hundred feet of such overhaul, arising out of the grading of defendant's property by plaintiffs; and the court instructs you that if you believe from the evidence that in hauling the earth here in question the plaintiffs did the work under the supervision and subject to the direction and control and to the satisfaction of defendant's engineer in charge and supervision thereof, and that the said engineer knew of the manner in which and the routes along which plaintiffs hauled the excavated earth in question, and made no objection thereto, and that the said engineer assisted plaintiffs in the location of the routes along which said earth was hauled, then plaintiffs were entitled to receive compensation based upon the said manner and routes that said earth was so moved, and you will find in favor of the plaintiffs on said \_\_\_\_\_ count for the amount, if any, remaining due them for the reasonable value of the work

<sup>45</sup> A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co. (Civ. App.) 44 S. W. 929. This instruction was based on the theory of the defendant owner that the plant had

not been completed in accordance with the contract and that there had not been a delivery and acceptance by the defendant.

done as shown by the evidence, and including the said average overhaul in excess of ——— feet, not exceeding however, for the said average overhaul the rate of ——— of a cent per cubic yard of earth hauled for every 100 feet of average haul in excess of ——— feet, together with interest thereon at the rate of ——— per cent. per annum from ———, the date of filing this suit, even though the jury may believe from the evidence that plaintiffs made a settlement of said claim with the defendant, providing the jury further find from the evidence, and under other instructions given you, that said settlement is not binding on plaintiffs.<sup>46</sup>

You are instructed that with reference to the amount of earth hauled under the contracts mentioned in the evidence, there is no dispute between the parties, the amount of same being ——— cubic yards.<sup>47</sup>

**§ 1305. Construction of contract as to compensation**

The court instructs the jury that, by the terms of the written contract sued upon, which are as follows: "If the coal vein should become of a less thickness than four feet, exclusive of slates and coal not usually mined in run of mine coal in adjoining collieries, this will entitle the contractor to the price of \$—— per cubic yard for the entire section of the tunnel instead of the price of \$—— per cubic yard"—the parties had reference to the rectangle, as shown on the blue print, ——— feet high, above subgrade, which may have been fixed at a point not exceeding two feet below the bottom of the ——— coal bed, as opened at each portal; and if the jury believe from the evidence that the said coal vein became of less thickness than four feet in said rectangle, then the plaintiff is entitled to the price of \$—— per cubic yard for the space in which it was less than four feet thick, unless the jury believe that the parties placed a different construction upon said contract, or changed said contract by agreement. And the court further instructs the jury that, though they may believe from the evidence that, when it became apparent that the coal vein disappeared from said rectangle by a dip or deflection in the vein, that the plaintiff assented to a change in the mode of doing the work contemplated, by agreeing to excavate the coal bed in its entire length, to the western portal, before taking down the top of the tunnel, and that, when said agreement was made for the change in the mode of the work, if nothing was said in reference to the price of the work to be done (provided they believe such change in the mode of doing the work did not necessarily contemplate a change in the price

<sup>46</sup> Scott v. Parkview Realty & Improvement Co., 164 S. W. 532, 255 Mo. 76.

<sup>47</sup> Scott v. Parkview Realty & Improvement Co., 164 S. W. 532, 255 Mo. 76.

also), then the terms mentioned in the written contract, as to the price, would prevail, and the plaintiff would be entitled to the price of \$—— per cubic yard for the part of the work in dispute, unless the jury believe from the evidence that the defendant so construed the contract at the time the change in the mode of the work was agreed upon, and while the work was being performed, as to entitle the plaintiff to demand and receive only the sum of \$—— per cubic yard for said work, and that the plaintiff, with full knowledge of the defendant's construction of the said contract, acquiesced in the said construction.<sup>48</sup>

**§ 1306. Agreement that compensation shall be certain percentage of cost of labor and material**

The jury are instructed that, if you find from the evidence that the contract between the plaintiff and the defendant for the completion of the building of the defendant required the procurement by plaintiff of both materials and labor, and that said material and labor were to be furnished at the cost thereof, and that, in addition to said cost of materials and labor, the plaintiff was to be allowed in addition —— per cent. on the amount of said cost to remunerate plaintiff for his services in superintending and managing said work, then and in that event you will be obliged to compute the actual cost of said materials and work, and after the amount is determined you will add thereto —— per cent. on said cost of materials and labor, and, after allowing all credits to which defendant is entitled, render your verdict accordingly. If the amount of estimated cost of materials and labor and the —— per cent. exceeds the payments made by defendant, you will find a verdict for plaintiff for said excess.<sup>49</sup>

The jury are instructed that if, however, you find the payments made by defendant exceed the amount of said costs of material and labor and the —— per cent., then you will find for the defendant the amount so overpaid.<sup>50</sup>

**§ 1307. Agreement that price shall not exceed certain sum**

The jury are instructed that, if you believe from the evidence that there was a contract made between the plaintiff and the defendant for the plumbing and gas-fitting, and in said contract the plaintiff agreed and guaranteed that the cost of the plumbing and gas-fitting of the building should not exceed the sum of \$——, then the plaintiff cannot recover for said work and material more

<sup>48</sup> Norfolk & W. R. Co. v. Mills, 22 S. E. 556, 91 Va. 613.

<sup>49</sup> Maverick v. Maury, 15 S. W. 686, 79 Tex. 435.

<sup>50</sup> Maverick v. Maury, 15 S. W. 686, 79 Tex. 435.

than the \$———. If you believe from the evidence that the steam-heating apparatus was put up by contract, and that the contract price was \$———, the plaintiff cannot recover for that work a sum in excess of the contract price.<sup>51</sup>

**§ 1308. Modification of contract**

The court instructs the jury to disregard all evidence of the construction put upon this contract by —— at the time this contract was entered into, unless the jury believe that the said construction was communicated by said —— to plaintiffs, and was acquiesced in by them, or unless the said plaintiffs put the same construction on said contract at said time; and, though they may believe from the evidence that, immediately prior to and about the time the contract was written and signed by the plaintiffs, the probability was discussed between —— and the plaintiffs as to the "petering out" of the coal vein in the mountain, yet such discussion cannot be considered by the jury as sufficient to change, modify, or add to the provisions and terms of said written contract, but only for the purpose of ascertaining the circumstance, connected with the subject-matter of the contract at the time it was made, and the object and purpose of the parties as avowed at the time they entered into the contract; but the terms of said contract are to be construed as directed by the court in instruction No. ——.<sup>52</sup>

**§ 1309. Waiver of rights of contractor**

The court instructs the jury that, if they believe from the evidence that —— received from the defendant railroad company compensation for the materials moved from the tunnel at the rate of \$——— per cubic yard for that portion in dispute, and that he relied on his ability to adjust the matter satisfactorily with said company, and that, under all the circumstances, he had the right, reasonably, to so rely, from his conversation with —— and other officers of the company, then the acceptance of such payment at \$——— is not to be taken as a waiver of his rights under the contract, or as acquiescing in the construction placed upon the contract by the defendant. The jury must determine from all the facts and circumstances of this case whether the plaintiff has, by his conduct, waived any of his rights under said contract, or has acquiesced in the construction placed on the contract by the defendant.<sup>53</sup>

<sup>51</sup> *Maverick v. Maury*, 15 S. W. 686, 79 Tex. 435.

<sup>52</sup> *Norfolk & W. R. Co. v. Mills*, 22 S. E. 556, 91 Va. 613.

<sup>53</sup> *Norfolk & W. R. Co. v. Mills*, 22 S. E. 556, 91 Va. 613.

The court instructs the jury that, in determining the question whether or not the plaintiff acquiesced in the construction of the contract on the part of the defendant by which the defendant paid, and the plaintiff received, \$—— per cubic yard for the material in the section of the tunnel in dispute, they are to look to all the circumstances of the case, and the plaintiff would not be considered as acquiescing in the defendant's construction of the contract unless he has neglected to assert his own construction thereof to the defendant or its agents for such length of time as to warrant the defendant in fairly believing that he had waived or abandoned his right to demand more than \$—— per cubic yard.<sup>54</sup>

**§ 1310. Recovery for alterations and extras**

See, also, post, §§ 1312, 1318.

**§ 1310(1). Connecticut**

The jury are instructed that, if the plaintiff was ordered by the defendant to do the work, and, judging that extras were included in the defendant's orders, notified the defendant that he should require pay for extras, and the defendant made no reply to the notice, but continued to give orders including extras, the natural consequences of defendant's conduct would be to influence the plaintiff to expend his money on the extra labor, which he might not have done, had the defendant, upon notice, refused to pay for extra labor; and if defendant's conduct, such as has been above supposed, in fact did induce the plaintiff to believe it, and to make expense which he would not otherwise have done, the defendant is chargeable with an intent to induce the plaintiff to do the extra work, and ought to pay for it.<sup>55</sup>

The jury are instructed that, if you find that the defendant had previously ordered part of the work claimed to be extra done, and pending the doing of the work ordered received plaintiff's letter (Exhibit C), and continued, after said notice, to order the rest of the said work done, and that this work was needed by and useful to the defendant, and the plaintiff was, before said notice, expending money in doing this work, and continued, after said notice, so to expend money therein, in the belief that the defendant would pay for extra work, and the defendant was taking and continued to take the benefit of said labor, and has ever since held and enjoyed the benefit, it was the duty of the defendant, on receiving plaintiff's notice (Exhibit C) to inform him whether it would pay him for such labor as he had furnished or should furnish upon the order of their engineer, and which should prove to be extra, or

<sup>54</sup> Norfolk & W. R. Co. v. Mills, 22 S. E. 556, 91 Va. 613.

<sup>55</sup> McCaffrey v. Groton & S. St. Ry. Co., 84 A. 284, 85 Conn. 584.

else, if defendant kept silent, and by its silence led the plaintiff to believe that it would pay for extra work, and so induced the plaintiff to do extra work, it was defendant's duty to pay for such work as should be extra; and the plaintiff had a right to expect that defendant would pay him for such part of the labor furnished by him upon the order of ——— as should prove to be extra, and to recover a reasonable price for the same.<sup>56</sup>

**§ 1310(2). Maryland**

The jury are instructed that, if the alterations were not within the scope of the contract, then the plaintiffs were entitled to recover a fair compensation for the increased cost of construction by reason of the alterations thus made, and in estimating which the jury are to be guided by the prices named in the original contract, so far as they are applicable to the labor and materials furnished on account of such alterations.<sup>57</sup>

The court instructs the jury that, for any alterations or extras sued for and claimed in this case that the jury find from the evidence were made or furnished with the knowledge of the defendant, the estimate or cost for which the defendant knew, the plaintiff is entitled to recover the amount of said cost or estimate; and for any of the alterations or extras made or furnished sued for and claimed in this case that the jury find from the evidence were made or furnished with the knowledge of the defendant, or at the request of his wife, if the jury find she had authority to order the same, that the defendant did not know the estimated cost thereof, the plaintiff is entitled to recover the reasonable value thereof; and for any of the alterations or extras made or furnished sued for and claimed in this case that the jury find from the evidence were done without the knowledge of the defendant, notwithstanding the jury find they were ordered by the architect, the plaintiff is not entitled to recover for. The jury may allow in their discretion interest at ——— per cent. upon any sum they may find to be due for alterations or extras.<sup>58</sup>

**§ 1310(3). Massachusetts**

You are instructed that, in order to entitle the plaintiff to recover for the stone furnished, you must be satisfied that A. had authority from W. to make a change from the agreement as to the stone, and that if A. was acting for both defendants in relation to the building and carrying out the contract, with a general authority from W. to make such changes as he deemed best, and

<sup>56</sup> *McCaffrey v. Groton & S. St. Ry. Co.*, 84 A. 284, 85 Conn. 584.

<sup>57</sup> *Annapolis & B. S. L. R. Co. v. Ross*, 11 A. 820, 68 Md. 310.

<sup>58</sup> *McEvoy v. Willard E. Harn Co.*, 98 A. 522, 129 Md. 93.

he made the change as to the stone, W. would be bound thereby, or if W., having knowledge of A.'s acts, subsequently ratified the same.<sup>59</sup>

§ 1310(4). **Virginia**

The court instructs the jury that if the plaintiff, who, as subcontractor, was making the excavation, in prosecuting the work of excavation, struck rock which required blasting, and thereupon notified the supervising architect that blasting was not contemplated in the contract and would be extra work; and if the architect directed him to proceed with the work, but keep a separate account of the cost of the blasting, and that he would be paid therefor, then, under the contract, this decision of the architect was binding upon his principal, the defendant, and the jury should find for the plaintiff.<sup>60</sup>

§ 1311. **Recovery for expense caused by deviations from specifications**

The court instructs the jury that, if they find for the plaintiffs, there should be no deduction made from the balance, if any, due under the contract price for deviations, if any, from the provisions of the contract, which were made by the plaintiffs in consequence of directions from the defendants or their duly authorized agents.<sup>61</sup>

§ 1312. **Conditions precedent to recovery for extra work**

§ 1312(1). **Indiana**

The jury are instructed that if the jury should find from the evidence that the plaintiff and the defendants made and entered into the contract which is filed with the complaint marked Exhibit C, and you should further find that the provisions of such contract marked Exhibit A, and the specifications marked Exhibit B, were not modified or changed by the school trustees and the said ———, then the court instructs you that, in order for the plaintiff to recover anything for extra work or extra material, he must show by a preponderance of the evidence that a change in writing was ordered and made by the school trustees in the plans and specifications, which required extra work and extra materials; and, if you should find that said school trustees did not order or make in writing any change in such specifications requiring extra work or extra materials, there can be no recovery in this action for any claim for extra work or extra materials, and as to any claim for such extra

<sup>59</sup> *Cunningham v. Washburn*, 119 Mass. 224.

<sup>60</sup> *Rosenburg v. Turner*, 98 S. E. 763, 124 Va. 769.

<sup>61</sup> *Iron Clad Mfg. Co. v. Thomas B. Stanfield & Son*, 76 A. 854, 112 Md. 360.



work and extra materials, except on the score of crooked walls, you should find for the defendants.<sup>62</sup>

**§ 1312(2). Virginia**

The court further instructs the jury that, under the terms of the contract sued on in this case, the line of road or the gradients could be changed in any manner and at any time if the chief engineer of the defendant company should consider such change necessary, and that, in case of any such change, no claim for an increase in prices of excavating or embankment on the part of the plaintiff on that account would be valid, or be required to be considered by the said engineer, unless such claim or claims were made in writing before the work on that part of the section where such alteration was made was commenced. Where this provision in the contract conflicts with the special provisions in relation to building the tunnel, the special provisions must prevail.<sup>63</sup>

**§ 1313. Conditions precedent to action by contractor for reserved percentage**

You are instructed that, if the jury believe that the estimates provided for in the contract were proper and show the correct amounts due the plaintiffs, then, before the plaintiffs could institute suit to recover the reserved percentage, they were bound to tender to the defendant the release stipulated for in the contract; but, if the jury believe that the estimates were not proper, because fraudulent, then the tender of such release was not necessary in order to give the plaintiffs the right to sue.<sup>64</sup>

**§ 1314. Effect of provision making third person arbiter on question of performance**

You are further instructed that the contract sued on provides that the electric light plant in question should be subjected to an examination by, and that the same should be subject to the approval of, the electrician of the ——— Survey and Rating Bureau. If the plaintiff made an effort in good faith to get the electrician of said bureau to examine said plant, then this clause of the contract would be substantially complied with; but if you find, from the evidence, that the plaintiff did not in good faith make an effort to secure said examination of said electric light plant by said electrician aforesaid, and if you find that same was not examined by said electrician of the ——— Survey and Rating Bureau, then you are instructed that this would constitute a complete defense to the

<sup>62</sup> Brown v. Langner, 58 N. E. 743, 25 Ind. App. 538.

<sup>63</sup> Norfolk & W. R. Co. v. Mills, 22 S. E. 556, 91 Va. 613.

<sup>64</sup> Norfolk & W. R. Co. v. Mills, 22 S. E. 556, 91 Va. 613.

action of the plaintiff on the contract; and if you so find you will return a verdict, as against plaintiff, as to any recovery on the contract sued on.<sup>65</sup>

**§ 1315. Estimates of engineer as condition precedent to recovery by contractor**

You are instructed that, if you find from the evidence that the engineer, or his assistant, only made approximate estimates of the work, as stated in the petition, such estimates would not limit the recovery of the plaintiffs to the amount of work so approximately estimated; but if you find the plaintiffs, not being in fault themselves, were prevented from performing the work by the default of the defendant not paying for the work, which was in consequence suspended or abandoned, and that no final or full estimate was made of all the work done, then and in that case the plaintiffs can recover for the whole amount of work done by them, whether estimated or not.<sup>66</sup>

**§ 1316. Deductions for defects**

**§ 1316(1). Arkansas**

You are instructed that, if you find that the contract as signed called for metal cornice, and you so find from the evidence, you will find in favor of defendant for its necessary and reasonable expense in building the new cornice, provided that you find that the cornice was ordered taken out by the architect for not coming up to contract and specifications.<sup>67</sup>

**§ 1316(2). Illinois**

The jury are instructed that, under the written contract in evidence, the defendant was entitled to have erected such a dock as was called for by the terms of the contract, and even though the jury may believe that there has been a substantial performance of the terms of the contract by the plaintiffs, yet, nevertheless, if the jury believe that the terms have not been fully complied with, the jury should allow to the defendant such sum or sums as from the evidence they may believe are reasonable and proper to enable the defendant to complete the dock in the manner stipulated for in the contract.<sup>68</sup>

**§ 1316(3). Maryland**

The court instructs the jury that if the jury find from the evidence that the plaintiff constructed the dwelling of the defendant in substantial accordance with the terms of the contract of ———,

<sup>65</sup> A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co. (Tex. Civ. App.) 44 S. W. 929.

<sup>66</sup> Bean v. Miller, 69 Mo. 384.

<sup>67</sup> Hatfield Special School Dist. v. Knight, 164 S. W. 1137, 112 Ark. 83.

<sup>68</sup> Keeler v. Herr, 41 N. E. 750, 157 Ill. 57.

offered in evidence, and that said dwelling has been occupied and used by defendant since ———, and was reasonably satisfactory and acceptable to the defendant, then the plaintiff is entitled to recover the unpaid balance of the contract price, less such sum as the jury find should be deducted therefrom on account of such defects as may be found by the jury in said dwelling caused by the lack of workmanship on the part of the plaintiff, or by the use of materials other and inferior to those specified in the contract, or by any omissions in work or materials, or by any deviations from the plans and specifications not acquiesced in by the defendant, and shown to have made said building less valuable to the defendant, together with interest at ——— per cent. in the discretion of the jury on such sum as the jury shall thus find to be due.<sup>69</sup>

**§ 1317. Conclusiveness of decision of engineer or architect**

The court further instructs the jury that, under the terms of the contract sued on in this case, the monthly estimates, in order to be valid, must be accompanied by the certificates of the chief engineer of the ——— Railroad Company approving the same, and declaring that the work done and materials furnished as therein stated are according to the contract, and that the charges for the same are according to the contract; and, without such certificate, no payment could be demanded by the plaintiffs, and in all questions connected with such estimates, and the amounts payable thereby and thereunder, the decision of the said engineer is final and conclusive on both parties. And the court further instructs the jury that, if they believe from the evidence that the prices fixed for the excavation mentioned in the plaintiffs' declaration were fixed in the monthly estimates provided for in said contract, and that said estimates were afterwards approved by the said engineer, and his certificates appended thereto, as provided in said contract, then the prices so fixed for all the work included in said estimates must be considered by the jury as the correct prices, unless the jury further believe from the evidence that, in approving said estimates and in making his decision in reference thereto, and in giving the certificate approving the same, the said engineer was guilty of intentional fraud, or of such gross mistake as to necessarily imply bad faith on his part.<sup>70</sup>

You are instructed that, if the jury believe from the evidence that there was no change in the contract sued on, or no construction of it by the parties different from the construction given by the court; and if the jury further believe that the coal bed became of

<sup>69</sup> *McEvoy v. Willard E. Harn Co.*,  
98 A. 522, 129 Md. 93.

<sup>70</sup> *Norfolk & W. R. Co. v. Mills*, 22  
S. E. 556, 91 Va. 613.

less thickness than \_\_\_\_\_ feet, exclusive of the slates and coal not usually mined in run of mine coal in adjoining collieries, in the rectangle \_\_\_\_\_ feet wide and \_\_\_\_\_ feet high, and described in the written contract, for the space of \_\_\_\_\_ lineal feet, which is equal to \_\_\_\_\_ cubic yards; and if the jury further believe that the engineer of the \_\_\_\_\_ Railroad Company in his estimates for said work allowed the said plaintiff \$\_\_\_\_\_ per cubic yard—then these estimates are not in accordance with the terms of the contract sued on, but in making the said estimates the engineer committed a mistake so gross as to amount to a fraud upon the plaintiff, and neither the said monthly or final estimates are binding or conclusive upon the said plaintiff, but he is entitled to \$\_\_\_\_\_ per cubic yard for the aforesaid \_\_\_\_\_ cubic yards, subject to any proper credits.<sup>71</sup>

You are instructed that, if the jury believe from the evidence that there was no change in the contract sued on, and no construction of it by the parties different from that placed upon it by the court; and if the jury further believe that the coal bed became of a less thickness than \_\_\_\_\_ feet exclusive of the slates and coal not usually mined in run of mine coal in adjoining collieries, in the rectangle \_\_\_\_\_ feet wide and \_\_\_\_\_ feet high, described in the written contract, for the space of \_\_\_\_\_ lineal feet, which is equal to \_\_\_\_\_ cubic yards; and if the jury further believe that the engineer of the \_\_\_\_\_ Railroad Company knew the said coal vein became of less thickness than \_\_\_\_\_ feet, as aforesaid, in the rectangle aforesaid, at the time of his making the monthly and final estimates, and the said engineer allowed the said plaintiff \$\_\_\_\_\_ per cubic yard for said material in said estimates, instead of \$\_\_\_\_\_ per cubic yard—then these estimates are not in accordance with the terms of contract sued on, and this conduct on the part of the engineer is a fraud upon the rights of said plaintiff, and neither the said monthly or final estimates are binding and conclusive upon the said plaintiff, but he is entitled to recover \$\_\_\_\_\_ per cubic yard for the aforesaid \_\_\_\_\_ cubic yards, subject to any proper credits.<sup>72</sup>

#### § 1318. Same—Right of recovery for work as extra work

The court instructs the jury that if the architect informed the plaintiff that the blasting was covered by the contract and was not extra work, but directed him to proceed with the work, keeping a separate account of the cost of the blasting, and he would take the matter up with the defendant, and he did take it up with the defendant

<sup>71</sup> Norfolk & W. R. Co. v. Mills, 22 S. E. 556, 91 Va. 613.

<sup>72</sup> Norfolk & W. R. Co. v. Mills, 22 S. E. 556, 91 Va. 613.

and the defendant refused to pay for the same as extra work, then the plaintiff is not entitled to recover.<sup>73</sup>

**§ 1319. Same—Forfeiture for delays caused by architect**

You are instructed that, under the law and evidence in this case, it was the duty of the architect, A., to supervise the work done by plaintiff, and to see that same was done in accordance with the contract, plans, and specifications, and the said A. by the terms of the agreement between plaintiff and defendant, had the exclusive right to pass upon said work, and the plaintiff (in the absence of fraud on the architect's part) cannot defeat the payment of the forfeit of \$—— per day for delays, if any, which were caused by said architect in supervising said work.<sup>74</sup>

**§ 1320. Burden of proof**

You are instructed that the burden of proof is on the plaintiff to show that the specifications were changed, after the execution of the contract, so as to eliminate the wooden cornice, and, unless he has done this by a preponderance of the evidence, you will find for the defendant on that issue.<sup>75</sup>

**D. LIABILITY ON BOND OF CONTRACTOR**

**§ 1321. In general**

The court instructs the jury that, if they shall find from the evidence that L. entered upon the performance of his contract of ——, with the plaintiff, read in evidence, on or about the —— day of ——, and after working thereon until ——, then voluntarily quit and abandoned the same, without default on the part of the plaintiff, leaving a large part of his work undone and unfinished, and that upon his said voluntary abandonment of his said work the plaintiff notified the defendant thereof in writing, and that said notice was duly received by the defendant; and if the jury shall further find that upon the receipt of said notice the defendant, in the exercise of the right reserved by it in the bond sued on, assumed the said contract and employed —— to complete the said contract of said L. for it in his place and stead; and if the jury shall further find that the work undertaken to be done by said L. under said contract was not done by him whilst he was engaged thereon, or by said —— acting on behalf of the defendant, in the mode, within the time, and with the materials and workmanship, prescribed in said contract of ——, but that, on the contrary, bad

<sup>73</sup> Rosenberg v. Turner, 98 S. E. 763, 124 Va. 769.

<sup>74</sup> Boston Store v. Schleuter, 114 S. W. 242, 88 Ark. 213.

<sup>75</sup> Hatfield Special School Dist. v. Knight, 164 S. W. 1137, 112 Ark. 83.

materials were used or bad workmanship put on the first and second floors of the building in question, or upon the back stairway, or into the roof of said building; and if the jury shall further find that, in consequence of the use of said bad materials or bad workmanship on the first and second floors of said building, three of the reinforced concrete beams under the first floor, and eight of the reinforced concrete beams under the second floor of said building, cracked and sheared in ———, and that for the purpose of strengthening said cracked and sheared beams the plaintiff was put to expense, or that in consequence of said bad materials or bad workmanship on the back stairway the plaintiff was put to expense in the strengthening and repairing thereof, or that in consequence of said bad materials or bad workmanship used in the roof the same collapsed on ———, and the plaintiff was put to expense in temporarily covering or protecting said collapsed roof, and in replacing and permanently restoring the same, and in rebuilding the parapet wall thereof, and was also delayed in obtaining full possession of his said building—then the plaintiff is entitled to recover upon the bond sued on such sum as the jury shall find from the evidence to be reasonably necessary to be expended by him in strengthening said first and second floors, and in repairing and strengthening said back stairway, and in temporarily covering and protecting said collapsed roof, and in replacing and permanently restoring the roof on said building, and rebuilding the parapet wall thereof, so as to make said first and second floors, said back stairway, and said roof as strong and serviceable as they would have been if the good material or good workmanship, or both good materials and good workmanship, prescribed by said contract of ———, had been used in and about the construction of said reinforced concrete work. The court further instructs the jury that the plaintiff is also entitled to recover such sum as the jury shall find from the evidence to be reasonably necessary to be expended to make the first and second floors as completely fireproof as they would have been if the three beams under the first floor and the eight beams under the second floor had been properly constructed with good materials and workmanship.<sup>76</sup>

§ 1322. Extent of obligations of contractor—"More or less"

The court instructs the jury that in this case it appears from the evidence that defendant contracted to construct for the plaintiff school district a tunnel approximately ——— feet in length, more or less. It further appears that this tunnel when fully completed was somewhat longer than ——— feet, the evidence on the part

<sup>76</sup> United Surety Co. v. Summers, 72 A. 775, 110 Md. 95.



of the plaintiff showing it to be ——— feet long, and the evidence on the part of defendants showing it to be ——— feet in length. In this connection I charge you that it was the distinct understanding of the parties, by the use of the words “more or less” in the contract, that the agreement in regard to the length of the tunnel in question should not fix the precise number of feet the tunnel should be constructed, and that the intent was that some deviation from a length of ——— feet should be allowed. The actual length of this tunnel, according to the evidence of either plaintiff or that of the defendants, is well within the limits to which such deviation might properly extend.<sup>77</sup>

I charge you that under the terms of that contract the defendant was obliged to build a tunnel through the hill north of ——— feet by ——— feet in size, for the distance of ——— feet, more or less, and that the words “more or less,” as used in this contract, mean the number of linear feet of tunnel that the plaintiff might require for its necessities as an outlet for its sewer system, and that the difference between ——— feet and ——— feet, the distance that the tunnel actually was constructed, was a reasonable distance for the plaintiff to extend its work over ——— feet, and that the extension of the tunnel that distance by the plaintiff was not sufficient to constitute a breach of the contract on the part of the plaintiff, and that such extension alone on the part of the plaintiff would furnish no excuse or justification for the defendant quitting his work or abandoning his contract.<sup>78</sup>

**§ 1323. Effect of changes in principal contract**

I charge you that any change in the contract of plaintiff school district with defendant for the building of the tunnel, made after the execution thereof and by mutual consent, and any such change in the plans, specifications, terms, or conditions for performing any work under such contract, which did not increase the amount to be paid said defendant more than ——— per cent. of the penalty of the bond furnished, would not vitiate said contract or release the surety upon said bond.<sup>79</sup>

I charge you that, if you find the course of such tunnel was changed, after the execution of the contract and bond in evidence in this case, with the consent of the defendant, and such change did not increase the amount to be paid defendant more than ——— per cent. of the amount of the penalty of the bond given, then both

<sup>77</sup> Township School Dist. of Wakefield Tp. v. MacRae, 165 N. W. 618, 198 Mich. 693.

<sup>78</sup> Township School Dist. of Wake-

field Tp. v. MacRae, 165 N. W. 618, 198 Mich. 693.

<sup>79</sup> Township School Dist. of Wakefield Tp. v. MacRae, 165 N. W. 618, 198 Mich. 693.



the defendants are liable to the plaintiff for all damages arising from the failure of defendant to complete his said contract.<sup>80</sup>

**§ 1324. Recovery by contractor on subcontractor's bond**

The court instructs the jury that if they believe from the evidence that the plaintiff is a corporation, and that the plaintiff and the defendant the ——— Company entered in to the contract, dated the ——— day of ———, offered in evidence, relating to concrete work at the ——— Building, and that said company commenced the said work comprehended under said contract, and continued to prosecute the same until the ——— day of ———, and that on said date the said defendant the ——— Company abandoned said work without first completing the same, and shall further find that the plaintiff took charge of the said unfinished work and completed the same, and if they shall further find that the plaintiff had up to the time of said abandonment of the work fully performed its part of said contract, and if they shall further find that said ——— Company and the defendant the ——— Indemnity Company executed and delivered to the plaintiff the bond sued on in this case and offered in evidence, then, unless the jury further find that the defendant the ——— Indemnity Company has shown by a preponderance of the evidence in this case that the bond sued on was obtained from it by the fraud or misrepresentations of the plaintiff, the verdict of the jury upon the whole case must be for the plaintiff.<sup>81</sup>

<sup>80</sup> Township School Dist. of Wakefield Tp. v. MacRae, 165 N. W. 618, 198 Mich. 693.

<sup>81</sup> Aetna Indemnity Co. of Hartford Conn., v. George A. Fuller Co., 73 A. 738, 111 Md. 321.

## CHAPTER LXXXI

## BUILDING AND LOAN ASSOCIATIONS

§ 1325. Authority of agent to bind association.

1326. Action to recover upon stock as fully matured.

1327. Waiver by stockholder of rights arising out of contract as to stock.

§ 1325. Authority of agent to bind association

The jury are instructed that if you believe from the evidence that R. had no authority to make a loan of money, and further believe from the evidence that the plaintiff had no notice of any statements or promises by R. to the defendants, if he made any, that he was lending them money under the guise of a building contract, then you will find for the plaintiff.<sup>1</sup>

§ 1326. Action to recover upon stock as fully matured

The jury are instructed that if the plaintiff has established his contract, and it does not appear to be an unreasonable or immoral contract, in which case the court would not allow him to set it up, he is entitled to recover on it, unless the defendant has shown something that would defeat it; and it only remains for you to determine whether or not he has established his contract. He is bound to prove it by the preponderance of the evidence, and, if he has so established it, then it remains for you to determine what your verdict will be in his favor, unless the defendant may have shown some matter which goes to defeat his right. The plaintiff is suing on a specific, definite claim, which must be the amount which he claims, or nothing at all. He claims that his stock is paid-up stock; that he is not suing to recover from the defendant an amount due on stock which was not paid up. This is not his contention. But he claims that his stock was fully matured, or paid up, and that he is entitled, on the terms of the contract, to have the full amount due on his contract, less, of course, the offset of the loan which you have heard mentioned. Now, if he was suing the defendant for the withdrawal value of the shares of stock which had not been already paid up, the defendant would probably not come and offer to allow him to have judgment for whatever you might conclude was due on that unmatured stock, but would take the position, as it would have the right to do, that he could not recover until he had fully complied with the terms of the contract. But he is suing on what he claims to be fully paid up or matured stock, and therefore if he establishes that contention he is entitled to recover the full amount of his paid-up stock. So your verdict must be in favor of

<sup>1</sup> Texas Bullding & Loan Ass'n v. Norwood (Tex. Civ. App.) 46 S. W. 404.

the plaintiff for the full amount he claims, or else in favor of the defendant. There is no ground for you to give a compromise verdict, to give him a few hundred, or a greater number of, dollars, but you must either give the plaintiff the full amount he claims, or give a verdict in favor of the defendant. So gentlemen, if you conclude the plaintiff is entitled to recover, your verdict will be in favor of the plaintiff in the sum of \$——, together with interest at —— per cent. from ——. That is what he claims. If you conclude that he is not entitled to recover that amount, then your verdict will be in favor of the defendant.<sup>2</sup>

**§ 1327. Waiver by stockholder of rights arising out of contract as to stock**

The jury are instructed that the remaining defense which the defendant set up is that the plaintiff, although it admits that the plaintiff entered into the original contract with the defendant, waived the provisions of that contract—cast them aside—when he entered into a subsequent contract by which he made a loan with the association. So that, by the defendant's contention, if you should conclude that the plaintiff did have a definite contract with the defendant, by which, after the plaintiff had made —— payments, he would be entitled to receive \$——, still if you should also conclude that he entered into the loan contract, the contention of the defendant is that by entering into the loan contract he waived his rights under the original contract, and became bound by whatever changes had been made in the by-laws of the association subsequent to the making of the original contract, and up to the time of the making of this loan contract. A person may waive a right which he has—especially a right arising out of contract. A man may have any one of you under contract to do some particular thing—to build a bridge or a house by a certain day. He may have you bound by a penalty to do the thing by a particular day. Yet he may although you fail to do the thing, waive his rights under the contract, and make some other contract with you. And so, in this case, the plaintiff, even though he had the defendant bound by this original contract which he alleges, had the power and right, if he chose, to waive the benefits accruing to him or the rights growing in his favor out of the original contract, and so release the defendant from the performance of it. Now, where a defendant comes into court relying on such a defense as that, it is bound to establish the facts necessary to show the truth of the defense; and it is bound to prove by the preponderance of the evidence that the plaintiff did cast aside

<sup>2</sup> *Williamson v. Eastern Building & Loan Ass'n of Syracuse, N. Y.*, 38 S. E. 616, 62 S. C. 390.

his rights and benefits which had accrued to him already under the contract, or, in other words, waive them, and thereby release the defendant from its performance. Now, in this case, if the defendant has offered evidence, satisfactory to your mind, of a waiver, has shown that the plaintiff did waive his original contract, it constitutes a good defense to the plaintiff's recovery in this case. But it is incumbent on the defendant to show that. The plaintiff is not bound to show anything with reference to that matter, unless in reply to anything which the defendant may show as going to establish the waiver. I charge you that, where a man has a valid claim against another, he may afterwards pledge that claim to the other party in any transaction, any subsequent transaction, and yet by that act of pledging not waive any right which he may have had under the original transaction. The mere act of pledging the shares of stock does not amount to a waiver of any right which the plaintiff had under the original contract.<sup>8</sup>

<sup>8</sup> *Williamson v. Eastern Building & Loan Ass'n of Syracuse, N. Y.*, 38 S. E. 616, 62 S. C. 390.

## CHAPTER LXXXII

## BURGLARY

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**A. ELEMENTS OF OFFENSE**

- § 1328. In general

- § 1328(1). Missouri

The jury are instructed that there can be no conviction in this case unless they believe from the evidence and beyond a reasonable doubt that the defendant actually entered, by forcibly unfastening a latch or other secure fastening, a building which was just before such entering by the defendant so securely fastened as to all of its openings that no one could enter said building without using some

force. And that there was within said building at the time of such entering goods, wares, and merchandise, or other valuable things, and that the defendant forcibly entered said building for purpose and with intent of stealing the same or some part thereof and for no other purpose.<sup>1</sup>

The court instructs the jury that the defendant is not charged with receiving or having possession of stolen property, knowing that it was stolen, but the charge for which he is placed upon trial at this time is burglary and larceny; and the court instructs the jury that, if you believe and find from the evidence that the defendant was guilty of having received the property mentioned in the information after the same was stolen, then you will acquit the defendant of the charge of burglary and larceny, for which he is now on trial.<sup>2</sup>

The jury are instructed that, if they believe from the evidence, beyond a reasonable doubt, that the defendants, ——— and ———, did, on or about the ——— day of ———, or at any time within ——— years next before the ——— day of ———, at the county of ——— and state of ———, feloniously and burglariously break and enter the warehouse of ———, in which at the time were stored flour and other goods, wares, and merchandise, with the intent then and there to feloniously take, steal, and carry away any of the goods, wares, or merchandise therein situated, with the intent to deprive the owner permanently thereof and to convert the same to their own use, then in that case you will find the defendants guilty of burglary, and assess their punishment at imprisonment in the penitentiary for not less than ——— years.<sup>3</sup>

The court instructs the jury that if you believe and find from the evidence, beyond a reasonable doubt, that the defendants, at the county of ——— and state of ———, at any time within ——— years before the finding of this indictment, which was on ———, did forcibly break the outer door of the dwelling house of ———, and enter said building, and at the time of such breaking and entering there was a human being in said building, and that the defendants did break and enter said building with the intent to rob the said ——— of any money or property that might be in said building, they will find the defendants guilty as charged in the indictment, and assess their punishment at imprisonment in the penitentiary for a term of not less than ——— years.<sup>4</sup>

<sup>1</sup> State v. McGuire, 91 S. W. 939, 193 Mo. 215.

<sup>2</sup> State v. Speritus, 90 S. W. 459, 191 Mo. 24.

<sup>3</sup> State v. Peebles, 77 S. W. 518, 178 Mo. 475.

<sup>4</sup> State v. Hale, 56 S. W. 881, 156 Mo. 102.



§ 1328(2). **Nebraska**

The court instructs the jury that the allegation of time in the information filed in this case is only material for the purpose of fixing the commission of the crime within the statute of limitations, which, in the state of ———, is ——— years for the crime of burglary. And if you find from the evidence, beyond a reasonable doubt, that the defendant forcibly, feloniously, and burglariously did, on or about the ——— day of ———, in the night season, at the place charged in the information, break and enter the barn of ———, by opening a closed door, as explained in these instructions, and after so entering said barn of said ——— did feloniously take therefrom any property of any value belonging to said ———, then your verdict should be guilty as charged in the information.<sup>5</sup>

§ 1328(3). **Texas**

You are instructed that, if you believe from the evidence beyond a reasonable doubt that the defendants did, in ———, on or about the ——— day of ———, by force or breaking at night, or by breaking in daytime, enter a house occupied by ———, with the intent fraudulently to take corporeal personal property situated in said house and belonging to said ———, from his (———'s) possession, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of themselves, the defendants, and that defendants, at the time of the commission of such act, had discretion sufficient to understand the nature and illegality of such act, then you will find the defendants guilty as charged in the indictment. Otherwise, if you do not find each and all said facts to be so established, you will acquit the defendants.<sup>6</sup>

You are instructed that the indictment in this case, having charged that the burglarious entry was made by force in the daytime, with intent to commit the crime of theft, before you would be warranted in finding the defendant guilty, you must be satisfied from the evidence, beyond a reasonable doubt, that the entry was so made in the daytime by force directly applied to the house, and with the intent to commit the specified crime of theft. Now, bearing in mind the foregoing definition of daytime, breaking, entry, and theft, if you believe from the evidence, beyond a reasonable doubt, that the defendant, about the time alleged in the indictment, in the county of ———, and state of ———, by force, in the daytime, by breaking, entered the house of ———, as charged

<sup>5</sup> *Ferguson v. State*, 72 N. W. 590, 52 Neb. 432, 66 Am. St. Rep. 512. The objection to this instruction was as to the statement as to time.

<sup>6</sup> *Ragsdale v. State*, 134 S. W. 234, 61 Tex. Cr. R. 145. It is not necessary to define theft in a separate paragraph.

in the indictment, with the intent to commit theft, you will find him guilty of burglary, etc.<sup>7</sup>

#### § 1329. Necessity of a breaking

Constructive breaking, see post, § 1330(4).

Entry without breaking and then breaking out, see post, § 1330(3).

You are instructed that, if the door was open when defendant entered the house, he would not be guilty, and in that event you will acquit him.<sup>8</sup>

You are instructed that, even if from the testimony you should find that defendant took the property as charged in the indictment, and you further find that said property was taken without and against the consent of ———, yet if you find and believe from the testimony that the door of the granary was open, and defendant made the entry through the open door, or if you have a reasonable doubt as to whether the door was open and the entry thus made, then, in any event, you should acquit defendant.<sup>9</sup>

#### § 1330. Sufficiency of breaking

See, also, post, § 1333(2).

##### § 1330(1). Kentucky

You are instructed that, to constitute a breaking, it was not necessary that there should have been an absolute entrance by the whole body; that breaking of an outside shutter and a pane of glass, and the introduction of an arm into the house, is a breaking within the meaning of the instructions.<sup>10</sup>

##### § 1330(2). Michigan

The jury are instructed that, if you believe from the evidence that the defendant entered the building in question through the window, then, in order to convict, you must be satisfied beyond a reasonable doubt that the window was shut into the frame, so as to require some force to open it, and that the defendants shoved it open, and that if the window was open or swinging the breaking is not proved.<sup>11</sup>

##### § 1330(3). Missouri

The jury are instructed that if they believe from the evidence that the warehouse of H. was a room of the same building in which the warehouse of R. was situate, and that said rooms were separated by a board partition, and that said partition did not extend the entire length of the building, nor up to the ceiling, and if you further believe that the outer doors of said building were closed

<sup>7</sup> Peryda v. State (Cr. App.) 35 S. W. 981.

<sup>8</sup> Fields v. State (Tex. Cr. App.) 74 S. W. 309.

<sup>9</sup> Duke v. State, 57 S. W. 652, 42 Tex. Cr. R. 3.

<sup>10</sup> Kelley v. Commonwealth, 54 S. W. 949.

<sup>11</sup> Dennis v. People, 27 Mich. 151.

and locked, and if you further believe that the defendants entered said building by means of opening either outside door of said building, with the intent to take, steal, and carry away any of the goods, wares, and merchandise in said building stored, such entrance would constitute burglary, whether it was directly in or to that part occupied by H., or whether the entrance was first made through the part occupied by R.<sup>12</sup>

The jury are further instructed that where the doors of a building are closed, and are opened by means of unlocking the same, or if said doors are closed, and the party removes a fastening—whatever it may be—and opens the door, such entrance will constitute a breaking, however small the force applied thereto.<sup>13</sup>

The jury are instructed that, if you find from the evidence that the door mentioned in the evidence was closed and fastened with a chain hooked over a nail, and that defendant opened it, this is a sufficient breaking to constitute burglary within the meaning of this indictment, provided such breaking is done with the intent to steal and carry away property, and is followed by an entering of the building to which such door belonged.<sup>14</sup>

The jury are instructed that, if the jury believe from the evidence that the defendant, on or about ———, at the county of ———, and state of ———, entered the dwelling house of one ———, in which there were at the time human beings, with the intent to commit a larceny by stealing and carrying away the property of the said ———, then and there being in said house by going through a window in said house, and after being in said house with intent aforesaid, did break and get out of said house by then and there breaking and opening an outer door of said dwelling house, they will find the defendant guilty of burglary in the second degree, and assess his punishment at imprisonment in the penitentiary for a period of not less than ——— years.<sup>15</sup>

**§ 1330(4). Oregon**

You are instructed that, to constitute a breaking, within the meaning of the law, it is not necessary that the structure of the dwelling house should be demolished in any degree. Any unlawful entry into a dwelling house, where there is a human being at the time, with intent to commit a crime therein, would constitute a breaking, within the meaning of the statute, although the defendant may have gone in at an open door.<sup>16</sup>

<sup>12</sup> State v. Peebles, 77 S. W. 518, 178 Mo. 475.

<sup>13</sup> State v. Peebles, 77 S. W. 518, 178 Mo. 475.

<sup>14</sup> State v. Hecox, 83 Mo. 531.

<sup>15</sup> State v. Tutt, 63 Mo. 595.

<sup>16</sup> State v. Huntley, 35 P. 1065, 25 Or. 349.

**§ 1331. Same—Breaking and entering railroad car**

You are instructed that, in order to convict the defendants, or any of them, the state must have proved beyond a reasonable doubt that the car was broken and entered and in this county. But we say to you that a breaking does not necessarily mean the breaking of a lock or any other fastening. If the car was unlocked or unfastened, and was pushed or pulled open by the defendants, or any of them, that would constitute a breaking within the meaning of the law. If, however, the car door was already open, and the entry was made without interfering with or moving the door at all, that would not be a breaking within the meaning and contemplation of law.<sup>17</sup>

**§ 1332. Consent of owner or occupant to entry.**

**§ 1332(1). Mississippi**

The court instructs the jury, for the state, that if they believe from the evidence in this case beyond every reasonable doubt that the defendants, either alone or in conjunction with C., broke and entered ———'s store, and that such breaking and entering was without the consent of ———, and the defendants, upon the turning on of the light, were in the act of willfully taking, stealing, and carrying away the goods mentioned in the testimony, they are guilty as charged, regardless of who actually broke open the store, and regardless of the fact that ——— had agreed to pay C. for assisting in the detection and apprehension of the defendants.<sup>18</sup>

**§ 1332(2). North Dakota**

The jury are instructed that, if the building in question was burglarized by the procurement and consent of the owner, you will find the defendant not guilty.<sup>19</sup>

The jury are instructed that mere knowledge by the owner of a building that it is being burglarized without taking steps to prevent the burglary would not be a consent to the commission of the offense.<sup>20</sup>

**§ 1332(3). Texas**

The jury are instructed that, if the defendant was admitted to the house by the watchman or any other person in authority, and he, by reason of the permission and consent of the watchman entered said house, he would not be guilty as charged; and if you

<sup>17</sup> State v. Davenport (Del.) 77 A. 987, 2 Boyce, 12.

<sup>18</sup> Dees v. State, 42 So. 605, 89 Miss. 754.

<sup>19</sup> State v. Currie, 102 N. W. 875,

13 N. D. 655, 69 L. R. A. 405, 112 Am. St. Rep. 687.

<sup>20</sup> State v. Currie, 102 N. W. 875, 13 N. D. 655, 69 L. R. A. 405, 112 Am. St. Rep. 687.

so find, or if you have a reasonable doubt thereof, you should find the defendant not guilty.<sup>21</sup>

You are instructed that, even though you may find and believe from the testimony that defendant broke and entered the house of ———, as charged in the indictment, and he took therefrom the property as described in the indictment, yet, if you should further find and believe that ——— consented and agreed to the taking of said property, you should acquit defendant.<sup>22</sup>

§ 1332(4). Washington

You are instructed that, if one having the right to do so goes into a building, that would not be breaking and entering, no matter what his object was in going into the building. One's right to enter a building may be general or limited. If general, then, he may go into the building at any time or for any purpose and the entry would not be wrongful; but if the right is limited, then an entry would be wrongful unless made for a purpose for which he had been given the right. It will be your duty to determine from the evidence in this case whether the right which the defendant had in going into the building was general or limited. If you find that the defendant's right to enter was general, that is, not restricted to purposes of his employment, then he could not be found guilty of burglary, no matter what his object may have been in going into the building. In order to prove the defendant guilty as charged in the information, it will be necessary for the state to show that the entry was wrongful by the evidence, and beyond a reasonable doubt, and to show that it was wrongful the state must show that the defendant's right to enter the building was not a general and unrestricted right, but one that was limited; and they must further show that the defendant entered the store on ———, for some purpose other than that for which he had a right to enter.<sup>23</sup>

§ 1333. Sufficiency of entry

§ 1333(1). Oregon

You are instructed that, if you find from the evidence beyond a reasonable doubt that the defendant entered the dwelling house named in the indictment in the nighttime, and against the will of those in charge thereof, with intent to commit the crime of adultery, named in the indictment, then the entry was unlawful, and the defendant should be convicted, however the entry may have been made.<sup>24</sup>

<sup>21</sup> Shelton v. State (Cr. App.) 108 S. W. 679, 52 Tex. Cr. R. 611.

<sup>22</sup> Duke v. State, 57 S. W. 652, 42 Tex. Cr. R. 3.

<sup>23</sup> State v. Corcoran, 143 P. 453, 82

Wash. 44, L. R. A. 1915D, 1015, Ann. Cas. 1916E, 531.

<sup>24</sup> State v. Huntley, 35 P. 1065, 25 Or. 349.

**§ 1333(2). Texas**

You are instructed that an entry, in burglary, may be constituted by the introduction of any instrument into the house for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced. It is not necessary that there should be any actual breaking when the entry is made in the nighttime; but there must be some degree of force. However, slight force is sufficient. The entry by a chimney, or climbing through a window, or the entry at any unusual place, would constitute force.<sup>25</sup>

**§ 1334. Time of breaking and entering**

**§ 1334(1). California**

You are instructed that, if you are satisfied from the evidence herein beyond a reasonable doubt that the defendant committed the crime charged in the information herein, in the manner and form therein charged, and that he entered the said house and building with the felonious intent as charged, in the nighttime, during the period between sunset and sunrise, then your verdict should be burglary of the first degree.<sup>26</sup>

You are instructed that, if the defendant entered the building in question in the nighttime—that is, between sunset of one day and sunrise of another day—with the intent to commit larceny, the jury will find him guilty of burglary in the first degree.<sup>27</sup>

**§ 1334(2). Texas**

You are instructed that the offense of burglary in the nighttime is constituted by entering a house by force in the nighttime for the purpose of committing the crime of theft.<sup>28</sup>

You are instructed that nighttime includes all of the twenty-four hours from thirty minutes after sunset until thirty minutes before sunrise.<sup>29</sup>

**§ 1335. Character of premises—What is house**

You are instructed that if a room has a door at each end of it by which it may be entered, but there is an obstruction across the room such as hay or other substance of such height and reaching so near the roof as to make it necessary to climb or crawl over it in order to pass from one of the rooms to the other, then each end of such rooms is in law a separate “house” within the meaning of the

<sup>25</sup> Hays v. State, 100 S. W. 926, 51 Tex. Cr. R. 111.

<sup>26</sup> People v. Higgins, 98 P. 683, 9 Cal. App., 267. It was objected to this instruction that whether the entry was effected in the daytime or the nighttime was determined by the

<sup>27</sup> People v. Perry, 78 P. 284, 144 Cal. 748.

<sup>28</sup> Phillips v. State (Cr. App.) 45 S. W. 709.

<sup>29</sup> Jackson v. State (Cr. App.) 38 S. W. 990.

law, and the entry into such room by breaking or prying open the door which gave immediate entrance thereto would, without the consent of the person having the occupancy of same, and with intent to commit theft of property therein, be burglary.<sup>30</sup>

**§ 1336. Same—What constitutes room**

You are instructed that to constitute a room the partition between it and the rest of the house need not extend to the ceiling or roof of the house, but that a partition eight or nine feet high from the floor would be a sufficient partition.<sup>31</sup>

**§ 1337. Breaking and entering chicken house**

**§ 1337(1). Kansas**

You are instructed that, if you believe from the evidence in this case that the building described in the information was an inclosed building, about twenty feet long and about eight feet wide, with a partition therein, and that the building was constructed with doors to be used in entering the building, and was built and used by the complaining witness as a building within which to keep his chickens, and that at the time of the breaking and entering, if you find there was such breaking and entering, such chicken house contained the chickens of the complaining witness, then I instruct you that would constitute a building as contemplated by our statute.<sup>32</sup>

**§ 1337(2). Missouri**

The court instructs the jury that, if the jury believe from the evidence in the cause and beyond a reasonable doubt that the defendant, on or about the ——— day of ———, at the county of ——— and state of ———, broke into and entered in the nighttime the chicken house of one ———, by forcibly unfastening the latch of the outer door of said chicken house building and forcibly pushing said door open, and that there were at said time in said chicken house building goods, wares, and merchandise, and other valuable things to wit, chickens and turkeys, kept and deposited, and further believe from the evidence and beyond a reasonable doubt that the defendant did so break into and enter said chicken house building with the intent of stealing, taking, and carrying away, converting to his own use, and of depriving the owner permanently of his property, and against the owner's consent, and without any honest claim of right thereto, any of the chickens and turkeys then in said chicken house and belonging to said ———, then the jury will find the defendant guilty of burglary in the second degree, and will assess his punish-

<sup>30</sup> Kinney v. State, 148 S. W. 783, 67 Tex. Cr. R. 175.

<sup>31</sup> People v. Young, 3 P. 813, 65 Cal. 225.

<sup>32</sup> State v. Poole, 70 P. 637, 65 Kan. 713.



ment at imprisonment in the penitentiary for a term of years not less than ——— years.<sup>33</sup>

**§ 1338. Necessity that railroad car should contain valuable goods and chattels**

You are instructed that the state must prove that there were goods and chattels within the car at the time of the alleged breaking and entering that were the subject of larceny. Generally speaking, any goods and chattels—that is, personal property—is the subject of larceny.<sup>34</sup>

We also charge you that it was incumbent upon the state, in order to sustain this indictment, based upon the statute we have mentioned, to prove that the goods and chattels were of some value.<sup>35</sup>

**§ 1339. Felonious intent**

**§ 1339(1) Missouri**

The court instructs the jury that the word “feloniously,” as used in these instructions means wickedly and against the admonitions of the law; that is, unlawfully.<sup>36</sup>

**§ 1339(2). Texas**

You are instructed that, if you believe from the evidence that the defendant entered said house with the intention of getting a drink of water, or if you believe from the evidence that the doors to said house were open when he entered said house, if he did enter the same, or if you believe from the evidence that at the time the defendant entered said house, if he did enter it, he did not have the specified intent to commit the crime of theft, or if you have a reasonable doubt thereof, then you will acquit the defendant and return a verdict of not guilty.<sup>37</sup>

You are instructed that, before you would be warranted in convicting defendant for burglary, you must believe beyond a reasonable doubt that he broke and entered the house of ——— with the specific intent at the time to commit either the crime of theft or arson. If he broke and entered such house with any other intent or purpose, he would not be guilty of burglary, and in this connection you are instructed that if you should find beyond a reasonable doubt that if defendant broke and entered said house, but if you further believe such breaking and entry, if any, was for the purpose of injuring, disarranging, or destroying property therein,

<sup>33</sup> State v. McGuire, 91 S. W. 939, 193 Mo. 215.

<sup>34</sup> State v. Davenport (Del.) 77 A. 967, 2 Boyce, 12.

<sup>35</sup> State v. Davenport (Del.) 77 A. 967, 2 Boyce, 12.

<sup>36</sup> State v. Peebles, 77 S. W. 518, 178 Mo. 475.

<sup>37</sup> Overstreet v. State, 150 S. W. 899, 68 Tex. Cr. R. 238.

or mingling oil in the carbonator, or for any other purpose than theft or arson, then you will find defendant not guilty.<sup>38</sup>

You are instructed that, if defendant picked up the property described and testified to, and did not enter the house, whether opened or closed, for the purpose of theft, but to return the property to the house, he would not be guilty of burglary, etc.<sup>39</sup>

**§ 1340. Same—Prosecution for breaking and entering railroad car**

**§ 1340(1). Delaware**

You are instructed that the state must have further shown that at the time of the alleged breaking and entering it was the intent of the defendants to steal the goods and chattels in the car, or some part of them. The intent is a material element of the charge contained in the indictment, and must be proved just as another material part of the charge.<sup>40</sup>

**§ 1340(2). Illinois**

The jury are instructed that, even if the jury should believe, from the evidence, beyond a reasonable doubt, that the defendants feloniously took and carried away the property described in the indictment, and that such property was the property of the ——— Railroad Company, such facts alone could not authorize a conviction under the first count of the indictment. In order to constitute the offense of burglary, as defined in that count, there must be the willful, malicious, and forcible breaking and entering of the car with intent to steal, as defined in the instructions on the part of the people.<sup>41</sup>

**§ 1340(3). North Dakota**

I charge you, gentlemen of the jury, that, in order to obtain at your hands a verdict of guilty, the state must establish by competent evidence to your satisfaction beyond a reasonable doubt every essential element of the crime of burglary. One of the essential elements of the crime of burglary, as charged in this indictment, is that, after breaking by force the car described in the indictment, under circumstances such as would constitute a burglarious breaking under the instructions already given you, the defendant entered into such car with intent to steal the coal therein contained. This intent to steal thus required to be established by the state to your satisfaction beyond a reasonable doubt on the part of the defendant at the time of breaking and entering the car must have been the intent on the part of the defendant to take, steal, and carry away the

<sup>38</sup> Vickery v. State, 137 S. W. 687, 62 Tex. Cr. R. 311, Ann. Cas. 1913C, 514.

<sup>39</sup> Fields v. State (Cr. App.) 74 S. W. 309.

<sup>40</sup> State v. Davenport, 77 A. 967, 2 Boyce, 12.

<sup>41</sup> Lyons v. People, 68 Ill. 271.

coal in said car contained, without the consent of the owner, and with the intent to deprive him thereof; such taking, stealing, and carrying away to be accomplished by fraud and stealth. If, therefore, the defendant's intent at the time of entering said car, or at the time of forcibly breaking the same, if you find he did so forcibly break the car under the instructions already given you, was not to steal the coal therein contained, but that such entry was made under the belief that he had a right to take the coal, or if you have a reasonable doubt that it was his intent to steal the coal, then your verdict must be not guilty.<sup>42</sup>

**§ 1341. Necessity of felonious intent at the time of entering**

You are instructed that, before you can render a verdict in the first degree, you will have to find from the evidence beyond a reasonable doubt that the defendant in the nighttime broke and entered the dwelling house, and that at the time of breaking and entering said dwelling, he intended to commit rape upon either \_\_\_\_\_ or \_\_\_\_\_ and carnally know one of them, notwithstanding any resistance she might make.<sup>43</sup>

**§ 1342. Necessity that property be taken**

The court charges the jury that if they believe from the evidence that defendant broke and entered the building, as charged in the indictment, with intent to commit a felony, to wit, larceny of the property of \_\_\_\_\_ of the value of more than twenty dollars, it is not necessary to prove that the defendant took any property, the intent being the gist of the larceny.<sup>44</sup>

**§ 1343. Principals and accessories—Aiding and abetting**

**§ 1343(1). Delaware**

You are instructed that, if you find beyond a reasonable doubt that E. did feloniously break and enter the said dwelling house with the intent as charged, and that the defendants aided and assisted in the commission of the crime in any manner, they would be equally guilty with E., as the law makes no distinction in the degree of guilt between the principal offender and his accomplice.<sup>45</sup>

You are instructed that it is not claimed on the part of the state that M. did actually break and enter the house of the prosecuting witness with the intent to commit larceny; but the claim is that at the time the crime was committed by \_\_\_\_\_ and \_\_\_\_\_ she was then and there present, abetting, procuring, commanding, and

<sup>42</sup> State v. Tough, 96 N. W. 1025, 12 N. D. 425.

<sup>43</sup> State v. Bowden, 95 S. E. 145, 175 N. C. 794.

<sup>44</sup> Clifton v. State, 7 So. 863, 26

Fla. 523. In this case the indictment alleged that the breaking and entry was in the nighttime.

<sup>45</sup> State v. Short, 75 A. 787, 7 Pennwll, 295.

counseling the commission thereof. In order to convict M., you must be satisfied beyond a reasonable doubt that either \_\_\_\_\_ or \_\_\_\_\_, or both, did feloniously break and enter the dwelling house of the prosecuting witness with the intent to commit larceny as charged in the indictment—that is, with the felonious intent to take and carry away the goods and chattels kept or deposited in said dwelling house, with the intent to convert them to his or their use without the consent of the owner, and that M. abetted, procured, commanded, or counseled the commission of the crime.<sup>46</sup>

## § 1343(2). Iowa

You are instructed that if you find from the evidence, and beyond a reasonable doubt, that at the time and place named in the indictment the witness \_\_\_\_\_, or any other person or persons, unlawfully broke and entered the car in question, and that said car was then under the charge and control of the \_\_\_\_\_ Railway Company, and was sealed, and contained goods and merchandise for transportation, and that the defendant aided and abetted such other person or persons in the acts just named herein, then the defendant is guilty as charged in the indictment, and you should so find.<sup>47</sup>

## § 1343(3). Kansas

You are instructed that you are to determine: First. Did the defendant in person, at the time and place charged, beyond a reasonable doubt, actually and physically break into and rob the \_\_\_\_\_ Bank in manner set forth in the information? Second. If you should fail to be satisfied from the evidence beyond a reasonable doubt that the defendant actually and in person was at \_\_\_\_\_ at the time and place stated, and in person physically by himself or with the assistance of others, broke into and robbed said bank as charged, then the inquiry under the law would be whether or not the defendant, beyond a reasonable doubt, was guilty as charged by reason of the fact that he, though not actually present at the time and place of the commission of the crime, had guilty knowledge of the intent and plan and preparation to commit such crime. and did, though not present, actually help, plan, counsel, aid and abet others, conspiring and confederating with others in the plan and purpose, and in the preparation and carrying out of such common plan and purpose and knowingly concealing the crime, and aiding, assisting, and facilitating the escape of the actual participants in the burglary.<sup>48</sup>

<sup>46</sup> State v. Short, 75 A. 787, 7 Pennewill, 295.

<sup>47</sup> State v. Berger, 98 N. W. 1094, 121 Iowa, 581.

<sup>48</sup> State v. Hoerr, 129 P. 153, 88 Kan. 573.

§ 1343(4). **Massachusetts**

The jury are instructed that, if the brick walls of the building of ——— were in the nighttime broken, and any entry made into the walls so broken by the persons who broke said walls, and those acts were for the purpose of stealing the property within said walls, the breaking and entering alleged in the indictment would be proved, notwithstanding such breaking and entering consisted of a series of acts by the same person for the same purpose, some of them in the daytime and some of them in the nighttime, and were not the final acts by which an entry into the said building and access to the property therein intended to be stolen was consummated, and notwithstanding such final acts were in the daytime. A person who counseled, hired, or otherwise procured such acts of breaking and entering would be an accessory before the fact to the same, if, not being present at such acts, he knew that such acts of breaking and entering would be partly by day and partly by night in consummating the breaking and entering and in consummating the purpose of such breaking and entering.<sup>49</sup>

§ 1343(5). **Nebraska**

The jury are instructed that, if you find from the evidence that others than the defendant jointly participated with him in the burglary, you will nevertheless be warranted in finding the defendant guilty. The evidence must satisfy you that the defendant is guilty individually or in conjunction with others, and that there is no other reasonable hypothesis that any other person or persons committed the crime.<sup>50</sup>

§ 1343(6). **Oregon**

You are instructed that, where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that both of the defendants, or either one of them, when tried alone, actually broke and entered the building or took the property. It is sufficient if it be shown that the joint defendants were acting together for that purpose, and if either one of them, while so acting together for that purpose, actually broke and entered the building with the intention of stealing therein, then all of the said defendants would be guilty of the crime, and either one of them may be prosecuted alone therefor.<sup>51</sup>

§ 1343(7). **Texas**

The jury are instructed that, if B. broke the house without the presence of defendant, and afterwards gave to the defendant some

<sup>49</sup> Commonwealth v. Glover, 111 Mass. 395.

<sup>50</sup> Johnson v. State, 73 N. W. 463, 53 Neb. 103. The information charged

the defendant only with the commission of the offense.

<sup>51</sup> State v. Tucker, 61 P. 894, 36 Or. 291, 51 L. R. A. 246.

of the property taken from the house, defendant cannot be convicted, even if he knew that B. had stolen the property; and unless you are satisfied by the evidence beyond a reasonable doubt that defendant did not so obtain the goods, if he had them, and that he was present at the entry into the house and agreed to the act, you will acquit him.<sup>52</sup>

The jury are instructed that, if you should believe from the evidence that ——'s house was burglarized at the time and place and in the manner alleged in the indictment, and if you should further believe that C. acted as a principal in committing such burglary, if any was committed, then I instruct you that you cannot convict defendant, unless you further believe, beyond a reasonable doubt, that defendant was present and knew the unlawful intent of C. and aided, encouraged, and advised him or agreed with him to commit such burglary.<sup>53</sup>

**§ 1344. Burglary with intent to rape**

You are instructed that, before you can find the prisoner guilty in manner and form as he stands indicted, you must, inasmuch as he is presumed to be innocent until proved guilty, be satisfied beyond a reasonable doubt, from all the evidence produced at the trial of this case—First, that the dwelling house of ——, in this county, was broken and entered into in the nighttime by said prisoner; and, second, that this was so done by the said defendant with intent to commit rape upon the said —— . It is not necessary to prove that such intent to rape was in fact executed, for, under the provisions of our statute, the actual accomplishment of the intended rape is expressly declared to be immaterial. Burglary generally is defined to be the breaking and entering into the dwelling house of another in the nighttime, with intent to commit a felony, such as murder, rape, arson, larceny, and other offenses not now necessary to enumerate or define. Both breaking and entering are necessary to constitute the offense, and both must be in the nighttime; and the building into which the entry is made must be proved to be a mansion or dwelling house for the habitation of man, and actually inhabited at the time the offense is committed. The breaking of the house may be actual, by the application of physical force, or constructive, as where the entrance is obtained by fraud, threats or conspiracy. An actual breaking may be proved by evidence of very slight force, such as lifting the latch of a door, pushing or forcing open a closed door, breaking a window, pulling up or down an unfastened sash, picking a lock, drawing back a bolt, breaking and opening an inner door, after having entered

<sup>52</sup> Criner v. State, 109 S. W. 128,  
53 Tex. Cr. R. 174.

<sup>53</sup> Glenn v. State (Cr. App.) 76 S.  
W. 757.



through an open outer door or window, or other like acts; and also by evidence of escaping from the house by any of these or the like means. If, upon consideration of all the evidence, you shall be satisfied, beyond a reasonable doubt, that the said dwelling house of ——— was broken and entered into in the nighttime, and by the prisoner, as alleged in the indictment, then you must further be likewise satisfied that it was so broken and entered into by him with intent, at the time of such breaking and entering, to commit rape upon the said ———, whether such intent was actually executed or not. For if you should be thus satisfied that he so broke and entered thereinto with such intent, then the proof of the offense would be complete, and the prisoner's guilt established. Therefore, the question whether or not he so broke and entered into said dwelling house with the felonious intention specifically alleged in the indictment, that is to say, with the intent to commit rape upon the said ———, is the gravest and most important one which you are required to consider in this case; for it is this specific intent which is the gravamen of this offense, and which constitutes that which would otherwise be only a misdemeanor under our statute law, the essential and indispensable ingredient of the alleged burglarious felony. To constitute our statutory offense of burglariously breaking and entering a dwelling house with intent to commit rape, the circumstances must be such as to show that it would have been rape had the accused executed his felonious intent, for the essential ingredients of rape, except an actual penetravit, must be proved. Therefore the jury should be informed as to the nature and definition of the crime of rape. Rape, in this state, has been held to be the carnal knowledge of a woman by force and against her will. Force, either actual or presumptive, is, in legal contemplation, an essential and indispensable element of rape, whether it be committed on a female over or under the age of consent. Upon proof of carnal penetration of a female of the age of consent—that is, of ——— years of age, or more, in this state—the burden is upon the prosecution to further prove to the satisfaction of the jury, beyond a reasonable doubt, that the penetration was consummated by force and against her will, or by putting her in great fear and terror, before a conviction of rape can be had. Consequently, as rape upon a female of the age of consent can only be committed with force and against her will, or by putting her in great fear and terror, it follows that the intent to commit rape upon such a female must also necessarily include the design and purpose to accomplish the felonious carnal knowledge with force and against her will, or by putting her in great fear and terror; and that, therefore, the burden is upon the prosecution to



satisfy the jury that such design and purpose are shown beyond a reasonable doubt by the evidence before them, before the accused can be convicted of such intent. If, however, the prosecution fail to do this, or if it appear to the satisfaction of the jury that the accused, at the time of the alleged burglarious breaking and entering, intended to seek or obtain the sexual connection by the milder means of solicitation, entreaty, and the like, or in any other way with the express consent or the silent acquiescence of such female, then the accused could not lawfully be found guilty of the intent to commit rape. It will therefore be for the jury to consider and determine in this case, from all the evidence and circumstances proved, whether or not the prisoner, ———, broke and entered the said dwelling house with the felonious intent then and there to have sexual connection with the said ——— by force and against her will; for, if that was not the intent with which he broke and entered the house, then he did not break and enter it with the intent to commit rape upon her, and therefore ought not to be convicted, under this indictment, of that specific crime. If, however, the jury should be satisfied, beyond a reasonable doubt, from all the evidence, that he so broke, and entered it with that intent, then he should be convicted thereof.<sup>54</sup>

**§ 1345. Attempt to commit burglary**

You have observed that the charge is that defendant attempted to break and enter said building with intent to commit a larceny. If another man than the defendant feloniously broke and entered said building, with intent to commit a larceny, he must have first attempted to do so before consummating the breaking and entering, and if the defendant was concerned in the commission of that offense, and co-operating with the person committing it in its commission, then he is chargeable with the attempt made by such a person the same as if he had made the attempt himself. If such a breaking and entering was with intent to commit a larceny, and the defendant was concerned in the commission of the breaking and entering with that intent, he is chargeable with such an intent. If you find beyond a reasonable doubt, upon all the evidence, that the defendant did thus attempt to break and enter said building, and the said attempt to break and enter was with intent to commit a larceny, then you will find him guilty; but if, upon a view of the whole evidence, you have a reasonable doubt of his guilt as charged, you will acquit him.<sup>55</sup>

<sup>54</sup> State v. Fisher (Del.) 41 A. 208,  
1 Pennewill, 303.

<sup>55</sup> State v. Mahoney, 97 N. W. 1089,  
122 Iowa, 168.

## B. PLEADING AND PROOF

### § 1346. Correspondence with allegations of indictment of proof of ownership of premises burglarized

#### § 1346(1). Texas

You are instructed that a person who is in the direct control of a house, and exclusive management and control of property, is, for the purposes of law, the occupant of such house, and owner of such property.<sup>56</sup>

#### § 1346(2). West Virginia

You are instructed that, if the jury believe from the evidence beyond a reasonable doubt that the house mentioned in the indictment was in the actual or constructive possession of M., then the ownership is properly laid in the said M., although they believe from the evidence that the title to said property was at the time in M., ———, and ———'s heirs.<sup>57</sup>

You are instructed that, if the jury believe from the evidence beyond a reasonable doubt that M. held the possession of said house at the time alleged in the indictment, and that he used and occupied said house as a dwelling, then, in contemplation of law, said house was the dwelling house of M., although he may have absented himself therefrom for several months, and although he may have had another dwelling house during the same time.<sup>58</sup>

### § 1347. Ownership of goods in railroad car charged to have been burglarized

You are instructed that it is charged in this indictment that the goods and chattels alleged to be in the car were the property of the ——— Railroad Company, and such allegation must be proved. It is not necessary, however, that the railroad company should have been the absolute owner of the property. If the goods and chattels were in the possession of the company as a common carrier for the purpose of transportation, that would constitute such ownership as would sustain the indictment in that particular.<sup>59</sup>

### § 1348. Included offenses

The jury are instructed that if any person, with intent to commit any public offense in the nighttime enter any dwelling house without breaking, he is guilty of a crime under the laws of this state, and this latter crime is necessarily included in that of burglary.<sup>60</sup>

<sup>56</sup> Lamater v. State, 42 S. W. 304,  
<sup>58</sup> Tex. Cr. R. 249.

<sup>57</sup> State v. Williams, 21 S. E. 721,  
40 W. Va. 268.

<sup>58</sup> State v. Williams, 21 S. E. 721,  
40 W. Va. 268.

<sup>59</sup> State v. Davenport (Del.) 77 A.  
967. 2 Boyce, 12.

<sup>60</sup> State v. Maxwell, 42 Iowa, 208.

**§ 1349. Same—Conviction of larceny****§ 1349(1). Iowa**

You are instructed that the indictment charges larceny from a store building in the nighttime. If you fail to find the defendant guilty of the crime charged in the indictment, you may find him guilty of the included crime of larceny, if you find, under these instructions, the evidence warrants you in doing so; and in considering whether he is guilty of such included crime you will observe the instructions herein given you on the subject of reasonable doubt and circumstantial evidence and you should not convict of the higher offense if you have a reasonable doubt as to the offense of which defendant is guilty, if you find him to be guilty.<sup>61</sup>

**§ 1349(2). Missouri**

The jury are instructed that there is no charge of larceny in this case, and although the jury may believe that the defendant stole the chickens and turkey, they will nevertheless acquit unless they believe beyond a reasonable doubt that the defendant is guilty of burglary, as defined in the other instructions.<sup>62</sup>

The jury are instructed that, if you believe and find from the evidence that the defendant unlawfully and forcibly both broke and entered into the store, shop, and building of the said ———, as defined and explained in the preceding instruction, and that after breaking into and entering the same the defendant took and carried away therefrom the one-horse wagon and ——— sets of single harness mentioned in the information in this case, or any part of it, and that he did so with the intent to fraudulently convert the same to his own use and to permanently deprive the owner thereof without his consent, and that said one-horse wagon and ——— sets of single harness were the property of the said ——— and were of any value whatever, you will find the defendant guilty of grand larceny also, and assess the punishment at imprisonment in the penitentiary in addition to the punishment for the burglary for a term of not less than ——— nor more than ——— years.<sup>63</sup>

The court instructs the jury that if you believe and find from the evidence that the defendant, at and in the county of ——— and state of ———, on the night of the ——— day of ———, did willfully and unlawfully break into and enter a certain storehouse, and if the said storehouse was at the time and place aforesaid in the possession of the ——— Company, a corporation organized under the laws of the state of ———, and if the said defendant

<sup>61</sup> State v. Nordman, 70 N. W. 621,  
101 Iowa, 446.

<sup>62</sup> State v. McGuire, 91 S. W. 939,  
101 Mo. 215.

<sup>63</sup> State v. Speritus, 90 S. W. 459,  
191 Mo. 24.

broke into and entered the said store building, at the time and place aforesaid, with the intent then and there to take, steal, and carry away, and convert to his own use, and deprive the owners of the use thereof, of any valuable goods, wares, and merchandise situate, kept, and deposited in the said building, then you will find him guilty of burglary, and assess his punishment at imprisonment in the penitentiary for a term not less than three years. And if you further believe and find from the evidence that this defendant, at the time and place aforesaid, did willfully and feloniously steal, take, and carry away from within said building, with intent to convert to his own use, and deprive the owners of the use thereof, any goods, wares, and merchandise of any value whatever, and if such goods, wares, and merchandise were then and there the property of the said company, a corporation as aforesaid, you will also find him guilty of larceny, and assess his punishment for such larceny at imprisonment in the penitentiary for not less than ——— nor more than ——— years.<sup>64</sup>

§ 1349(3). **Nebraska**

The jury are instructed that under an information for burglary the accused may be found guilty of larceny; and if, in this case, the jury are not satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the burglary as charged in the information, still, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant did steal the goods described in the information from the possession of the said ———, then the jury may, under this information, find the defendant guilty of larceny.<sup>65</sup>

§ 1349(4). **West Virginia.**

The jury is instructed that although they should believe that no dwelling house was broken or entered, as alleged in the indictment, yet if they believe from the evidence beyond a reasonable doubt that the defendant stole and carried away any of the goods of ———, as alleged in the indictment, then they should find him guilty of the larceny of said goods.<sup>66</sup>

<sup>64</sup> State v. Sprague, 50 S. W. 901, 149 Mo. 409. This instruction was drafted to meet the provision of the statute that, if both burglary and larceny are committed, the value of the property stolen is immaterial.

<sup>65</sup> Ferguson v. State, 72 N. W. 590, 52 Neb. 432, 66 Am. St. Rep. 512. It was objected to this instruction that the fact of burglary was assumed.

<sup>66</sup> State v. Williams, 21 S. E. 721, 40 W. Va. 268.

## C. EVIDENCE

## § 1350. Presumptions and burden of proof

## § 1350(1). California

You are instructed that the fact that a person attempts to steal while in a building is not sufficient, without other circumstances proved, to cast on him the burden of proving himself not guilty of burglary.<sup>67</sup>

## § 1350(2). Iowa

You are instructed that if you find from the evidence, and beyond reasonable doubt, that the defendant went to the dwelling house of ——— secretly and in the nighttime, and there secretly entered the dwelling house, and was shortly thereafter found undressed and in bed with ———, who was then also undressed, then a strong presumption would arise that he did so enter for the purpose of committing adultery; and such presumption would continue until rebutted by the evidence, and, if not so rebutted, would justify you in finding such intent to have existed at the time of the entry. "Nighttime" means the time between darkness after sundown and dawn of daylight in the morning.<sup>68</sup>

## § 1351. Presumption raised by possession of goods taken from burglarized premises

Effect of possession of stolen goods as evidence of guilt in prosecution for larceny, see post, § 3321.

## § 1351(1). United States

The jury are instructed that, if you are satisfied that defendant was, on the night this post office was broken into, in the town of ———, and that he was passing under an assumed name, and that afterwards some of the property which was stolen on that occasion was found in his possession, then the jury might infer that he was one of the persons who broke into the post office and robbed it, unless he has explained his possession of the stolen property in such a way as to show that he was not, and could not have been, connected with the breaking of the post office.<sup>69</sup>

## § 1351(2). Arizona

You are charged that possession of stolen goods by the accused recently after a burglary in which larceny has been committed, if

<sup>67</sup> People v. Barry, 29 P. 1026, 94 Cal. 481.

<sup>68</sup> State v. Mecum, 64 N. W. 286, 95 Iowa, 433.

<sup>69</sup> Considine v. United States (C. C. A. Ohio) 112 F. 342, 50 C. C. A. 272, certiorari denied 22 S. Ct. 938, 184 U. S. 699, 46 L. Ed. 765.

unexplained, is a circumstance from which you may infer the complicity of the accused in the larceny.<sup>70</sup>

You are instructed that the value of such evidence, however, is to be determined by you alone. In determining the weight to be attached to such a circumstance as evidence tending to prove guilt, you should take into consideration all the facts and circumstances connected with such possession, and their relation to the other proofs in the case.<sup>71</sup>

**§ 1351(3). California**

The jury are instructed that, if unexplained, you may consider, as a circumstance tending to prove guilt, the possession by the defendant of the stolen property recently after the alleged commission of the offense, if you find any such property to have been in his possession.<sup>72</sup>

I charge you, gentlemen, that the mere fact of the defendant having in his possession and disposing of the property alleged to have been stolen; that is, if you are satisfied beyond a reasonable doubt that he had in his possession the property alleged to have been stolen, and attempted to dispose of it—I say that those facts are only circumstances tending to show guilt, but they are not of themselves sufficient to prove that he committed the burglary. And if the defendant has explained satisfactorily how he came into possession of the alleged stolen property, and from such explanation you believe that he did not participate in the burglary, and there is no other evidence connecting him with the crime, then you will return a verdict of not guilty.<sup>73</sup>

The court instructs the jury that the possession of stolen property recently after the commission of the alleged offense by the persons charged, if you find any such property to have been in their possession, if unexplained, is a circumstance tending to prove their guilt; and if the jury believe from the evidence that the defendants were found with the stolen property in their possession, if you find any was feloniously taken, then, to determine the weight to be attached to that circumstance as tending to prove guilt, the jury should consider all the circumstances attending such possession, proximity of the place where found to the place of the alleged burglary, the lapse of time since the property was taken, the character and nature of the property taken, whether the property was concealed, whether the parties denied or admitted the possession, and the demeanor and character of the accused. All of these cir-

<sup>70</sup> Vincent v. State, 145 P. 241, 16 Ariz. 297.

<sup>71</sup> Vincent v. State, 145 P. 241, 16 Ariz. 297.

<sup>72</sup> People v. O'Donnell, 117 P. 933, 16 Cal. App. 716.

<sup>73</sup> People v. Lang, 76 P. 232, 142 Cal. 482.

cumstances, so far as they have been proved, are proper to be taken into account by the jury in determining how far the possession of the property by the accused, if it has been proved, tends to show his or their guilt.<sup>74</sup>

§ 1351(4). **Delaware**

You are instructed that, it is a well-settled rule of criminal law in this state that, when property recently stolen is found in the possession of a person, that person is presumed to be the one who stole it, unless he accounts for his possession thereof satisfactorily to the jury. When a dwelling house, in which moneys, goods and chattels, the subjects of larceny, are kept and deposited, has been recently broken and entered into, and such moneys, goods, and chattels, or any part of them, are then and there stolen, the subsequent possession thereof by a person is prima facie evidence of the commission by such person as well of the breaking and entering as of the intent to commit larceny; that is, the possessor of such goods is presumed to have committed the whole crime—it may be as principal or accomplice—unless he satisfactorily accounts to the jury for his possession of such goods. This, however, is a rebuttable presumption. It is for you to say, under all evidence in this case, whether that presumption has been rebutted.<sup>75</sup>

§ 1351(5). **Georgia**

You are instructed that, if the corpus delicti—that is, if the burglary—is proven to your satisfaction, and after that the goods alleged to have been stolen, or some part of them, are found in recent possession of the defendant, if you find there was a recent possession of stolen goods not satisfactorily accounted for, that would be a circumstance from which you might infer that the party so in possession of them is the guilty party, and convict her of the offense.<sup>76</sup>

Now I charge you, gentlemen, that if it be shown by the evidence in this case, beyond a reasonable doubt, that some one did break and enter the pressing-club house of ———, in this county, and about the time charged in this bill of indictment, and it was his place of business, and you believe that there were valuable goods contained in that house at the time, and that this breaking and entering was done with intent to steal, or if, after breaking and entering, the parties did steal therefrom goods of the value as here charged and as here described, and if it be shown, gentlemen, that recently thereafter this defendant was found in possession of those

<sup>74</sup> People v. Brady, 65 P. 823, 133 Cal. xx.

<sup>75</sup> State v. Short, 75 A. 787, 7 Pennewill, 295.

<sup>76</sup> Walker v. State, 63 S. E. 534, 5 Ga. App. 430. This instruction was not objected to.



goods, or a portion thereof, so stolen from that house, if there were any stolen, then, gentlemen, that would be a circumstance from which you would be authorized to find him guilty of the offense of burglary, unless he made an explanation of his possession of those goods consistent with his innocence in your opinion, of all of which you are to be the judges.<sup>77</sup>

You are instructed that, where a burglary has been committed, and property which was in the house at the time of the burglary is soon thereafter found in the possession of a person who is unable to account for his possession, it raises a presumption of his guilt, and the jury are authorized to convict upon this testimony alone; this being a matter entirely for the jury, taking into consideration the character of the case, the nature of the property found upon his person or in his possession, the length of time which had elapsed since the burglary, and the difficulty or impossibility on the part of the accused to account for his possession of the property, if you should conclude that it was stolen from the house at the time that a burglary was committed.<sup>78</sup>

§ 1351(6). Illinois

The jury are instructed that possession of stolen property recently after a larceny has been committed is prima facie evidence that the party in whose possession the same is found committed the larceny, and, if a burglary was committed at the same time and in connection with the larceny, that such possession is also prima facie evidence that the party in possession committed the burglary, and that such possession, if unexplained, would warrant a conviction.<sup>79</sup>

§ 1351(7). Iowa

You are instructed that possession of goods recently stolen does not in itself create presumption or amount to prima facie proof that the possessor is guilty of breaking and entering the building in which the goods were kept; but if other evidence in the case shows beyond a reasonable doubt that the building was broken and entered by some one, that the theft of the goods was accomplished at the time and by means of the breaking and entering, proof of possession unexplained, or in the absence of circumstances raising a reasonable doubt as to whether the possession of the goods had been acquired otherwise than by the crime charged, is sufficient to warrant a conviction.<sup>80</sup>

You are instructed that the fact of possession, soon after a burglary, of goods taken from burglarized premises by breaking and

<sup>77</sup> McElroy v. State, 53 S. E. 759, 125 Ga. 37.

<sup>78</sup> Scott v. State. 50 S. E. 49, 122 Ga. 138.

<sup>79</sup> People v. Everett, 90 N. E. 226, 242 Ill. 628.

<sup>80</sup> State v. Donovan, 101 N. W. 122, 125 Iowa, 239.

entering, if unexplained, is sufficient to warrant the conclusion that the person having such possession is the person who broke and entered the building, unless the evidence showing such possession leaves a reasonable doubt whether the defendant may not have come into possession of the goods otherwise than by breaking and entering.<sup>81</sup>

You are instructed that, if you find from the evidence, beyond a reasonable doubt, that on or about the \_\_\_\_\_ of \_\_\_\_\_, a building belonging to or in the possession or occupancy of \_\_\_\_\_, and situated in \_\_\_\_\_ county, state of \_\_\_\_\_, was broken into and entered, and that personal property was stolen therefrom, and you further find that within a few hours thereafter the property so stolen was in the possession of the defendants, you will, in such case, be warranted in concluding and finding that such property was stolen by the defendants from said building by breaking and entering the same, unless the facts and circumstances disclosed, or the evidence introduced by the state or the defendants, raises in your mind a reasonable doubt as to whether the defendants did not come honestly into the possession of such property. If such reasonable doubt has been raised in your minds by the testimony and facts and circumstances introduced and appearing in the case, then you should not act upon said presumption in convicting the defendants, and should not convict the defendants, unless their guilt has otherwise been proven, as you are directed it must be.<sup>82</sup>

The jury are instructed that, if parties are found in possession of goods recently stolen by breaking into a building, and which have been stolen by breaking into a building, it causes a presumption that such parties have stolen such goods by breaking into a building. This presumption may be rebutted by the defendant's explaining such possession. The burden is on the state to prove, and it must prove, that such goods were stolen from a building, before such presumption exists.<sup>83</sup>

The jury are instructed that, if you find from the evidence beyond a reasonable doubt that in the month of \_\_\_\_\_ a building belonging to \_\_\_\_\_ and situated in \_\_\_\_\_ county, was broken into, and that property was stolen therefrom, and you further find that within a few hours thereafter the property so stolen was found in the possession of the defendant, you will, in such a case, be warranted in concluding that the property was stolen by defendant from said building by breaking and entering the same, unless the facts and circumstances disclosed by the evidence raise in your

<sup>81</sup> State v. Swift, 94 N. W. 269, 120 Iowa, 8.

<sup>82</sup> State v. Ryan, 85 N. W. 812, 113 Iowa, 536.

<sup>83</sup> State v. La Grange, 62 N. W. 664, 94 Iowa, 60.

minds a reasonable doubt as to whether he did not come honestly into such possession.<sup>84</sup>

You are instructed that, if you are satisfied from the evidence, beyond a reasonable doubt, that some person, between sunset of ———, and sunrise of the next day, wrongfully broke in and entered the above referred to office, with the intent to commit the crime of larceny, as above defined, and if you, in like manner, find from the evidence, beyond a reasonable doubt, that at and just after such entry certain coin described by the witnesses was taken from such office, and that said coin was the next morning found in the possession of the defendant, then you will be warranted in finding that the defendant stole such coin by breaking and entering said office, as charged in the indictment.<sup>85</sup>

§ 1351(8). **Michigan**

The jury are instructed that the possession of stolen property found with persons accused is not prima facie evidence, even, of a burglary. As applied to this case, however, if you find that whoever broke the window stole the flour out of the mill, then, in whosoever possession the flour was found shortly after, such possession would be evidence of larceny; and you would from that be justified, provided you found as a fact that the same persons who broke and entered the mill committed the larceny, in finding the parties in whose possession the goods were found guilty of burglary, as well as larceny.<sup>86</sup>

§ 1351(9). **Mississippi**

The court instructs the jury for the state that in a trial for burglary and larceny possession of property shown to have been recently stolen from the burglarized house is a circumstance from which the jury may infer the guilt of the person or persons found in possession of such recently stolen property; and if, in this case, the jury believe from all the evidence and circumstances in evidence beyond a reasonable doubt that the barn house of the ——— was broken into, and property of the ———, of any value whatever, stolen therefrom, and that recently thereafter the defendants were then in possession of said stolen property, then the jury are authorized to convict these defendants, and should do so, unless the defendants have given in the evidence shown a reasonable

<sup>84</sup> State v. La Grange, 62 N. W. 664, 94 Iowa, 60.

<sup>85</sup> State v. Yohe, 53 N. W. 1088, 87 Iowa, 33. This instruction does not charge that the jury can convict, if the defendant was merely guilty of larceny, but charges that the jury

may be warranted in finding that the defendant stole the coin by means of the breaking alleged in the indictment.

<sup>86</sup> People v. Wood, 58 N. W. 638, 99 Mich. 620.

account or explanation of how they came in possession of the same.<sup>87</sup>

**§ 1351(10). Missouri**

You are instructed that, where property has been stolen, by means of a burglary, proved beyond a reasonable doubt, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person, in whose possession the same is found, is presumed to be the thief who stole the same, and is also presumed to have used all means necessary to have secured access to and possession of such property, and if he fails to account for his possession of such property in a manner consistent with his innocence, or unless such presumption be overcome by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, then this presumption that the person in whose possession such property is found is the thief, and used all means necessary to secure such property, becomes evidence against him, so that unless such possession be explained or the presumption arising therefrom be overcome by evidence, as aforesaid, to your satisfaction, then from such possession of property recently stolen you are authorized to presume such person guilty of both the larceny and the burglary.<sup>88</sup>

If you find from the evidence that the property mentioned in the information, to wit, a one-horse wagon and ——— sets of single harness, was the property of ———, and that it was stolen in the city of ———, state of ———, on or about the ——— day of ———, and that recently thereafter the same or any part of said property was found in the exclusive possession of the defendant, then the defendant is presumed to be guilty of the theft, and the law will further presume that the thief resorted to and made use of all means necessary to gain access to and possession of such stolen property, and the burden is on him to rebut or overcome presumption to your satisfaction, but not beyond a reasonable doubt. The presumption of guilt arising from the mere naked fact of possession of stolen goods may, in the absence of other corroborating testimony, be rebutted by the evidence that the defendant received the property from another person, or by evidence that the defendant was at a different place than that at which the property was stolen at the time it was stolen; but unless such presumption is so rebutted, or unless such possession is accounted for in a manner consistent with the innocence of the defendant by the evidence in the case, or the circumstances attending such

<sup>87</sup> Cook v. State, 28 So. 833.

<sup>88</sup> State v. James, 92 S. W. 679, 194 Mo. 268, 5 Ann. Cas. 1007.

possession, or by the combined weight of one or more of the kinds of evidence just mentioned, then you should find the defendant guilty of stealing the property and also of the burglary.<sup>89</sup>

The court instructs the jury that recent possession of personal property obtained by and through a burglary, if unexplained to the reasonable satisfaction of the jury that such possession is not a guilty possession, is presumed by the law to be a guilty possession, and such presumption becomes conclusive upon the defendant that such possession is a guilty possession, both as to the burglary and larceny, unless he shall satisfy the jury, from all the evidence in the case, that such possession is not a guilty possession; but the court further instructs the jury, if they believe from the evidence in the case such presumption of law aforesaid is not corroborated or strengthened by other evidence as to the commission of the offense, such presumption may be rebutted by the fact of the defendant's good character, if they believe he had a good character from the evidence in the case.<sup>90</sup>

The jury are instructed that if the jury believe that, soon after the commission of the burglary charged in the second count, any portion of the property taken at the time of the burglary, was found in the possession of the defendant, such possession will be presumptive evidence of defendant's guilt, and if such possession of said stolen property is not satisfactorily explained by the defendant, it will be conclusive evidence of his guilt, and the jury are further instructed that it devolves upon the defendant to explain such possession.<sup>91</sup>

#### § 1351(11). Vermont

You are instructed that, if you find that the articles mentioned in the evidence were the same as were in that house, then the respondent's possession of them is a circumstance, taken unexplained, that may be weighed and considered by you upon the question of whether he committed the crime of burglary.<sup>92</sup>

#### § 1352. Effect of possession not exclusive of that of others

You are instructed that, when the possession sought to be proved on the part of the accused consists of the asserted fact that the stolen property was found in the house of the defendant, it must be shown that the possession and occupation of the house by the defendant was exclusive, and was not enjoyed by other parties jointly with him. If you find the house was used by others—by

<sup>89</sup> State v. Speritus, 90 S. W. 459, 191 Mo. 24.

<sup>90</sup> State v. Owsley, 20 S. W. 194, 111 Mo. 450. This should be accompanied by other instructions as to

the effect of any explanation by defendant of his possession.

<sup>91</sup> State v. Tutt, 63 Mo. 595.

<sup>92</sup> State v. Peach, 40 A. 732, 70 Vt. 283.

others with him—such evidence would not alone authorize a conviction, but such fact may and should be considered by the jury, together with all the evidence in the case, in passing upon the guilt or innocence of the person charged.<sup>93</sup>

**§ 1353. Sufficiency of explanation of possession of stolen property**

**§ 1353(1). Alabama**

The court charges the jury, while the law is that the recent possession of stolen goods, if unexplained, may justify a conviction, yet, if defendant has explained his possession of the goods to the reasonable satisfaction of the jury, and if, upon a fair consideration of all the evidence, the jury have a reasonable doubt, growing out of any part of the evidence, as to defendant's guilt, the jury must acquit him.<sup>94</sup>

**§ 1353(2). Florida**

You are instructed that, where property taken by breaking and entering with intent to commit a felony is found in the exclusive possession of the defendant being tried on the charge, recently after the breaking and entering and the theft of the goods so found, such possession, when standing alone, is sufficient to cast upon him or them the burden of explanation how he came by them, or of giving some explanation; and, if he fail to do so, to warrant the jury of convicting him of the crime charged. The explanation given must not only be reasonable; it must be credible, or enough so to raise a reasonable doubt in the minds of the jury, who are the judges of the reasonableness and probability as well as credibility.<sup>95</sup>

**§ 1353(3). Georgia**

The court instructs the jury that the exclusive and unexplained possession of stolen property recently after a burglary, in the commission of which a theft was perpetrated, may raise a presumption of fact that the party in possession is the burglar, where the burglary has been established beyond a reasonable doubt; and the burden would be upon the person in whose recent possession the goods, if stolen, were found, to explain such possession. It is a presumption arising out of fact, and is therefore a matter for the jury; what would be recent possession is a matter for the jury, as is the satisfactoriness of the explanation. The presumption being one of fact, before it arises, the state must have established the facts from which the inference is drawn beyond a reasonable doubt; and whilst the burden is upon the defendant, if such facts have

<sup>93</sup> *Moncrief v. State*, 25 S. E. 735, 99 Ga. 295.

<sup>94</sup> *Hale v. State*, 26 So. 236, 122 Ala. 85.

<sup>95</sup> *Roberson v. State*, 24 So. 474, 40 Fla. 509.



been established beyond a reasonable doubt, to explain the possession to the jury, such explanation may be drawn from any evidence in the case which demonstrates it, or from the statement of the defendant, if such statement satisfies the jury upon that point.<sup>96</sup>

§ 1353(4). Iowa

You are further instructed that, if the evidence in this case raises a reasonable doubt in your minds whether or not the defendant received these harness from some other person, no matter if he did get them on Sunday, or even if he had reason to believe the harness had been stolen by the man from whom he got them—if the evidence does raise in your minds a reasonable doubt that he received these harness from some other person—then it is your duty to acquit.<sup>97</sup>

You are further instructed that the words “honestly acquired,” as used in these instructions, mean nothing more than that the defendant obtained these harness otherwise than breaking and entering, as charged in the indictment.<sup>98</sup>

§ 1353(5). Missouri

The court instructs the jury that, if they believe and find from the evidence that the defendant had possession of the alleged stolen property recently after the same had been stolen, and that, in course of the same conversation with the witness ——— by which the state attempts to prove defendant's possession of said property, the defendant gave an account of said possession, explanatory of how he obtained said possession otherwise than by stealing the same, then if they believe such account of said possession, they should find the defendant not guilty of the crime charged against him in this information now on trial.<sup>99</sup>

The jury are instructed that the recent possession of stolen property raises the presumption that the person in possession is guilty, and throws upon him the burden of rebutting this presumption, and explaining his possession in one of the modes hereafter declared; otherwise, this presumption becomes conclusive. And in this case, if you believe from the evidence that the store of ———, within the time and at the place specified, was entered under such circumstances as constituted burglary, as before defined; that certain of ———'s goods were then stolen and carried away therefrom; and that recently thereafter (and, determining whether the

<sup>96</sup> August v. State, 76 S. E. 164, 11 Ga. App. 798.

<sup>97</sup> State v. Brady, 97 N. W. 62, 121 Iowa, 561, 12 L. R. A. (N. S.) 199; State v. Brady, 91 N. W. 801.

<sup>98</sup> State v. Brady, 97 N. W. 62, 121 Iowa, 561, 12 L. R. A. (N. S.) 199; State v. Brady, 91 N. W. 801.

<sup>99</sup> State v. Speritus, 90 S. W. 459, 191 Mo. 24.



time was recent, you will have regard to the nature, character, and situation of the goods) that the goods, or any part thereof, were found in the possession of the defendant—the law presumes him guilty of both the burglary and the larceny, and casts upon him the burden of accounting for such possession to the satisfaction of the jury, that he was not the guilty party, or by evidence of the attending circumstances, or by evidence of the character and habits of life of the defendant, or by evidence which satisfactorily explains such possession, as hereafter more fully declared. And unless the jury believe, from all of the evidence in the case, he has so accounted for such possession on one or the other of these modes, you should find him guilty of the burglary charged, and may also, in addition thereto, find him guilty of the larceny, if the goods found in his possession were any of those described in the indictment. You are also instructed that, in determining the guilt or innocence of the defendant, you should take into consideration all of the facts and circumstances detailed in the evidence in reference to his possession of the said goods, and also all the other facts and circumstances shown in evidence, and if, from all the evidence, you believe him guilty beyond a reasonable doubt, as afterwards explained, you should so find. Though you may believe from the evidence that the defendant was found in the recent possession of stolen goods, after the time of the alleged burglary and larceny, the law does not from that fact alone presume him conclusively guilty. It only raises a presumption of guilt, which becomes conclusive if unexplained by the defendant by evidence showing that he was not the guilty party, or by all the attending circumstances accompanying his possession, or by evidence of his good character and habits of life, or by any other facts or circumstances which satisfactorily explain his possession, or show he could not be the guilty party. And in this case, if you believe, from the evidence, \_\_\_\_\_'s store was entered, and certain goods stolen and carried away, and that certain of these goods were recently thereafter found in the possession of the defendant, yet, if you believe either one of the following facts has been shown by the evidence, you will find the defendant not guilty, notwithstanding such recent possession of the stolen property by him: First. That, at the time of the commission of the burglary and larceny (if you believe it was committed by some one), he was not present, either assisting, aiding, or abetting, but that he was elsewhere; that is, if he has established what is termed in law an "alibi." Second. If you believe, from all of the evidence in the case of the attending circumstances surrounding and attending his possession, such possession has been explained. Third. By evidence of the good character and habits of

life of the accused, if you believe from the evidence he has established the same. Fourth. Or if the other evidence in the case satisfactorily explains to you such possession.<sup>1</sup>

§ 1353(6). Texas

You are instructed that, if the defendant was not present when and where the house was broken and the property was taken, if you find it was so broken, but he got the same from some other person, he would not be guilty, and if you so find, or if you have a reasonable doubt thereof, find him not guilty.<sup>2</sup>

The jury are instructed, if they believe from the evidence that the house of ——— was burglariously entered by some person about the time alleged in the indictment, and recently thereafter defendant was found in possession of the property which was situated and contained in the house of ——— at the time it was burglarized, which had been stolen from said house at the time said burglary was committed, if it was, and, when his possession of said property was first questioned, he made an explanation how he came by it, and accounted for his (defendant's) possession in a manner consistent with his innocence, and you believe such explanation is reasonably and probably true, then you should acquit the defendant.<sup>3</sup>

You are instructed if you believe from the evidence that the property alleged to have been stolen from the house of the said ——— was found in the possession of defendant recently thereafter; that, when first accused with the theft of said property found in his possession, if you find that he had the property, he made an explanation of how he came by it, and you further believe that such explanation is reasonable and probably true, and accounted for defendant's possession in a manner consistent with his innocence—then you will acquit defendant, unless, if, on the contrary, you believe such explanation was unreasonable, and did not account for defendant's possession in a manner consistent with his innocence, but the state has shown the falsity thereof, then you will take the possession of defendant, together with his explanation, in connection with all the other facts and circumstances, if any, in evidence, and, if you believe defendant guilty beyond a reasonable doubt, you will so find; otherwise you will acquit.<sup>4</sup>

The jury are instructed that, if you have a reasonable doubt whether the defendant got the property from ——— or from any-

<sup>1</sup> State v. Bryant, 35 S. W. 597, 134 Mo. 246.

<sup>2</sup> Scott v. State, 111 S. W. 657, 53 Tex. Cr. R. 332.

<sup>3</sup> McCoy v. State (Cr. App.) 81 S. W. 46.

<sup>4</sup> Lovelace v. State, 76 S. W. 756, 45 Tex. Cr. R. 261.

body else, other than the ——— residence, then you should acquit him.<sup>5</sup>

You are instructed that, if a defendant makes contradictory or inconsistent or unreasonable statements in regard to his possession, then such inconsistency and unreasonableness are circumstances to be weighed with all the other circumstances, in determining upon the question of his guilt or innocence; and the question whether an explanation is reasonable or unreasonable; if reasonable, whether it is shown to be untrue; and whether the statements, if any are made by a defendant, are consistent with each other,—are questions for the jury.<sup>6</sup>

**§ 1354. Sufficiency of evidence of possession of stolen goods**

You are instructed that if the stolen goods, or any part of them, were found upon premises of which the accused was the tenant, and if it is proved that he was on said premises on the morning next after the alleged offense was committed, the jury may infer that the goods were upon said premises with the knowledge of the accused, and that they were in fact in his possession, unless the circumstances proved are such as to warrant the jury in inferring the contrary.<sup>7</sup>

**§ 1355. Consideration of intoxication of defendant on question of intent**

The jury are instructed that, in order to find the defendant guilty, you must be satisfied from the evidence beyond a reasonable doubt that he intended to steal property from the store, and that the intoxication of the defendant at the time, if he was intoxicated, should be considered by you in determining the intent of defendant.<sup>8</sup>

**§ 1356. Sufficiency of proof of intent**

You are instructed that in the case now before you the prisoner is indicted, not for rape, but for the burglarious breaking and entering a certain dwelling house with intent to commit rape. It is the specific felonious intent to commit rape which constitutes the offense as charged in this indictment. Therefore, the said intent to commit rape on the body of ——— is a material fact alleged by the state, and is as necessary to be proved by the prosecution, to the satisfaction of the jury, beyond a reasonable doubt, as any other essential ingredient of the offense alleged in this indictment, in order to obtain the conviction of the accused in manner and

<sup>5</sup> *Hines v. State* (Cr. App.) 42 S. W. 299.

<sup>6</sup> *Marshall v. State* (Cr. App.) 24 S. W. 25.

<sup>7</sup> *State v. Wright* (Del.) 66 A. 364. 6 Pennewill, 251.

<sup>8</sup> *State v. Conners*, 64 N. W. 295, 95 Iowa, 485.

form as he stands indicted. Such specific, felonious intent may be proved by direct evidence—such as the express confession or declaration of the accused that he committed the alleged burglarious breaking and entering with the intent charged. Such intent or purpose of the accused's mind may also be established by indirect or circumstantial evidence—that is, it may be inferred by the jury from the proven acts and conduct of the prisoner, and the facts and circumstances attending them, which fairly and reasonably indicate the alleged intent to commit a rape, where these are sufficient, viewed in connection with all the evidence in the case, to warrant such an inference and conclusion beyond a reasonable doubt.<sup>9</sup>

### § 1357. Sufficiency of proof of identity of goods stolen

#### § 1357(1). Texas

The jury are instructed that if you have a reasonable doubt whether the property charged to have been stolen and that said to have been found in the house of defendant was the property of ———, you should acquit the defendant.<sup>10</sup>

#### § 1357 (2). West Virginia

The jury are instructed that one of the essential questions involved in this case is the identity of the ——— alleged to have been stolen, and before the jury can convict the prisoner the identity of the ——— must be proven beyond all reasonable doubt.<sup>11</sup>

### § 1358. Effect of confession of theft

The court charges the jury, for the defendant, that a conviction of said defendant will not be warranted alone on the confession of the defendant that he stole the ———. It devolves upon the state to show by satisfactory testimony beyond every reasonable doubt to the jury, not only that the crime of burglary was committed, but also the state must connect the defendant by sufficient evidence with the commission of the crime.<sup>12</sup>

## D. VERDICT

### § 1359. Form of verdict

You are instructed that, although you cannot, under the information, find the defendants, or either of them, guilty of any offense other than burglary, it would be somewhat difficult to furnish you with the complete form of every possible verdict at which, according to your view of the evidence, you may arrive. The court will

<sup>9</sup> State v. Fisher (Del.) 41 A. 208, 1 Pennewill, 303.

<sup>10</sup> Hines v. State (Cr. App.) 42 S. W. 299.

<sup>11</sup> State v. Belknap, 19 S. E. 507, 39 W. Va. 427.

<sup>12</sup> Richardson v. State, 31 So. 544, 80 Miss. 115.

therefore furnish you mere blank forms. Upon one of such forms you will formulate your verdict, and your foreman will sign it. You will be careful to dispose of the whole case, observing that there are two defendants, and if you find either or both of them guilty of burglary you will specify whether in the first or second degree. With proper care, you will probably be able to frame a verdict, but, should you need further instruction, you may request the officer in charge of you to return you to the court room for such instruction.<sup>13</sup>

**E. PROSECUTION FOR HAVING POSSESSION OF BURGLARIOUS  
IMPLEMENTS**

**§ 1360. Requisites of possession to sustain conviction**

The jury are instructed that the government must show that each one of the defendants had possession of these instruments. This does not mean that the government must show that each defendant had his hand on them. It does not mean that each man had them in his own room, the special room that he occupied for that lodging; but if these men were all living there, occupying this apartment in this house, that was their home, and the articles were found in the house, in the home where all the defendants lived, that would be a sufficient possession within the meaning of the indictment.<sup>14</sup>

<sup>13</sup> *People v. Brady*, 65 Pac. 823, 133 Cal. xx.

<sup>14</sup> *Commonwealth v. Johnson*, 85 N. E. 188, 199 Mass. 55.

## CHAPTER LXXXIII

## CANCELLATION OF INSTRUMENTS

- § 1361. Grounds.
- 1362. Cancellation on ground of fraud.
  - 1362(1). Indiana.
  - 1362(2). Texas.
- 1363. Cancellation on ground of undue influence.
- 1364. Deed given in consideration of support of grantor.
- 1365. Deed obtained by defendant from custody of depositary without consent of grantor.
- 1366. Right of grantor to assert ignorance of contents of deed.
- 1367. Fraudulently inducing mistaken belief as to character of instrument acknowledged.
- 1368. Conditions precedent to cancellation—Restoration of statu quo.
- 1369. Relief awarded.

## § 1361. Grounds

The court instructs the jury that it appears in this case that the plaintiff, at the time he bought the ——— acre tract, paid nothing on the purchase price, and up to ———, had not reduced the amount due. Therefore, if the jury shall find that, at the expiration of the ——— years, the plaintiff went to the defendant and asked him to take the land back and cancel the debt and sell him a smaller tract, and that, in pursuance of this request by plaintiff, the defendant, without fraud or oppression, agreed to take back this ——— acres and cancel the debt, amounting to more than the purchase price, and that the debt then due was a full and reasonable value, and he further agreed to sell him ——— acres on ——— years' time, and that in pursuance of the request of plaintiff, and without any coercion on the part of defendant, this agreement was carried out, then there would be nothing unfair in the transaction, and you will answer the issue, "No."<sup>1</sup>

## § 1362. Cancellation on ground of fraud

## § 1362(1). Indiana

The jury are instructed that, if you believe from the evidence that the representation charged and relied upon as false and fraudulent was that the plaintiff was indebted to the defendant in a certain sum, and the plaintiff was in fact so indebted, then your finding must be for the defendant on the question of fraud. This will be so, even although the defendant may have by mistake wrongly stated the items, or some of the items, which formed the consideration of such alleged debt.<sup>2</sup>

<sup>1</sup> Alford v. Moore, 77 S. E. 343, 161 N. C. 382.

<sup>2</sup> Adams v. Stringer, 78 Ind. 175.

## § 1362(2). Texas

You are instructed that if the defendant, at the time he secured said deed from ———, dated ———, promised and represented to her (if you find from the preponderance of the evidence that he made such promises and representations) that he would pay her the sum of \$——— cash upon her execution of the deed to him of the corner lot No. ———, and did so with the design of cheating and deceiving said ——— and had the intention at the time of not paying the said \$——— at that time or any other time in the future, but merely used such promises and representations, if any, as a false pretense, if any, to induce the said ——— to execute said deed, and if the said ——— relied upon such promises and representations at the time, if any, and executed the said deed, and would not have executed the said deed had such promises and representations, if any, not been made to her, and if she had not believed the same, if you find she did believe same, and if you find that the said \$——— was not paid, then you will find for the plaintiff for both of said lots.<sup>3</sup>

## § 1363. Cancellation on ground of undue influence

The court instructs the jury that undue influence is a fraudulent influence, overruling or controlling the mind of the person operated upon, the fraudulent influence by which the will of the maker of an instrument (that is, in this case, the will of ———) is perverted from its free exercise, and there is sustained injury, and the will of the influencing party substituted for it. Did the defendant, ———, possess over ———, his brother, an undue influence as defined by the court? And, if so, did he make a fraudulent use of it, and thereby procure the deed of ———? Did the defendant possess and exert a fraudulent influence over ——— sufficient to destroy or pervert free agency in him, so that the act of executing the deed was the result of the domination of the mind of the defendant rather than the expression of the will and mind of ———?<sup>4</sup>

## § 1364. Deed given in consideration of support of grantor

The court instructs the jury that you are to take into consideration all the facts and circumstances which surrounded ———, the deceased. If you find that he didn't take any steps to create a forfeiture, although there was a willful refusal to comply with the conditions in this deed, see whether or not that failure to take advantage of such refusal was due to his inability, mentally or physically; if the circumstances surrounding him were such as to keep him from asserting his rights under the deed. You are

<sup>3</sup> Wyatt v. Chambers (Civ. App.)  
182 S. W. 16.

<sup>4</sup> Myatt v. Myatt, 62 S. E. 887, 149  
N. C. 137.



to look to the evidence to see whether or not he had a desire to do that. If he had no desire to do it, why then the plaintiff couldn't recover. If you find from the facts and circumstances in the evidence that he did have a desire to do it, but by reason of his physical or mental condition, or both, he was unable to do it, why then, gentlemen of the jury, she, his administratrix, would not be precluded from bringing suit in this case; and if you find under those circumstances that the support was an inadequate one, and that he didn't acquiesce in it or waive his right under it, and was prevented from creating the forfeiture or acting upon the clause which would create the forfeiture, why, then, her right would be the same as his right, and she would have the right to have the deed to ——— annulled.<sup>5</sup>

**§ 1365. Deed obtained by defendant from custody of depository without consent of grantor**

The jury are instructed that, if you believe from the evidence before you that the plaintiff executed the deed described in his petition, and that he placed the same in the possession of R., to be placed with other papers and documents belonging to plaintiff in the ——— Bank of ——— for safe-keeping, and that at the time plaintiff placed said deed in the custody of R., he did not intend to surrender control and dominion over said deed, and that defendant obtained possession of said deed without the knowledge or consent of plaintiff, then you should find a verdict for the plaintiff.<sup>6</sup>

**§ 1366. Right of grantor to assert ignorance of contents of deed**

You are instructed that, if you find from the evidence that at the time of the execution of the quitclaim deed introduced in evidence purporting to have been executed by the plaintiff on ———, the plaintiff accompanied one L., who was then and there acting for the defendant, to the office of one ———, a justice of the peace in and for said county, and the said L. then and there, in the presence and hearing of the said plaintiff, stated to said justice that he had brought the plaintiff there to sign and acknowledge a deed and wanted him to take an acknowledgment thereof, and that the plaintiff did thereupon, under the direction of said justice of the peace, knowingly and voluntarily sign said deed and acknowledge the same and deliver or permit the same to be delivered to said L. for the defendant, and that the plaintiff then and there received from said L. the sum of \$——— in consideration of the execution of said deed. and has ever since retained said consideration, the plaintiff will not now be heard to say that she did not know the character and

<sup>5</sup> *Gropver v. Wilkes*, 98 S. E. 503, 148 Ga. 794.

<sup>6</sup> *Gatt v. Shive* (Tex. Civ. App.) 82 S. W. 303.

contents or nature of the instrument, executed there, unless you should further find that she was prevented from reading the same or having some other party read the same to her or acquaint her with the contents because of some act or omission of the said L.<sup>7</sup>

**§ 1367. Fraudulently inducing mistaken belief as to character of instrument acknowledged**

The court instructs the jury that, if you believe from the evidence that the defendant in this action of ejectment, requested the plaintiff to go with him on ——— to ———'s office to have her will completed or corrected, and she went with him to said office at that time, and that she did not know that the paper she is said to have signed that day was a deed and not a will, you must find for plaintiff.<sup>8</sup>

**§ 1368. Conditions precedent to cancellation—Restoration of statu quo**

The jury are instructed that, in order to warrant the plaintiff to rescind, he must have acted promptly upon the discovery of the misrepresentations, if any, so made, and should thereupon have tendered and offered to reconvey the land back to the defendants, and offered to restore them to the same position they were in before the sale of the land to the plaintiff. If you find that he did not offer to restore the land upon discovering the land was not in the condition as represented, if in fact it was not as represented, or if you shall find that there were misrepresentations as to its quality and kind, made to plaintiff by defendant when he sold the land to plaintiff, and upon learning of such misrepresentations the plaintiff did not, within a reasonable time, offer to restore the same and reconvey, then you should find against the plaintiff on the question of rescinding the sale, unless you shall find that the defendant refused to do anything with reference to accepting back the land or possession thereof; and in case you so find, under such circumstances, then plaintiff was not required to make such tender.<sup>9</sup>

**§ 1369. Relief awarded**

The jury are instructed that, if you find that plaintiff, under the facts and charge given you, is entitled to a rescission, then you should return a verdict for the plaintiff for a rescission, canceling all the notes executed by him, and for the cash consideration paid by him, as against ———, with ——— per cent. interest per annum from date of such payment.<sup>10</sup>

<sup>7</sup> Kemery v. Zeigler, 109 N. E. 774, 184 Ind. 144.

<sup>8</sup> Butler v. Hill, 67 So. 260, 190 Ala. 576.

<sup>9</sup> Hagelstein v. Blaschke (Tex. Civ. App.) 149 S. W. 718.

<sup>10</sup> Hagelstein v. Blaschke (Tex. Civ. App.) 149 S. W. 718.

## CHAPTER LXXXIV

## CARRIERS

## A. CARRIERS OF GOODS

1. *Who are Common Carriers of Goods*

§ 1370. Definition.

2. *Duty to Furnish Cars*

1371. Duty to furnish on request.

1372. Character of duty.

1373. Sufficiency of compliance with demand for cars.

1374. Excuses for failure to furnish.

1374(1). Arkansas.

1374(2). South Carolina.

1375. Contributory negligence of shipper.

1376. In whom cause of action, for damages for failure to furnish, exists.

1377. Burden of proof.

1378. Measure of damages for failure to furnish.

3. *Special Contracts to Furnish Cars*

1379. Liability for breach.

1380. Measure of damages for breach—Loss of profits.

4. *Scope of Liability for Loss or Injury of Goods*

1381. Liability in absence of contract limiting it.

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1381(2). Kentucky.

1382. Duty to deliver goods in as good condition as when received.

1383. Losses due to act of God.

1384. Act of God concurring with negligence of carrier.

1385. Validity of limitation of liability by special contract.

1385(1). Alabama.

1385(2). Delaware.

1385(3). Nebraska.

1385(4). West Virginia.

1386. Sufficiency of contract to limit liability.

5. *Delivery of Goods to Carrier and Acceptance Thereof*

1387. Sufficiency of delivery to charge carrier as such, with liability.

6. *Duty as to Transportation*

1388. Right of carrier to transport goods over usual and customary route.

1389. Failure to furnish refrigerator cars.

1390. Failure to ice.

1390(1). Arkansas.

1390(2). Michigan.

1391. Negligence of shipper.

7. *Liability for Delay in Transportation or Delivery of Goods*

1392. Duty to carry on first train.

1393. Duty of carrier to notify shipper of inability to forward goods promptly.

1394. Delay as proximate cause of injury to goods—Extraordinary flood.

1395. Same—Destruction of goods by fire following negligent delay of carrier to forward.

**8. *Final Delivery***

- § 1396. Sufficiency of delivery to consignee to terminate liability of carrier as such.  
1396(1). Missouri.  
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1397. Liability for misdelivery.  
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1397(2). Oregon.  
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1398. Ratification by shipper of delivery.
1399. Release of claim for wrongful delivery.
1400. Liability of carrier as for conversion on failure to deliver goods.
1401. Same—Right of carrier to require surrender of bill of lading on delivery of goods.
1402. Same—Effect of conditional offer by shipper to pay charges.
1403. Same—Effect of subsequent tender of goods by carrier.
1404. Liability for wrongful sale of goods to pay charges.

**9. *Liability of Connecting Carrier.***

1405. Liability on through contract.
1406. Liability of initial carrier for damages occurring on connecting line.
1407. Limitation of liability of connecting carrier to its own line.  
1407(1). Iowa.  
1407(2). Missouri.
1408. Duty with respect to perishable goods.
1409. Presumption as to when injury occurred.
1410. Burden of proof as to cause of damage.

**10. *Custody of Goods Before and After Transportation***

1411. Whether liable as carrier or warehouseman—Effect of custom.
1412. When liability of express company as carrier with respect to money package ceases—Duty of consignee to receive.
1413. Degree of care required to be exercised as custodian or warehouseman.

**11. *Claims for Damages and Notice of Loss***

1414. Penalty for delaying in settling.
1415. Time of presenting claim for damages.
1416. Waiver of provision with respect to giving notice of loss.

**12. *Evidence in Actions for Loss or Injury of Goods***

1417. Presumptions and burden of proof.  
1417(1). Colorado.  
1417(2). Minnesota.  
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1418. Presumption as to condition of goods when received by carrier.
1419. Same—Effect of recitals in bill of lading.  
1419(1). Georgia.  
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**13. *Measure of Damages for Loss, Injury or Delay***

1420. Measure of damages for loss or injury.  
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1421. Same—Where no market value.
1422. Liability for special damages on account of delay—Necessity of notice to carrier of special circumstances.
1423. Measure of damages for delay in giving notice of nondelivery of goods.

- § 1424. Duty of shipper to mitigate damages from delay.  
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#### 14. *Freight Charges*

1426. Effect of contract for rate less than rates filed with Interstate Commerce Commission.  
1427. Liability to shipper for discrimination.  
1428. Sale of goods to satisfy charges—Right of carrier on consignee's refusal to pay.

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1429. Sufficiency of delivery to carrier to charge it with liability.  
1430. Scope of liability of carrier in general.  
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1430(2). Texas.  
1431. Liability for injuries in transit.  
1432. Liability for injuries due to inherent propensities of animals.  
1433. Strength and suitability of cars furnished to transport live stock.  
1434. Duty with respect to condition of stock yards or pens.  
1435. Duty to feed and water stock or to afford facilities therefor.  
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1435(2). Missouri.  
1435(3). New Mexico.  
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1437. Liability for negligence with respect to dipping cattle.  
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1439. Concealment by shipper of conditions requiring greater vigilance by carrier.  
1440. Duty of shipper with respect to loading.  
1441. Liability for delay in transportation.  
1441(1). Iowa.  
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1442. Duty of carrier to deliver on particular market day.  
1442(1). Iowa.  
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1443. Duty to transport within reasonable time.  
1444. Excuse for delay—Pressure of business.  
1445. Act of God as excuse for delay—Conditions existing at time of accepting stock for shipment.  
1446. Duty of carrier pending delay.  
1447. Presumption of negligence from fact of injuries.  
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1449. Measure of damages for injury or loss.  
1449(1). Delaware.  
1449(2). Indian Territory.  
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1449(4). Texas.  
1450. Measure of damages for delay in shipment or failure to transport.  
1450(1). Iowa.

- 1450(2). Kentucky.
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§ 1451. Evidence of damage—Price brought at sale.

### C. CARRIERS OF PASSENGERS

#### 1. *Existence of Relation of Carrier and Passenger*

- 1452. Liability as dependent on whether plaintiff a passenger or a trespasser.
- 1453. Inception of relation—Relation between carrier and intending passenger arriving before train time.
- 1454. Place of getting on board.
  - 1454(1). United States.
  - 1454(2). South Carolina.
- 1455. Necessity of knowledge by carrier of attempt to become passenger.
- 1456. Necessity of entering train.
- 1457. Effect of response, or apparent response, by carrier to signal to stop.
  - 1457(1). Michigan.
  - 1457(2). Virginia.
- 1458. Necessity of intention to pay fare.
  - 1458(1). Missouri.
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- 1460. Effect of entering car with ticket.
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- 1462. Status of ejected passenger attempting to reenter car.
- 1463. When relation ceases—Reasonable time for getting off at destination.
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- 1465. Same—Persons riding on platform.
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- 1466. Recalling invitation to enter street car.
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  - 1467(1). Oklahoma.
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- 1468. Persons accompanying stock.
- 1469. Duty towards mail clerk.
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- 1471. Duty to receive passengers.
- 1472. Liability for refusal to issue transfer.
- 1473. Liability for breach of contract to carry at certain price.
- 1474. Liability for negligence in making representations as to best route.
- 1475. Duty to discharge passenger at destination—Right to operate some trains which do not stop at every station.
- 1476. Duty of passenger to observe requirements as to changing cars.

- § 1477. Liability for putting passenger off at other than regular stopping place.**
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  - 1478(1). Alabama.**
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- 1479. Liability for negligently selling ticket to wrong destination.**
- 1480. Obligation of carrier to transport beyond terminus of its own line.**
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- 1482. Same—Duty to passenger who fails to act on announcement of his station.**
- 1483. Same—Defense that passenger misled conductor.**
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- 1485. Liability for delay in transportation.**
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- 1488. Measure of damages for carrying beyond destination.**
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- 1491. Wrongfully requiring passenger to ride in coach set apart for members of another race.**
- 1492. Same—Damages.**
- 1493. Duty towards passenger having custody of another .**
- 1494. Disorderly conduct as ground for ejection.**
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- 1495. Nonpayment of fare as ground for ejection.**
- 1496. Same—Failure to pay fare of third person.**
- 1497. Same—Right of purchaser from another ticket holder of nontransferable ticket.**
- 1498. Same—Threatening to put passenger off.**
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- 1500. Duty of passenger to surrender ticket—Right to retain where carrier refuses accommodations to which ticket entitles holder.**
- 1501. Duty of passenger to present ticket in reasonable time.**
- 1502. Right of passenger who has furnished ticket.**
- 1503. Ejection for refusal of passenger to observe rules as to identification.**
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- 1505. Passenger given wrong ticket through fault of ticket agent.**
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- § 1511. Same—Use of abusive language or more force than necessary.  
1511(1). Illinois.  
1511(2). Missouri.  
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1512. Same—Duty towards drunken passenger.
1513. Liability for injuries to bystanders resulting as incident to act of ejecting passenger.
1514. Gist of action for wrongful ejection—Necessity of showing willfulness.
1515. Burden of proof in action for wrongful ejection.
1516. Damages for wrongful expulsion.  
1516(1). Alabama.  
1516(2). Florida.  
1516(3). Illinois.  
1516(4). Kentucky.  
1516(5). North Carolina.  
1516(6). South Carolina.  
1516(7). Texas.
1517. Damages for wrongfully taking up ticket which carrier refuses to honor.
1518. Proximate cause of damages.
1519. Duty of passenger to mitigate damages.
1520. Exemplary damages.  
1520(1). Illinois.  
1520(2). Missouri.  
1520(3). South Carolina.  
1520(4). West Virginia.  
1520(5). Wisconsin.

**D. LIABILITY FOR PERSONAL INJURIES TO PASSENGERS OR PERSONS ACCOMPANYING OR MEETING THEM**

**1. Scope of Liability in General**

1521. Carrier not an insurer.  
1521(1). Arkansas.  
1521(2). Missouri.  
1521(3). Texas.  
1521(4). Utah.
1522. Unavoidable accident.  
1522(1). Delaware.  
1522(2). Illinois.  
1522(3). Kentucky.  
1522(4). Missouri.
1523. Liability for negligent acts of employees.  
1523(1). Indiana.  
1523(2). Oklahoma.  
1523(3). Texas.

**2. Degree of Care Required to Protect Passenger from Injury**

1524. Rules as to degree of care stated.  
1524(1). United States.  
1524(2). Alabama.  
1524(3). Arkansas.  
1524(4). Colorado.  
1524(5). Connecticut.  
1524(6). Delaware.  
1524(7). Georgia.  
1524(8). Illinois.  
1524(9). Indiana.

- 1524(10). Iowa.
- 1524(11). Kansas.
- 1524(12). Kentucky.
- 1524(13). Maryland.
- 1524(14). Minnesota.
- 1524(15). Missouri.
- 1524(16). Nevada.
- 1524(17). Oklahoma.
- 1524(18). Oregon.
- 1524(19). South Carolina.
- 1524(20). Texas.
- 1524(21). Virginia.
- 1524(22). Washington.
- 1524(23). West Virginia.
- 1524(24). Wisconsin.

§ 1525. Care required with respect to children.

### 3. *Right of Carrier to Limit Liability for Negligence*

- 1526. Gross negligence.
- 1527. Persons riding on passes—Pass given as part consideration for services rendered.

### 4. *Care Required with Respect to Particular Instrumentalities of Conveyance*

- 1528. Steam railroads.
- 1529. Emigrant car.
- 1530. Freight train.
  - 1530(1). United States.
  - 1530(2). Arkansas.
  - 1530(3). Indiana.
  - 1530(4). Kansas.
  - 1530(5). South Carolina.
  - 1530(6). Texas.
- 1531. Logging train.
- 1532. Mixed trains.
  - 1532(1). United States.
  - 1532(2). Arkansas.
  - 1532(3). Kentucky.
  - 1532(4). North Carolina.
  - 1532(5). Oklahoma.
- 1533. Street cars.
  - 1533(1). New Jersey.
  - 1533(2). Texas.
- 1534. Horse railroads.
- 1535. Stagecoaches.
  - 1535(1). Kansas.
  - 1535(2). Missouri.
- 1536. Elevators.
  - 1536(1). Indiana.
  - 1536(2). Nebraska.
  - 1536(3). Virginia.
- 1537. Freight elevators.
  - 1537(1). Alabama.
  - 1537(2). Missouri.
- 1538. Same—Permitting trucks to be carried in car with passenger.

### 5. *Care Required in Selection of Servants*

- 1539. Employment of unfit elevator operator.

### 6. *Duty to Care for, Assist, and Protect Passengers*

- 1540. Duty to render personal attention and services.

- § 1541. Duty to sick passenger or one under disability.  
1541(1). Texas.  
1541(2). Virginia.  
1541(3). Washington.
1542. Duty to pregnant woman.
1543. Duty to persons of unsound mind.
1544. Duty to protect passengers from violence or insult.  
1544(1). Alabama.  
1544(2). Nevada.
1545. Duty to protect passenger from wrongful arrest.
1546. Liability for acts of police officer in connection with making arrest.
1547. Duty to protect from injury by fellow passengers.  
1547(1). Kentucky.  
1547(2). Maryland.  
1547(3). Texas.
1548. Failure to enforce separate coach law as proximate cause of assault on passenger.

*7. Care Required as to Safety of Premises*

1549. Defects in platform and approaches to station.  
1549(1). Arkansas.  
1549(2). Missouri.  
1549(3). West Virginia.
1550. Duty to provide lights and railings.  
1550(1). Kentucky.  
1550(2). Missouri.  
1550(3). Virginia.  
1550(4). Wisconsin.
1551. Care required in operation of trains or cars at station or place of boarding or alighting.  
1551(1). Iowa.  
1551(2). Kentucky.  
1551(3). Michigan.  
1551(4). Missouri.

*8. Care Required with Regard to Safety of Roadbed and Equipment*

1552. Degree of care required and duty of inspection in general.  
1552(1). Delaware.  
1552(2). Iowa.  
1552(3). Kentucky.  
1552(4). Maryland.  
1552(5). Michigan.  
1552(6). Missouri.  
1552(7). Texas.  
1552(8). Virginia.
1553. Latent defects.  
1553(1). California.  
1553(2). Maryland.
1554. Duty with respect to roadbed and track.  
1554(1). Kentucky.  
1554(2). Oklahoma.
1555. Duty with respect to keeping ties in sound condition.
1556. Duty with respect to rails.
1557. Defective trestle.
1558. Duty to guard against obstruction of track.
1559. Injury of passenger by objects near track.
1560. Care required in construction of cars.
1561. Defective brakes.
1562. Defects in heating apparatus.

- § 1563.** Care required as to steps, running board, etc.
  - 1563(1). Delaware.
  - 1563(2). Texas.
- 1564.** Same—Grease or other slippery material.
  - 1564(1). Missouri.
  - 1564(2). Texas.
- 1565.** Snow and ice on steps or platform.
  - 1565(1). Kentucky.
  - 1565(2). Utah.
- 1566.** Safety of aisles and passageways of cars.
- 1567.** Same—Banana peeling.
- 1568.** Duty as to furnishing safe seats.
- 1569.** Duty as to car belonging to another company.
- 1570.** Duty as to equipment of elevators.
  - 1570(1). California.
  - 1570(2). Missouri.
- 1571.** Same—Equipment of elevator shaft.
- 1572.** Same—Violation of statute.
- 1573.** Obstructions placed on track by persons not connected with carrier.
- 1574.** Liability for acts of independent contractor.

#### *9. Taking on Passengers*

- 1575.** Duty of carrier in general.
- 1576.** Duty of carrier where passengers required to go between tracks to enter cars.
- 1577.** Duty to give passenger time to procure ticket.
- 1578.** Duty of conductor, when starting car, to know that no one is seeking to enter.
  - 1578(1). Massachusetts.
  - 1578(2). Minnesota.
- 1579.** Duty to afford reasonable opportunity to board car.
  - 1579(1). Arkansas.
  - 1579(2). Kentucky.
  - 1579(3). Michigan.
  - 1579(4). Missouri.
  - 1579(5). Texas.
- 1580.** Suddenly starting car while passenger getting on.
  - 1580(1). California.
  - 1580(2). Colorado.
  - 1580(3). Delaware.
  - 1580(4). Illinois.
  - 1580(5). Kentucky.
  - 1580(6). Michigan.
  - 1580(7). Missouri.
  - 1580(8). Oregon.
  - 1580(9). Virginia.
  - 1580(10). Wisconsin.
- 1581.** Same—Negligence of motorman in starting car without signal.
- 1582.** Same—Unauthorized signal to start train.
- 1583.** Duty to passenger incumbered with parcels.
- 1584.** Duty as to passenger attempting to board moving car.
  - 1584(1). Kentucky.
  - 1584(2). Missouri.
  - 1584(3). Oklahoma.
  - 1584(4). Texas.
- 1585.** Misleading passenger into attempt to board moving car.
  - 1585(1). Missouri.
  - 1585(2). Wisconsin.
- 1586.** Duty to prevent getting on while train in motion.
- 1587.** Requirements of ordinance as to time and place of stopping cars.

- § 1588. Closing door on passenger's foot.  
1589. Duty to give passenger opportunity to reach place of safety on car.  
1589(1). Michigan.  
1589(2). Missouri.  
1590. Care required while passenger going to seat.  
1590(1). Kentucky.  
1590(2). Washington.  
1591. Injuries caused in attempting to regulate time or method of entering train.  
1592. Injuries caused in attempting to exclude intoxicated passenger.  
1593. Duty to persons accompanying passengers for purpose of assistance.

10. *Care Required in Management and Operation to Prevent Injuries in Transit*

1594. Degree of care required in general.  
1594(1). Alabama.  
1594(2). Arkansas.  
1594(3). Indiana.  
1594(4). Missouri.  
1594(5). Nebraska.  
1594(6). Washington.  
1595. Liability for unauthorized acts of strangers.  
1595(1). United States.  
1595(2). Virginia.  
1596. Duty to avoid alarming passenger.  
1597. Duty to avoid collision with other vehicles.  
1597(1). California.  
1597(2). Missouri.  
1597(3). Texas.  
1598. Same—Collision with steam roller.  
1599. Care required from street car company on crossing tracks of another company.  
1600. Speed as negligence.  
1600(1). Indiana.  
1600(2). Iowa.  
1600(3). South Carolina.  
1600(4). Texas.  
1601. Duty to avoid sudden jerks and jars.  
1601(1). Kentucky.  
1601(2). Missouri.  
1601(3). Texas.  
1602. Same—Jar or jerk resulting from coupling car with another car.  
1603. Same—Freight train.  
1604. Same—Mixed trains.  
1605. Duty on down grade.  
1606. Open switch.  
1607. Duty to make provision for the accommodation and control of periodical large crowds.  
1608. Duty to passengers on crowded train or car.  
1608(1). United States.  
1608(2). Texas.  
1609. Care required as to passengers standing on platform or steps.  
1609(1). Alabama.  
1609(2). Florida.  
1609(3). Washington.  
1610. Same—Starting car suddenly from a standstill.  
1611. Duty towards passenger on running board of street car.  
1612. Compelling passenger to ride in dangerous position because of overcrowding.

- § 1613. Care required as to passenger riding on platform because of overcrowding or failure to furnish seats.
  - 1613(1). Alabama.
  - 1613(2). Texas.
- 1614. Duty to prevent passengers from riding on platform or steps.
- 1615. Injuries occurring from failure of carrier to perform duty to provide separate coaches for white and negro passengers.
- 1616. Injuries caused by catching arm in door jamb.
- 1617. Leaving trapdoor in vestibule open.
- 1618. Duty to avoid exposing passenger to injury from objects near track.
  - 1618(1). Alabama.
  - 1618(2). Illinois.
  - 1618(3). Missouri.
- 1619. Duty to warn passengers concerning possible dangers.
- 1620. Duty as to passengers leaving train en route for lunch or other business purposes.
  - 1620(1). United States.
  - 1620(2). Texas.
- 1621. Duty to passenger going from one car to another to find a seat.
- 1622. Duty to passenger in street car attempting to transfer to another car.
  - 1622(1). Michigan.
  - 1622(2). Missouri.
- 1623. Duty to passenger who has taken wrong train through fault of carrier.
- 1624. Duty to persons accompanying stock.
  - 1624(1). United States.
  - 1624(2). Missouri.
  - 1624(3). Texas.
- 1625. Collision with frightened horse attached to vehicle.
- 1626. Duty to anticipate unusual occurrence—Acts in emergencies.

#### 11. *Setting Down Passengers*

- 1627. Degree of care required in general.
  - 1627(1). Colorado.
  - 1627(2). Delaware.
  - 1627(3). Florida.
  - 1627(4). Indiana.
  - 1627(5). Kentucky.
  - 1627(6). Michigan.
  - 1627(7). Missouri.
  - 1627(8). Texas.
- 1628. Duty to set down safely at point of destination.
  - 1628(1). Indiana.
  - 1628(2). Oregon.
- 1629. Duty not to mislead passenger as to time and place of getting off.
  - 1629(1). Arkansas.
  - 1629(2). Michigan.
  - 1629(3). Oregon.
- 1630. Inducing or misleading passenger to alight while car in motion.
  - 1630(1). Delaware.
  - 1630(2). Kentucky.
  - 1630(3). Missouri.
  - 1630(4). Oklahoma.
- 1631. Stopping car as an invitation to alight.
- 1632. Duty to give reasonable opportunity to get off.
  - 1632(1). Arkansas.
  - 1632(2). Delaware.
  - 1632(3). Florida.
  - 1632(4). Indiana.
  - 1632(5). Mississippi.

- 1632(6). Missouri.
- 1632(7). Montana.
- 1632(8). Nebraska.
- 1632(9). Pennsylvania.
- 1632(10). South Carolina.
- 1632(11). Texas.
- 1632(12). Washington.
- § 1633. Duty to announce station.
  - 1633(1). Florida.
  - 1633(2). Kentucky.
  - 1633(3). Wyoming.
- 1634. Duty, after stopping, to give passenger notice of all movements of car or train.
- 1635. Suddenly starting car while passenger alighting.
  - 1635(1). Arkansas.
  - 1635(2). California.
  - 1635(3). Delaware.
  - 1635(4). Florida.
  - 1635(5). Indiana.
  - 1635(6). Kentucky.
  - 1635(7). Massachusetts.
  - 1635(8). Michigan.
  - 1635(9). Missouri.
  - 1635(10). Nebraska.
  - 1635(11). North Carolina.
  - 1635(12). Oregon.
  - 1635(13). Texas.
  - 1635(14). Virginia.
  - 1635(15). Washington.
- 1636. Same—Duty of conductor, on receiving starting signal from flagman to avoid injury to alighting passenger.
- 1637. Same—Starting signal given by outsider.
  - 1637(1). Missouri.
  - 1637(2). Rhode Island.
- 1638. Duty of carrier after giving reasonable opportunity to leave car.
  - 1638(1). United States.
  - 1638(2). Florida.
  - 1638(3). Indiana.
  - 1638(4). Mississippi.
  - 1638(5). Missouri.
  - 1638(6). Texas.
  - 1638(7). Wyoming.
- 1639. Same—Duty of carrier as dependent upon knowledge that passenger is alighting.
- 1640. Duty as to passenger going on platform while train in motion for purpose of alighting.
  - 1640(1). Missouri.
  - 1640(2). Texas.
- 1641. Suddenly starting or jerking train or car after slowing down and while passenger on platform for purpose of alighting.
  - 1641(1). Illinois.
  - 1641(2). Kentucky.
  - 1641(3). Texas.
- 1642. Duty as to person getting off while train in motion.
  - 1642(1). Mississippi.
  - 1642(2). Missouri.
- 1643. Duty to prevent passenger from getting off moving car.
- 1644. Mutual mistake of passenger and conductor.
- 1645. Duty to set down passengers at suitable and safe place.
  - 1645(1). Alabama.
  - 1645(2). Arkansas.



- 1645(3). Georgia.
- 1645(4). Illinois.
- 1645(5). Maryland.
- 1645(6). Michigan.
- 1645(7). Missouri.
- 1645(8). New Hampshire.
- 1645(9). Texas.
- 1645(10). Virginia.
- 1646. Same—Passenger on freight train.
- 1647. Care required where stop is made at unusual stopping place.
- 1648. Duty to passengers getting off at other places than station.
- 1649. Duty with respect to steps or stepping stools.
  - 1649(1). Iowa.
  - 1649(2). Texas.
- 1650. Duty to assist passengers in alighting.
- 1651. Duty to assist passengers under disability.
  - 1651(1). Maryland.
  - 1651(2). South Carolina.
- 1652. Same—Notice of disability.
- 1653. Duty to assist passenger incumbered with parcels.
- 1654. Effect of undertaking by outsiders to assist passengers to alight.
- 1655. Duty to passenger re-entering train to get baggage.
- 1656. Care required not to injure passenger after alighting.
- 1657. Same—Rate of speed.
  - 1657(1). California.
  - 1657(2). North Carolina.
- 1658. Instructions summing up matters from carrier's standpoint.
- 1659. General instruction covering both sides of case.

## 12. *Proximate Cause of Injuries*

- 1660. Necessity of showing that negligence of carrier caused injuries.
  - 1660(1). Alabama.
  - 1660(2). Arkansas.
  - 1660(3). Delaware.
  - 1660(4). Maryland.
  - 1660(5). Oklahoma.
  - 1660(6). Texas.
- 1661. Defective equipment as proximate cause of accident.
  - 1661(1). Kentucky.
  - 1661(2). Michigan.
  - 1661(3). Missouri.
  - 1661(4). Texas.
- 1662. Same—Unprecedented bad weather co-operating with neglect of duty to keep roadbed in repair.

## 13. *Contributory Negligence of Passenger*

- 1663. Degree of care required in general.
  - 1663(1). Delaware.
  - 1663(2). Illinois.
  - 1663(3). Indiana.
  - 1663(4). Kentucky.
  - 1663(5). Maryland.
  - 1663(6). Missouri.
  - 1663(7). Texas.
  - 1663(8). Washington.
  - 1663(9). Wisconsin.
- 1664. Care required of passenger in approaching station.

- § 1665. Duty to look and listen on approaching train for purpose of becoming passenger.  
1665(1). Kansas.  
1665(2). Kentucky.
1666. Implied invitation to cross tracks to board car.
1667. Care required in boarding car.
1668. Withdrawing from one car to enter another.
1669. Boarding train or car while in motion.  
1669(1). California.  
1669(2). Illinois.  
1669(3). Kentucky.  
1669(4). Missouri.  
1669(5). Oklahoma.  
1669(6). Oregon.  
1669(7). Texas.  
1669(8). Virginia.
1670. Taking overcrowded train.
1671. Care required of passenger while in transit.  
1671(1). United States.  
1671(2). Kentucky.  
1671(3). Missouri.  
1671(4). Ohio.  
1671(5). Oklahoma.
1672. Taking position attended with greater danger than other parts of vehicle of transportation.
1673. Same—Voluntary surrender of seat to other passengers.
1674. Occupying place not intended for passengers.  
1674(1). Arkansas.  
1674(2). Kentucky.
1675. Standing on platform or steps.  
1675(1). Delaware.  
1675(2). Florida.  
1675(3). South Carolina.  
1675(4). Texas.  
1675(5). Washington.
1676. Getting on running board of street car.
1677. Care required from passenger taking position on inner footboard of street car.
1678. Standing on platform in violation of rule of carrier.  
1678(1). Massachusetts.  
1678(2). Nebraska.
1679. Leaving safe place to go out on platform.
1680. Going upon platform while train stopping at intermediate station.
1681. Resting arm on window sill.
1682. Leaning out from, or projecting part of body from, car.  
1682(1). District of Columbia.  
1682(2). Iowa.  
1682(3). Missouri.
1683. Passing from one car to another.  
1683(1). Illinois.  
1683(2). Virginia.
1684. Attempt to go from one car to another to find a seat.
1685. Going from one car to another to get drinking water.
1686. Care required from passengers on freight train.
1687. Care required from passenger on mixed train.
1688. Care required from passenger on freight elevator.
1689. Care required in movements preparatory to alighting.  
1689(1). Alabama.  
1689(2). Arkansas.  
1689(3). California.  
1689(4). Colorado.  
1689(5). Delaware.

- § 1690. Care required in alighting.
  - 1690(1). California.
  - 1690(2). Delaware.
  - 1690(3). Iowa.
  - 1690(4). Kentucky.
  - 1690(5). Missouri.
  - 1690(6). Texas.
- 1691. Getting off while incumbered with grips or parcels.
- 1692. Leaving train or car while in motion.
  - 1692(1). Alabama.
  - 1692(2). Arkansas.
  - 1692(3). California.
  - 1692(4). Colorado.
  - 1692(5). Delaware.
  - 1692(6). Indiana.
  - 1692(7). Kentucky.
  - 1692(8). Michigan.
  - 1692(9). Missouri.
  - 1692(10). Montana.
  - 1692(11). Nebraska.
  - 1692(12). New York.
  - 1692(13). Oklahoma.
  - 1692(14). Texas.
  - 1692(15). Wisconsin.
- 1693. Same—Passenger incumbered with bundles.
- 1694. Getting off car at unusual or improper place.
  - 1694(1). Alabama.
  - 1694(2). Illinois.
  - 1694(3). Missouri.
- 1695. Leaving train on opposite side from station.
- 1696. Duty of passenger to observe method of operating car.
- 1697. Acts in obedience to direction of trainmen.
- 1698. Boarding, or alighting from, moving car at direction of trainman.
  - 1698(1). Delaware.
  - 1698(2). Iowa.
- 1699. Taking unsafe position at direction of trainman.
- 1700. Injuries resulting from needless attempt of passenger to avoid injury.
- 1701. Same—Jumping to avoid collision or other peril.
- 1702. Acts in emergencies.
- 1703. Acts in emergency created by negligence or wrongful act of carrier.
  - 1703(1). Arkansas.
  - 1703(2). California.
  - 1703(3). Delaware.
  - 1703(4). Iowa.
  - 1703(5). Maryland.
  - 1703(6). Michigan.
  - 1703(7). South Carolina.
- 1704. Same—Attempt to escape from falling elevator.
- 1705. Care required from mail clerk on mail car.
- 1706. Care required from children.
  - 1706(1). Florida.
  - 1706(2). Illinois.
  - 1706(3). Missouri.
- 1707. Effect of intoxication and care required from intoxicated passengers.
  - 1707(1). United States.
  - 1707(2). Arkansas.
  - 1707(3). Colorado.
  - 1707(4). Indiana.
  - 1707(5). Kentucky.
  - 1707(6). Texas.

- § 1708. Effect of contributory negligence.  
1708(1). Alabama.  
1708(2). Arkansas.  
1708(3). Colorado.  
1708(4). Delaware.  
1708(5). Florida.  
1708(6). Illinois.  
1708(7). Kansas.  
1708(8). Kentucky.  
1708(9). Missouri.  
1708(10). Texas.  
1708(11). Virginia.
1709. Effect of negligence of passenger as dependent on whether proximate contributing cause of injuries received.  
1709(1). Arkansas.  
1709(2). Colorado.  
1709(3). Missouri.  
1709(4). Illinois.  
1709(5). Kansas.  
1709(6). Maryland.  
1709(7). South Carolina.  
1709(8). Texas.
1710. Doctrine of last clear chance or discovered peril.  
1710(1). California.  
1710(2). Missouri.  
1710(3). Virginia.
1711. Effect of negligence of passenger as dependent on whether it amounts to criminal negligence.

#### 14. *Pleading and Proof*

1712. Confining plaintiff to cause of injury alleged in pleading.  
1712(1). Alabama.  
1712(2). Colorado.  
1712(3). Delaware.  
1712(4). Illinois.  
1712(5). Michigan.  
1712(6). Missouri.  
1712(7). Nebraska.  
1712(8). Texas.

#### *Evidence*

1713. Presumptions and burden of proof.  
1713(1). Arkansas.  
1713(2). Colorado.  
1713(3). Missouri.
1714. Burden of proof as to existence of relation of carrier and passenger.  
1714(1). Illinois.  
1714(2). Indiana.
1715. Presumptions and burden of proof as to negligence.  
1715(1). California.  
1715(2). Delaware.  
1715(3). Iowa.  
1715(4). Kansas.  
1715(5). Missouri.  
1715(6). Texas.  
1715(7). Utah.  
1715(8). Virginia.

- § 1716. Rule of res ipsa loquitur.**
  - 1716(1). Arkansas.
  - 1716(2). California.
  - 1716(3). Delaware.
  - 1716(4). District of Columbia.
  - 1716(5). Florida.
  - 1716(6). Georgia.
  - 1716(7). Kentucky.
  - 1716(8). Missouri.
  - 1716(9). Nebraska.
  - 1716(10). South Carolina.
  - 1716(11). Virginia.
- 1717. Presumption from fact of collision.**
  - 1717(1). Arkansas.
  - 1717(2). California.
  - 1717(3). Missouri.
  - 1717(4). Washington.
- 1718. Presumption from derailment.**
  - 1718(1). Alabama.
  - 1718(2). Arkansas.
  - 1718(3). California.
  - 1718(4). Delaware.
  - 1718(5). Indiana.
  - 1718(6). Missouri.
- 1719. Same—Rebuttal of presumption.**
  - 1719(1). Alabama.
  - 1719(2). Arkansas.
  - 1719(3). California.
  - 1719(4). Delaware.
  - 1719(5). Virginia.
- 1720. Presumption from overturning of automobile.**
- 1721. Presumption from sudden stops or jerks or jars.**
  - 1721(1). California.
  - 1721(2). Indiana.
  - 1721(3). Missouri.
  - 1721(4). Texas.
- 1722. Presumption from explosion on car or locomotive.**
  - 1722(1). California.
  - 1722(2). Illinois.
- 1723. Burden of showing contributory negligence or lack of it.**
  - 1723(1). United States.
  - 1723(2). Arkansas.
  - 1723(3). California.
  - 1723(4). Colorado.
  - 1723(5). Delaware.
  - 1723(6). Illinois.
  - 1723(7). South Carolina.
  - 1723(8). Virginia.
  - 1723(9). Washington.
- 1724. Presumption with respect to contributory negligence where passenger killed.**
- 1725. Burden of proof as to lack of negligence of children.**
- 1726. Burden of proof as to proximate cause.**
  - 1726(1). Virginia.
  - 1726(2). Washington.
- 1727. Matters considered on issue of contributory negligence.**
- 1728. Limiting effect of evidence.**
- 1729. Questions for jury.**

- § 1730. Sufficiency of evidence.  
1730(1). Alabama.  
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## A. CARRIERS OF GOODS

### 1. *Who are Common Carriers of Goods*

#### § 1370. Definition

You are instructed that a common carrier is one who undertakes and exercises, as a public employment, the transportation or carriage of goods for persons generally, from place to place, whether by land or by water, and to deliver them at the place appointed, for hire or reward, and with or without a special agreement as to price.<sup>1</sup>

### 2. *Duty to Furnish Cars*

Duty to furnish refrigerator cars, see post, § 1389.

#### § 1371. Duty to furnish on request

You are instructed that, if the logs mentioned in the evidence were plaintiff's logs, and they were delivered for shipment at a usual point of shipment on defendant's line of railway, and plaintiff thereupon requested defendant to furnish cars to transport them to ———, by request, definite as to the time and number of cars wanted, it was the duty of defendant to furnish such cars within a reasonable time after such request.<sup>2</sup>

#### § 1372. Character of duty

You are instructed that the duty on the part of defendant as a common carrier to furnish plaintiff with cars sufficient to transport timber was not an absolute one; but its only duty was to furnish with reasonable promptness after demand made therefor and to exercise reasonable diligence and care to provide transportation

<sup>1</sup> *Carpenter v. Baltimore & O. R. Co.* (Del.) 64 A. 252, 6 Pennewill, 15.

<sup>2</sup> *St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co.*, 99 S. W. 375, 81 Ark. 373.



facilities to meet such requirements as might be made in the usual course of its business, considering the general demand for such cars, and the general condition of freight traffic. Defendant was not obliged to discriminate against any other shippers or other places nor supply plaintiff with any sudden demand for cars.<sup>3</sup>

**§ 1373. Sufficiency of compliance with demand for cars**

You are instructed that, if it was the custom of plaintiff to accumulate logs or timber upon or near the railway right of way for shipment, and if this was not a delivery of such logs or timber to the defendant, and if, after the demand for cars was made, the defendant used such diligence as an ordinarily prudent person would have done under the circumstances to procure cars for such shipment, considering the general demand for cars and the general freight traffic, then your verdict should be for the defendant.<sup>4</sup>

**§ 1374. Excuses for failure to furnish**

**§ 1374(1). Arkansas**

You are instructed that, if the general freight traffic was congested at ——— and upon the railway therefrom to ———, embracing the station at ———, and if such congestion of traffic was such that cars could not be furnished for plaintiff to transport the logs and timber in question, without discriminating against various other shippers and persons interested in shipments in such congested conditions, then your verdict should be for the defendant.<sup>5</sup>

**§ 1374(2). South Carolina**

You are instructed that the obligation to furnish cars in this case is an obligation imposed by law, and is not as binding as if the defendant railroad had contracted to furnish the cars. In this case the defendant is not liable if it has shown a reasonable excuse for failure to furnish the cars; heavy and unprecedented traffic, not reasonably to be expected and prepared for, would excuse the railroad for a deficiency of cars.<sup>6</sup>

**§ 1375. Contributory negligence of shipper**

You are instructed that, even if you should find that there was negligence on the part of the defendant in this case, yet if there was any negligence whatever, in any manner or degree, on the part of the plaintiffs or any persons acting for them, causing or contrib-

<sup>3</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

<sup>4</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

<sup>5</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

<sup>6</sup> Mauldin v. Seaboard Air Line Ry., 52 S. E. 677, 73 S. C. 9.

uting to any damage complained of as to the logs and timber claimed by plaintiff, then the plaintiff cannot recover.<sup>7</sup>

**§ 1376. In whom cause of action, for damages for failure to furnish, exists**

You are instructed that if it was understood between S., from whom plaintiff purchased the logs, and the plaintiff that the title to these logs should pass to the plaintiff when they were delivered at the point of shipment, branded and the advancement of \$——— per —— was made upon them, the logs thereupon became the property of the plaintiff, and the deterioration in the value of the logs thereafter, if any, was the loss of the plaintiff. On the other hand, if the logs were not to become the property of the plaintiff until loaded upon the cars, any deterioration on them between the time of their deposit at the place of shipment and loading on cars would be the loss of S., for which there can be no recovery in this case.<sup>8</sup>

You are instructed that, if the plaintiff and S. had a contract of sale of the logs and timber in question, and such timber and logs were to be loaded on the cars by S. or persons under his supervision, or under contract with him, other than the plaintiff, and if the plaintiff was not to receive such logs and timber until loaded on cars and it was not the property of the plaintiff, it cannot recover.<sup>9</sup>

You are instructed that the mere fact of the plaintiff causing marks to be placed on the logs in question, if it did so, is not in itself sufficient to constitute a delivery or complete sale to the plaintiff before being loaded upon the cars, but is only a circumstance to be considered by you, together with the contract, and all other circumstances relating thereto as to whether or not delivery was to be made upon the cars as a completed sale to plaintiff.<sup>10</sup>

**§ 1377. Burden of proof**

You are instructed that, if you should find for the plaintiff, there must appear from a preponderance of the evidence the extent of its damage, and you are not at liberty to guess at it, but must find it from the proof. The burden of proof is upon the plaintiff upon all issues in this case, and if it has failed to establish its case by a preponderance of the proof as to negligence on the part of the

<sup>7</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

<sup>8</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

<sup>9</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

<sup>10</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

defendant, or as to the measure of damages, then your verdict should be for the defendant.<sup>11</sup>

**§ 1378. Measure of damages for failure to furnish**

You are instructed that, if you find for the plaintiff, and find that the logs deteriorated in value by reason of the failure to furnish cars, you will assess the damages at such a sum of money as would represent the difference in value between the value of the logs at ——— at the time the cars should have been furnished, if such cars had been furnished as stated in these instructions, and their value at the time the cars were furnished, in so far as such deterioration arose from the failure to furnish cars. If the deterioration resulted from any other cause, defendant is not liable for it, and, if there was a deterioration from any other cause, you will deduct from said difference the amount of said deterioration from such cause.<sup>12</sup>

**3. *Special Contracts to Furnish Cars***

**§ 1379. Liability for breach**

You are instructed that if you believe from the evidence that plaintiffs contracted with defendant's agent at ——— that defendant would furnish cars in which to ship cattle at a time certain, and that said agent had authority to so contract, and you further believe that defendant failed to receive and ship said cattle at the time agreed upon, and that, by reason of the failure to receive and ship said cattle, plaintiffs were damaged, then plaintiffs are entitled to recover.<sup>13</sup>

**§ 1380. Measure of damages for breach—Loss of profits**

You are instructed that, if you find for the plaintiff under the instructions given you in this case, then you are to determine what damage, if any, he has suffered by reason of the failure of the defendant company to furnish cars for the disposition of his coal. If you find plaintiff could and would have sold his coal from his mines at a profit to himself and was prevented by the wrongful act of the defendant from making such sale and earning such profits, then the defendant must compensate him in damages for the amount of the profit or gain which this prevented him from making. In arriving at such amount, you should consider the nature of his business, the condition of the coal, the kind of coal that he produced, the quantity of coal that he produced, his opportunity for selling and the market price at which he could have sold; and the price,

<sup>11</sup> St. Louis, I. M. & S. R. Co. v. Wynne Hoop & Cooperage Co., 99 S. W. 375, 81 Ark. 373.

<sup>12</sup> St. Louis, I. M. & S. R. Co. v. Co., 15 S. W. 164, 79 Tex. 33.

<sup>13</sup> McCarty v. Gulf, C. & S. F. Ry.

or prices, at which the coal produced by him should and would have been sold less the cost of producing and marketing such coal, including the royalties to be paid thereon, would be the measure of his recovery. And in this connection I charge you that the cost of production above referred to must be measured and computed on the basis of a reasonable car supply.<sup>14</sup>

#### 4. *Scope of Liability for Loss or Injury of Goods*

##### § 1381. **Liability in absence of contract limiting it**

###### § 1381(1). **Delaware**

You are instructed that a common carrier is bound to exercise the strictest care, and to deliver safely at their place of destination the goods entrusted to him. He is regarded by the law in the light of an insurer; and, in case goods are injured, lost, or destroyed, nothing will excuse or discharge him but the act of God or of the public enemies.<sup>15</sup>

You are instructed that a common carrier cannot relieve himself of any portion of his common-law liability for the loss or destruction of property carried by him, unless by express or implied contract with the shipper.<sup>16</sup>

###### § 1381(2). **Kentucky**

You are instructed that, if the jury believe from the evidence that the fire which damaged or destroyed the goods of the plaintiff was caused by the negligence or carelessness of the defendant's agents or employes in charge of the wagon upon which said goods were being carried, or if the jury believe from the evidence that the defendant at the time of said fire was a common carrier, and was conveying said goods as a common carrier, the jury should find for the plaintiff.<sup>17</sup>

##### § 1382. **Duty to deliver goods in as good condition as when received**

The jury are instructed that the bill of lading, offered in evidence, recites that the goods were in apparently good condition, but that the contents and condition of contents of packages was unknown to the railroad company, and by said bill of lading the defendant contracted to deliver said goods in like condition at ———, as the same were received by it at ———; if the jury be-

<sup>14</sup> *Midland Valley R. Co. v. Hoffman Coal Co.*, 120 S. W. 380, 91 Ark. 180.

<sup>15</sup> *Carpenter v. Baltimore & O. R. Co.*, 64 A. 252, 6 Pennewill, 15.

<sup>16</sup> *Carpenter v. Baltimore & O. R. Co.*, 64 A. 252, 6 Pennewill, 15.

<sup>17</sup> *Farley v. Lavary*, 54 S. W. 840, 21 Ky. Law Rep. 1252, 47 L. R. A. 383. The defendant in this case did not plead that the damage complained of was caused by the act of God, the public enemy or the inherent quality of the goods.

lieve by the evidence that the goods were not delivered in as good order and condition as when received by defendant, ordinary wear and tear, deterioration, defect or vice in the property excepted, and that the plaintiff was injured and has sustained damages thereby, then the plaintiff is entitled to recover, unless the jury believe from the evidence, that the damage or injury to such goods resulted from some fault or negligence of the plaintiff or his consignor.<sup>18</sup>

**§ 1383. Losses due to act of God**

You are instructed that by the act of God is meant such inevitable accident as cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning and tempest, floods, inundation, etc.<sup>19</sup>

**§ 1384. Act of God concurring with negligence of carrier**

You are instructed that, if you believe from the evidence that defendant received warnings of the approach of the ——— storm in question in time to have removed the lost and damaged goods in question to a place of safety, and that it failed to do so, and that such failure was negligence on its part, and that said negligence was the direct and proximate cause of plaintiff's loss of the three cases of ——— in question, and damage of the one case to such an extent as to be rendered worthless to it, you will find for plaintiff against said defendant for the amount of \$———, and interest at ——— per cent. thereon from ———.<sup>20</sup>

**§ 1385. Validity of limitation of liability by special contract**

Limitation of liability of connecting carrier, see post. § 1407.

Right of carrier to limit liability for negligence to passenger, see post, §§ 1526, 1527.

**§ 1385(1). Alabama**

I charge you that the defendant cannot limit its liability for the negligence of itself or its servants in and about the transportation and delivery of the plaintiff's goods and effects, by a stipulation in a bill of lading to that effect and if you are reasonably satisfied from the evidence that the defendant was negligent in the transportation and delivery of the goods in question in this suit, and that as a proximate result thereof the plaintiff suffered damage, then you are authorized to award the plaintiff such damages as from the evidence you are reasonably satisfied she has so suffered, regardless of the valuation in the bill of lading or the true value

<sup>18</sup> *Michellod v. Oregon-Washington R. & Nav. Co.*, 168 P. 620, 86 Or. 329.

<sup>19</sup> *Carpenter v. Baltimore & O. R. Co.* (Del.) 64 A. 252, 6 Pennewill, 15.

<sup>20</sup> *Mistrot-Calahan Co. v. Missouri K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 209 S. W. 775.

of all the goods and effects shipped by plaintiff over defendant company's railroad.<sup>21</sup>

**§ 1385(2). Delaware**

You are instructed that, where there is a contract fairly made between the shipper and the common carrier, whereby, in consideration of a reduced rate of freight it is agreed that in case of loss or injury the carrier shall be liable only to the extent of an agreed valuation of the goods, such contract is valid and will operate as a limitation upon the liability of the carrier.<sup>22</sup>

**§ 1385(3). Nebraska**

The jury are instructed that the defendant is a common carrier as to all property within the scope of its chartered powers, and it cannot by special agreement divest itself of such character, and therefore it is liable for the negligence of its servants.<sup>23</sup>

**§ 1385(4). West Virginia**

The court instructs the jury that the defendant in this case could not lawfully stipulate by special contract or otherwise for exemption from responsibility for the negligence of itself or its servants; and if the jury believes from the evidence that there was an unreasonable delay in transporting the cattle referred to in this cause from ——— to the city of ——— by the defendant, and that such delay was caused by the negligence of the defendant or its servants, they should find for the plaintiff.<sup>24</sup>

**§ 1386. Sufficiency of contract to limit liability**

Limitation of liability for baggage, see post, § 1757.

You are instructed that, whenever a common carrier claims that he has by special agreement been released by the shipper from the operation of the before-mentioned common-law rule for the ascertainment of damages in case of loss or injury to goods transported, it is incumbent on the carrier to prove such special agreement to the satisfaction of the jury, and upon failure so to do the said common-law rule prevails. If such alleged special agreement is in writing, it must be expressed in such manner and form as to be understood by a person of average intelligence; or, if not so expressed, it must be shown to have been explained to the person to be bound, unless such person himself had such knowledge of the subject as would enable him to understand the meaning of the writing.<sup>25</sup>

<sup>21</sup> *Central of Georgia Ry. Co. v. Broda*, 67 So. 437, 190 Ala. 266.

<sup>22</sup> *Carpenter v. Baltimore & O. R. Co.*, 64 A. 252, 6 Pennewill, 15.

<sup>23</sup> *Missouri Pac. Ry. Co. v. Vandeventer*, 41 N. W. 998, 26 Neb. 222, 3 L. R. A. 129.

<sup>24</sup> *Bosley v. Baltimore & O. R. Co.*, 46 S. E. 613, 54 W. Va. 563, 66 L. R. A. 871.

<sup>25</sup> *Carpenter v. Baltimore & O. R. Co. (Del.)* 64 A. 252, 6 Pennewill, 15.

### 5. *Delivery of Goods to Carrier and Acceptance Thereof*

#### § 1387. Sufficiency of delivery to charge carrier, as such, with liability

The court instructs the jury that, if you believe from the evidence that on the afternoon or evening of ———, before or at the time the car of the defendant referred to in the evidence was sealed by ———, the agent of the defendant at ———, the plaintiff told or informed the said agent that the loading of said car was completed, or that said car was ready, then in that event the law is for the plaintiff, and the jury should so find, notwithstanding the fact, admitted by the evidence, that no bill of lading was issued by the defendant to the plaintiff for the shipment of said goods or property.<sup>26</sup>

The court instructs the jury that, unless you believe from the evidence that on the afternoon or evening of ———, before or at the time the said car of defendant referred to in the evidence was sealed by ———, the agent of the defendant at ———, the plaintiff told or informed said agent that the loading of said car was completed, or that said car was ready, then the law is for the defendant.<sup>27</sup>

### 6. *Duty as to Transportation*

#### § 1388. Right of carrier to transport goods over usual and customary route

The court charges the jury that the law did not require the defendant to inform ——— of the route over which it would ship the leather; and, if ——— did not give the defendant instructions over which route to ship the leather, then the law gave the defendant the right to ship the leather over the usual and customary route the defendant used to ship goods from ——— to ———, if such route was reasonable and prudent.<sup>28</sup>

The court charges the jury, if the jury believe from all the evidence that defendant held the leather for shipment by its usual and customary route for shipping freights to ———, and that such arrangement for shipment was reasonably prudent, and if the jury believe from the evidence that defendant exercised reasonable care and diligence in keeping it for such shipment, then plaintiff is not entitled to recover, and the jury must find for defendant.<sup>29</sup>

<sup>26</sup> Louisville & N. R. Co. v. Edwards' Adm'r, 209 S. W. 519, 183 Ky. 555.

<sup>27</sup> Louisville & N. R. Co. v. Edwards' Adm'r, 209 S. W. 519, 183 Ky. 555.

<sup>28</sup> Louisville & N. R. Co. v. Gidley, 24 So. 753, 119 Ala. 523.

<sup>29</sup> Louisville & N. R. Co. v. Gidley, 24 So. 753, 119 Ala. 523.



### § 1389. Failure to furnish refrigerator cars

I charge you that it is no defense to this action that the defendant did not have any refrigerator cars of its own, and obtained its refrigerator cars from the ———. If the defendant accepted orders for refrigerator cars to be placed at ——— in the season of ———, it was its duty to furnish them, regardless of the fact that it did not own them itself; and therefore it is no defense that it could not get these cars from other people when it wanted them, or it didn't have them itself.<sup>30</sup>

I charge you that the fact, if you find it to be a fact, that the defendant placed more cars at ——— during the entire season than the plaintiff had ordered for the entire season, will not excuse the defendant, if it did not furnish the cars on the dates for which they were ordered, if you find that the defendant had reasonable notice to furnish the cars, and it was within its power so to do.<sup>31</sup>

### § 1390. Failure to ice

Liability of connecting carrier, see post, § 1408.

#### § 1390(1). Arkansas

You are instructed that defendant was not required to re-ice the cars at ———, if the necessity to do so was caused by delay in loading the cars. But it was its duty to re-ice same as soon as it could, in the due course of its business, do so after same was loaded and turned over to it.<sup>32</sup>

#### § 1390(2). Michigan

I charge you that it is no defense, if these cars had to be iced by any company or persons, that the persons who were to furnish the ice for the cars failed or refused or were unable to furnish the ice.<sup>33</sup>

### § 1391. Negligence of shipper

See, also, post, §§ 1438-1440.

You are charged that there was a delivery and acceptance of the fruit to plaintiff, and if you find that plaintiff had knowledge of defects in the car, it devolved upon plaintiff to take such steps as an ordinarily prudent person would have taken under the circumstances to prevent damage to the fruit. And if you find that plaintiff failed to exercise such care, and that this was the proximate cause of damage to plaintiff, then plaintiff cannot recover.<sup>34</sup>

<sup>30</sup> Fremont Canning Co. v. Pere Marquette R. Co., 146 N. W. 678, 180 Mich. 283.

<sup>31</sup> Fremont Canning Co. v. Pere Marquette R. Co., 146 N. W. 678, 180 Mich. 283.

<sup>32</sup> Wright v. Midland Valley R. Co., 163 S. W. 1151, 111 Ark. 196.

<sup>33</sup> Fremont Canning Co. v. Pere

Marquette R. Co., 146 N. W. 678, 180 Mich. 283.

<sup>34</sup> Missouri, K. & T. Ry. Co. of Texas v. Tripis (Tex. Civ. App.) 117 S. W. 199. In this case the relation of carrier had ended, the goods having been delivered and accepted at their destination and the freight paid.

*7. Liability for Delay in Transportation or Delivery of Goods*

See, also, post, §§ 1441-1446.

**§ 1392. Duty to carry on first train**

The court instructs the jury that if you find, from the evidence, that the railroad company operated a train passing \_\_\_\_\_ at \_\_\_\_\_ p. m., carrying express, mail, and passengers, and not equipped for transportation of berries in as large quantities as \_\_\_\_\_ crates, and that the public knew it, then the defendant was under no obligation to ship those \_\_\_\_\_ crates on such train; and, if you find from the evidence that the defendant accepted these crates of strawberries and shipped them on the first train that was properly prepared and equipped for carrying strawberries in that quantity, then the plaintiff would not be entitled to recover any damages.<sup>35</sup>

**§ 1393. Duty of carrier to notify shipper of inability to forward goods promptly**

You are instructed that if you believe, from the evidence, that the defendant could not ship the cotton mentioned in the evidence on account of the yellow fever, or because of consequences arising from reports of the said yellow fever, yet if you further believe, from the evidence, that the defendant, when it received such cotton, knew that it could not be shipped at once, or within a reasonable time, and failed to notify the plaintiff of such inability, and the plaintiff was injured solely on account of the failure of the defendant to give such notice, then the law is for the plaintiff.<sup>36</sup>

**§ 1394. Delay as proximate cause of injury to goods—Extraordinary flood**

The jury are instructed that if they find, from the evidence before them, that the damage to the wheat, for which this action is brought, was occasioned by a sudden high and extraordinary freshet in the \_\_\_\_\_ river, which occurred the last of \_\_\_\_\_ or the first of \_\_\_\_\_, overflowing and submerging the railroad track of the defendant at the \_\_\_\_\_ junction of the \_\_\_\_\_ branch road, where the wheat was then in a car on the tracks of said road, and that such freshet was the immediate and direct cause of the damage to the wheat, as testified to by the witnesses, then the plaintiffs are not entitled to recover for such damage to the wheat, although there may have been undue and unnecessary delay by the defendant in the transportation of said wheat to its place of destination previous to the occurrence of such damage thereto by the freshet,

<sup>35</sup> Shaw v. Southern Express Co., 88 S. E. 222, 171 N. C. 216.

<sup>36</sup> Alabama, etc., Ry. Co. v. Hayne 24 So. 907, 76 Miss. 538.

unless the jury believe from the evidence before them that the defendant could, by reasonable exertion and diligence in the use of the means at its command, after discovering the impending danger to the wheat from the rising flood, have saved the wheat from injury by the water by moving the car to a place of safety, or by the reasonable use of any other means in its power have prevented such damage, but that the burden of proof of the want of diligence and care in this respect on the part of the defendant rests with the plaintiffs; and if, by the use of reasonable care and diligence, after the freshet had subsided, the wheat, or any portion thereof, could have been saved from ruin, it was the duty of the defendant so to save the same, and if any portion of the wheat was lost or ruined, that could have been so saved, the defendant is liable therefor.<sup>37</sup>

**§ 1395. Same—Destruction of goods by fire following negligent delay of carrier to forward**

The court instructs the jury that if they find that there was any delay in forwarding the cotton from ——— by reason of the negligence of the defendant railway company, or by reason of the failure of the ocean carriers to send for and take away the cotton as it was received at ———, and that but for the defendant's negligence in failing to forward the cotton from ———, or the ocean carrier's failure to receive and take it away, it would not have been in the cars or under the sheds at the time the fire occurred, such negligent delay in forwarding would not make the defendant liable in this case, for the reason that such negligent delay would, in law, be the remote, and not the direct and proximate, cause of the destruction of the cotton.<sup>38</sup>

**8. Final Delivery**

**§ 1396. Sufficiency of delivery to consignee to terminate liability of carrier as such**

**§ 1396(1). Missouri**

The court instructs the jury that the defendant was not required to deliver the stock mentioned in plaintiff's petition to ——— Commission Company, but its full duty was performed when it carried said stock to the unloading platforms in the Union Stockyards in the city of ———, and it is not responsible for the delay, if any there were, in the unloading thereof by the stockyards company, nor is it liable for the delay, if any there were, occasioned by

<sup>37</sup> *Baltimore & O. R. Co. v. Keedy*,  
75 Md. 320, 23 A. 643.

<sup>38</sup> *Texas & P. Ry. Co. v. Coutourie*  
(C. C. A. N. Y.) 135 F. 465, 68 C. C.  
A. 177.

the failure of the said commission company to take said stock from the unloading chutes, or the action of the stockyards company in putting said stock in pens; and plaintiffs cannot recover anything from this defendant on account of loss, if any there were, by reason of the lapse of time between the arrival of the train carrying the stock at the Union Stockyards and the arrival of the stock at the selling pens of the commission company.<sup>39</sup>

**§ 1396(2). Washington**

The court instructs the jury that, although they believe from the evidence that the defendant company safely transported the wine in question and safely landed it upon the wharf in ———, yet the defendant company would nevertheless be liable unless the jury further find, from a fair preponderance of the evidence, that the said wine was separated by the defendant from other shipments, if any, and placed in a position so as to be conveniently accessible to plaintiff for removal by him, and a reasonable time allowed for the removal of the wine from the dock; and if the jury find, from the evidence, that these conditions were not complied with by the defendant company, and that the wine was lost or destroyed in the meantime, then your verdict should be for the plaintiff in such sum as the jury find to have been the fair market value of the wine at the time in question.<sup>40</sup>

**§ 1397. Liability for misdelivery**

**§ 1397(1). North Carolina**

You are instructed that, if you are satisfied that M. was the authorized drayman to receive freight from the railroad company, and you are further satisfied that it was delivered to M., as testified to by one of the witnesses, then you should answer that second issue "No," because that would be a delivery to the knitting mills. It was not necessary that they should have a receipt for it. If they had a man there authorized to go after their goods, and he went there, and the railroad company had been in the habit of delivering goods to him without an order, it was very careless on the part of the railroad agent there to do it; still it was not necessary to take a receipt for it; and if you find that M. was the authorized drayman, and he went there and got that yarn from the railroad company, why then the court charges you that that would be a delivery to the knitting mills. We all take notice that railroads do not send around packages to the consignees like express companies do. We have to send for them.<sup>41</sup>

<sup>39</sup> *Ratliff v. Quincy, O. & K. C. R. Co.*, 94 S. W. 1005, 118 Mo. App. 644.

<sup>40</sup> *Lagomarsino v. Pacific Alaska Nav. Co.*, 170 P. 368, 100 Wash. 105.

<sup>41</sup> *Kinston Cotton Mills v. Atlantic Coast Line R. Co.*, 86 S. E. 633, 169 N. C. 721.

## § 1397(2). Oregon

I instruct you, gentlemen of the jury, that it is the duty of a common carrier of goods to deliver the goods only to the consignee named in the bill of lading, or some one authorized by the consignee to receive the same. It is the duty of a railroad company not to deliver freight without the production of the bill of lading. If you find from the evidence in this case that the defendant delivered the cement to ——— without the production of the bill of lading, and without plaintiff's consent or direction, and that plaintiff did not, subsequent to the delivery of said cement to ———, ratify said delivery to said ———, and if you further find that the plaintiff was the owner of the cement at the time it was delivered to ———, then you will find for the plaintiff for the reasonable value thereof.<sup>43</sup>

The court instructs the jury that, if you find from the evidence in this case that said carload of cement upon its arrival at ———, was delivered to ——— by the defendant, and that the plaintiff immediately or shortly thereafter had notice and knowledge of such delivery, and thereupon charged up said car of cement to ———, and thereafter wrote to them admitting and stating that they had shipped said carload of cement to them and never made any claim against the railroad company for wrongful delivery of said cement until the ——— day of ———, and that plaintiff intended to release the defendant company from liability for misdelivery, and take the said ——— for payment, then it will be your duty to return a verdict for the defendant.<sup>43</sup>

## § 1397(3). Virginia

The court instructs the jury that if they believe from the evidence that the defendant railroad company delivered to persons other than the plaintiff the shipments mentioned and described in the declaration, without obtaining the surrender of the bills of lading therefor, or without authority from, or subsequent ratification by the plaintiff, the holder of the bills of lading, then the plaintiff is entitled to recover of the defendant the value of the goods, with interest from the date of delivery.<sup>44</sup>

## § 1398. Ratification by shipper of delivery

The court instructs the jury that, if you find from the evidence in this case that the plaintiff either expressly or impliedly consented to the delivery of said carload of cement to ———, or that after the

<sup>43</sup> W. H. Stanchfield Warehouse Co. v. Central R. of Oregon, 136 P. 34, 67 Or. 396.

<sup>43</sup> W. H. Stanchfield Warehouse Co.

v. Central R. of Oregon, 136 P. 34, 67 Or. 396.

<sup>44</sup> Kewanee Private Utilities Co. v. Norfolk Southern R. Co., 88 S. E. 95, 118 Va. 628.

same was so delivered to them they ratified and approved of said delivery, then your verdict must be for the defendant.<sup>45</sup>

**§ 1399. Release of claim for wrongful delivery**

The court instructs the jury that, if you find from the evidence that after the delivery wagon was in the possession of L., the plaintiff did send such mechanics to ———, at the request of L. to make repairs upon said machine, in order to induce said L. to accept such machine and pay for it, and that such repairs were made, and broken parts returned to factory, such acts of plaintiff would not alone in and of themselves be sufficient to release the defendants from any wrongful delivery, if the plaintiff, as soon as it discovered such wrongful delivery, made claim upon defendants for the value of such machine because of such wrongful delivery, and kept on pressing its claim against defendants and without at any time intending to release defendants from such claim.<sup>46</sup>

**§ 1400. Liability of carrier as for conversion on failure to deliver goods**

You are instructed that plaintiff claims that he made an unconditional offer and a tender of the money, a bona fide and genuine offer to pay the money, presenting the bill of lading, to pay such charges and such expenses as the railroad claimed against him; if he did that, of course, it was absolutely the duty of the railroad company to deliver it to him, upon his paying those charges. He claims that all they demanded he offered to pay; if that be so, of course, it was the duty of the railroad to deliver it to him.<sup>47</sup>

You are instructed that, if plaintiff did not make a bona fide unconditional offer to pay what was legally assessed against the property, then he cannot get back his property at all, and your verdict would be for the railroad. If he made an offer only on conditions which the railroad was not required to perform, he cannot get back the property, and your verdict would be for the railroad. If he made a bona fide offer to pay, he would be entitled to get it back—to get back the property or its equivalent. That is all there is in the case. You will say: We find for the plaintiff so many dollars, so much money; or, We find for the defendant. Now, take the complaint here, as it sets out all the details, all that plaintiff claims, a great deal of which has been eliminated; take the answer of the defendant, which sets out what the railroad claims, and a great deal of

<sup>45</sup> *W. H. Stanchfield Warehouse Co. v. Central R. of Oregon*, 136 P. 34, 67 Or. 396.

<sup>46</sup> *Lake Shore & M. S. Ry. Co. v.*

*W. H. McIntyre Co.*, 108 N. E. 978, 60 Ind. App. 191.

<sup>47</sup> *Dowling v. Seaboard Air Line Ry.*, 93 S. E. 863, 108 S. C. 186.



that has been stricken out; take this bill of lading, and any other paper you want in the case, and go and decide it. You may retire.<sup>48</sup>

**§ 1401. Same—Right of carrier to require surrender of bill of lading on delivery of goods**

In this controversy here, gentlemen, you will see the claim is made by the plaintiff, that he bought this certain machinery, and that he had it shipped over the lines of the defendant, on what is known as an order notify bill of lading, and that he paid for the bill of lading at the bank, and got it in his possession, and lost it, and could not get a delivery of his goods. The very first question to be decided in this case is to settle the value of the property in controversy; take that question up first, and say what you will fix the value of the machinery at, and the idea of that is this: That, had plaintiff, in due course, gotten that bill of lading and presented it, in due and ordinary length of time, and the railroad had refused or could not deliver it to him, why it would be the measure of his damages at that time; that is, the value of the property in question, and by that we mean such as it could have been bought for, or be sold for at the time, what he could have gone out and bought similar property, or property just like it for or what could he have sold it for. After you fix that, you go one step further in this case: You will take this bill of lading, which is the contract or agreement between the parties, and follow the terms and conditions of it, because that shows what the stipulations were in reference to the shipment. You will see printed in this bill of lading that the railroad is not called upon or required to deliver property, except upon presentation of the bill of lading. You will find this here: "Tender of this bill of lading, properly indorsed, will be required before delivery of the property." So you will see that there was no duty, on the part of the railroad, under the law, to deliver that property to plaintiff until he could produce this bill of lading. So all of these matters as to the correspondence going on between them, when plaintiff did not have the bill of lading, has very little to do with the case; it being merely an effort of both parties to get the matter adjusted—the railroad to get rid of the property, and plaintiff to get his property.<sup>49</sup>

**§ 1402. Same—Effect of conditional offer by shipper to pay charges**

You are instructed that, if it is as the railroad claims, that plaintiff did not make an unconditional offer, but brought the money and offered to pay all these charges that the railroad had taxed up

<sup>48</sup> *Dowling v. Seaboard Air Line Ry.*, 93 S. E. 863, 108 S. C. 186.

<sup>49</sup> *Dowling v. Seaboard Air Line Ry.*, 93 S. E. 863, 108 S. C. 186.



against this property, only on condition that they would make certain indorsements on the paper, which they were not required by law to make, then plaintiff cannot claim he has complied with his contract, and therefore he would not be entitled to get the goods, and the railroad had the right to go on and sell them; and if you find that to be true, then you will find a verdict in favor of the railroad company.<sup>50</sup>

**§ 1403. Same—Effect of subsequent tender of goods by carrier**

You are instructed that, should you find from the evidence that the railroad company converted the flour, but after so doing they made a tender of the entire shipment of flour back to the plaintiff, and that there had been no damage resulting from the time of the alleged conversion to the time of the tender back to the plaintiff, this could be pleaded in mitigation of damages. Should you find that no damage had been caused by reason of the conversion up to the time of the offer to tender and of actual tender of the flour back to the plaintiff, you would be authorized in finding in favor of the defendant railroad company.<sup>51</sup>

**§ 1404. Liability for wrongful sale of goods to pay charges**

You are instructed that, if plaintiff did make the offer in good faith to pay all charges, he would be entitled to recover in this action the value of the property, which you will fix, diminished, first, by the freight, which there is no dispute about; you will deduct that from the value you will fix, and then you will deduct the newspaper advertising, about which there is no dispute, and then the question open for you would be to fix, under the terms of this paper, a reasonable amount for storage charges of the property, if it was stored. You will first say: Did they comply with the terms of this agreement, in reference to storage? Did they store it? If they did not store it, of course, there could not be any charges for it. You know, of course, what storage means. Now, however, if you decide they did store it, you will fix what is a reasonable storage charge, and then you would put these items together—the freight, newspaper advertising, and reasonable storage charges; and you will deduct that from the amount at which you fix as the value of the property, and giving plaintiff a judgment for that difference.<sup>52</sup>

<sup>50</sup> Dowling v. Seaboard Air Line Ry., 93 S. E. 863, 108 S. C. 186.

<sup>51</sup> Georgia, F. & A. Ry. Co. v. Blish

Milling Co., 82 S. E. 784, 15 Ga. App. 142.

<sup>52</sup> Dowling v. Seaboard Air Line Ry., 93 S. E. 863, 108 S. C. 186.

### 9. *Liability of Connecting Carrier*

Duty with respect to unloading stock for rest and food, see post, § 1436.

#### § 1405. **Liability on through contract**

You are instructed that, if you believe from the evidence that the contract upon which plaintiffs' cattle were shipped was a through contract from ——— to ———, and was accepted and acquiesced in by all the lines transporting said cattle, then, if you should find from the evidence that plaintiffs were entitled to recover in any sum for the improper handling of said cattle while in transit, your verdict should be for plaintiffs against all the defendants in such sum, if any, as you should find for plaintiffs.<sup>53</sup>

#### § 1406. **Liability of initial carrier for damages occurring on connecting line**

Liability for loss of baggage on connecting line. see post, § 1754.

The court instructs the jury that if they believe from the evidence that the defendant company received for shipment at a point on its line the ——— barrels of spinach to be carried to ———, at ———, and issued its receipt or bill of lading therefor, the said defendant is responsible for all loss or damage or injury to the said shipment resulting from negligence or unreasonable delay on its part or any of its connecting carriers.<sup>54</sup>

The court further instructs the jury that, if they believe from the evidence that the plaintiffs in this case entered into a written contract with the defendant to transport said stock in question (which was consigned to ———, ———, and ———) to the terminus of its own road, and there to deliver it to the connecting carrier, and that it was agreed between the plaintiffs and said defendant in said contract, in case of loss and damage, whereby any legal liability or responsibility should or might be incurred by the terms of said contract, that that company alone should be held responsible therefore in whose actual custody the live stock might be at the happening of such loss or damage, and if the jury further believe from the evidence that the northern terminal of the defendant's road is in ———, and that it safely and in a reasonable time delivered the said stock there to the ——— Railroad, and that the damage, if any, occurred after it had been so delivered to the connecting carrier, then they will find for the defendant, unless they believe from the evidence that the plaintiffs or their agent did within

<sup>53</sup> *Williams & Hawkins v. Gulf, & I. Ry. Co. of Texas*, 135 S. W. 390, 63 Tex. Civ. App. 543.

<sup>54</sup> *Norfolk Southern R. Co. v. Norfolk Truckers' Exchange*, 88 S. E.

318, 118 Va. 650. The specific objection to this instruction was that it did not confine plaintiff to the negligence alleged in the complaint.

a reasonable time after said delay or damage, if any, make demands upon the said defendant, for satisfactory proof that said delay or damage did not occur while the said stock was in its possession.<sup>55</sup>

**§ 1407. Limitation of liability of connecting carrier to its own line**

See, also, ante, § 1406.

**§ 1407(1). Iowa**

The jury are instructed that, if plaintiffs have established that there was an unreasonable delay in the arrival of the horses in question at the ——— stockyards, and if you find that the said horses were injured through neglect in the course of transportation, and that both this unreasonable delay and injury to the stock in the transportation was caused, or materially contributed to, by the defendant, by acts of omission or commission, before there had been a proper and sufficient delivery of the horses by the defendant to the ——— Company, then the defendant would be liable for the damages sustained by such unreasonable delay, and for any injury the horses sustained, even though such injury may not have developed until after said horses had passed into the hands of the ——— Company, or after their arrival at their destination.<sup>56</sup>

**§ 1407(2). Missouri**

The court instructs the jury that if the plaintiff, at the time of delivering the package in question to the defendant's agent, received a receipt for the said package, wherein it was expressly stipulated that defendant would not be responsible for the same beyond the station of defendant nearest to ———, and that when it reached that point defendant was to deliver the package to others to complete the transportation, and that S. was the nearest point on the route of defendant to ———, and that defendant carried said package to S. safely and in good order, and then delivered it to the ——— Express Company in good order to complete the transportation, the defendant was not liable any further, and the issues must be found for defendant.<sup>57</sup>

The court instructs the jury that the defendant in this case, being a common carrier, had the right to limit its responsibility by special contract, and if the jury believe from the evidence that the defendant made a special contract with the plaintiff, whereby it accepted said package upon the express condition that it was not to be responsible for the same beyond its line, and if they find that defendant carried said package safely to ———, the

<sup>55</sup> Norfolk & W. Ry. Co. v. Reeves, 33 S. E. 606, 97 Va. 284.

<sup>56</sup> Wisecarver & Stone v. Chicago,

R. I. & P. R. Co., 119 N. W. 532, 141 Iowa, 121.

<sup>57</sup> Snider v. Adams Express Co., 63 Mo. 376.

terminus of its route, in the direction to ———, and then delivered it to another responsible forwarder and carrier, then its responsibility ceased, and defendant is not responsible for any loss happening after that time.<sup>58</sup>

**§ 1408. Duty with respect to perishable goods**

The jury are instructed that if, under the pleadings and evidence in this case, they shall find that on the ——— day of ———, at ———, the plaintiff delivered to the ——— Railroad Company a car load of peaches belonging to the plaintiff in good condition, in what is commonly known as a refrigerator car to be carried from said ——— over the said company's line and connecting line or lines and delivered to ——— in ——— and shall further find that said car load of peaches was transported over the line of the ——— Railroad Company, a connecting carrier running from ——— to ———, then, if the jury so find, they are instructed that it thereupon became the duty of the defendant, the ——— Railroad Company, to use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car by keeping a sufficient quantity of ice in the bunkers of said car for that purpose and to re-ice as often as was necessary to maintain said refrigeration, and if the jury shall further find that the said defendant did not use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car according to its duty as above set forth, and failed to take all reasonable precaution to protect said peaches from the effect of the heat, and further find that by reason of the defendant's failure to use the aforesaid care, diligence, and exertion, and to take the aforesaid precaution, said peaches were damaged and were delivered by the defendant to said ——— in ——— in such damaged condition, and the plaintiff sustained loss thereby, then, if the jury so find, their verdict must be for the plaintiff.<sup>59</sup>

**§ 1409. Presumption as to when injury occurred**

The jury are instructed that if they find from the evidence that the plaintiff delivered to the ——— Railroad Company at ———, on the ——— day of ———, a car load of peaches belonging to the plaintiff, in good condition, packed in a refrigerator car, and consigned to ——— in ———, and shall further find that said car load of peaches was carried over the line of the said ——— Railroad to ———, and shall further find that said car of peaches was delivered by the said ——— Railroad at ———, at said ——— to the defendant, a connecting carrier, running from ——— to ———, and shall further find that said car of peaches was delivered by

<sup>58</sup> *Snider v. Adams Express Co.*, 63 Mo. 376.

<sup>59</sup> *Philadelphia, B. & W. R. Co. v. Diffendal*, 72 A. 193, 109 Md. 494.

the defendant to the said ——— in ———, in a damaged condition, then the jury are instructed that the presumption of law is that said peaches were damaged while in the possession of the defendant, and their verdict must be for the plaintiff, unless the jury shall find such damage was not caused either by the failure of the defendant to transport said car with all reasonable dispatch, or by its failure to use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car, or by its failure to take all reasonable precautions to protect said peaches from damage.<sup>60</sup>

**§ 1410. Burden of proof as to cause of damage**

The jury are instructed that if, under the pleadings and evidence in this case, they shall find that on the ——— day of ——— at ———, the plaintiff delivered to the ——— Railroad Company a car load of peaches belonging to the plaintiff in good condition loaded in a refrigerator car to be carried from said ———, over the said company's line and connecting line or lines, and delivered to said ——— in ———, and further find that said car load of peaches was transported over the line of the defendant in this case, the ——— Railroad Company, a connecting carrier running from ——— to ——— and that said car load of peaches was delivered to ——— in ——— by the defendant in a damaged condition, then, if the jury so find, they are instructed that the burden is on the defendant to show that the damaged condition of said peaches was not caused by its failure to carry said peaches to the said ——— in ———, with all reasonable dispatch, or by its failure to use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car, or by its failure to take all reasonable precaution to protect said peaches from damage.<sup>61</sup>

**10. Custody of Goods Before and After Transportation**

**§ 1411. Whether liable as carrier or warehouseman—Effect of custom**

The jury is further instructed that if they find from the evidence that the defendant has been in the habit of keeping the trunk and samples of the plaintiff in its depot at ———, from time to time, then it is for the jury to say whether the plaintiff had the right to rely on said custom as a silent consent on the part of the defendant to keep said goods as a common carrier for the plaintiff; and, if there was such a custom, then whether the defendant was retaining the goods for the plaintiff as a common carrier or as a

<sup>60</sup> Philadelphia, B. & W. R. Co. v. Diffendal, 72 A. 193, 109 Md. 494.

<sup>61</sup> Philadelphia, B. & W. R. Co. v. Diffendal, 72 A. 193, 109 Md. 494.

warehouseman is for the jury to determine; and, if the defendant was keeping said goods as a common carrier, then the defendant would be liable for all damages whether it was negligent or not. If, however, the defendant was retaining possession of said goods as a warehouseman, then it would be liable for damages caused by negligence only.<sup>62</sup>

**§ 1412. When liability of express company as carrier with respect to money package ceases—Duty of consignee to receive**

The court instructs the jury that the defendant's duty and liability as a carrier ceased after it safely carried the packages to defendant's office and place of business in ———, and it then became and was the duty of the plaintiff to call for and receive them within a reasonable time after plaintiff knew of their arrival, and that plaintiff could not impose upon defendant the responsibility of guarding and caring for the packages until it suited plaintiff's convenience to receive them, and, if plaintiff left them with defendant's agent after it had an opportunity and reasonable time, considering the value of the packages and their character, to take them away, it did so at plaintiff's risk, and, if you believe defendant's agent used ordinary care in storing the packages in the place he did, then the plaintiff cannot recover. By "ordinary care" is meant such care as an ordinarily prudent man would exercise under like conditions and circumstances.<sup>63</sup>

The court instructs the jury that if you believe and find from the evidence in this case that the plaintiff ordered the money sued for to be shipped to it at ———, on the evening of ———, and it was shipped, and that plaintiff knew that the train upon which it would have to be shipped arrived at ——— about ——— o'clock in the evening, and if you find that it was so shipped, that the train arrived at its usual time, and that the defendant did not maintain a delivery system at ———, then you are instructed that it became and was the duty of the plaintiff to be on hand at the time of the arrival of the money and to receive the same, and if plaintiff knew of the arrival of the money and failed to call for it, or if it was offered to plaintiff and he failed or refused to take it, then the only duty resting upon defendant was to take reasonable care of the money for the plaintiff, and if you find defendant did take reasonable care of it, your verdict will be for the defendant. By "reasonable care"

<sup>62</sup> McCoy v. Atlantic Coast Line R. Co., 65 S. E. 939, 84 S. C. 62. This instruction does not tell the jury that plaintiff had a right to rely on custom as an assent by defendant to hold it as a common carrier, nor

that such custom was sufficient to make it liable as a common carrier, nor that it would be liable for all damages, whether negligent or not.

<sup>63</sup> Bank of Vanduser v. Wells-Fargo Co., 120 S. W. 678, 139 Mo. App. 77.



is meant such care as a reasonably prudent man would take of his own property under like circumstances.<sup>64</sup>

The court instructs the jury that in this case the ——— Trust Company in making the shipment of \$——— sued for by plaintiff acted for and on behalf of plaintiff, and any contract, agreement, or representation made to the defendant by the said trust company in regard to the receipt of the money by plaintiff at ——— was in law made for and on behalf of the plaintiff, and it is now bound by the same, and if you believe and find from the evidence that at the time the said package was offered to the defendant for transportation it declined to receive it for conveyance on the evening of ———, because it was Saturday, and it would arrive at ——— after banking hours, and could not be delivered that evening, and that the agent of the said trust company then represented and told the agent of the defendant that the plaintiff would accept and receive it upon its arrival at ——— and that the defendant relied upon said representation, and that had such representation not been made, defendant would not have accepted the package for transportation to ——— that evening, and if you also believe the defendant carried the package to ——— on the evening delivered to it as directed, that it arrived at ——— at the usual time trains arrived there from ———, and was placed at the defendant's office and place of business, and that plaintiff failed to call for the same in a reasonable time after the arrival, or if you believe and find that defendant's agent offered it to the vice president of plaintiff, and he refused to accept it, and that then the defendant's agent placed the money in an iron safe to secure it for the plaintiff, and that such iron safe was a reasonable and safe place in which to store said package, and that it was lost or stolen from the safe, then your verdict will be for the defendant.<sup>65</sup>

**§ 1413. Degree of care required to be exercised as custodian or warehouseman**

The court instructs the jury that you are not to determine the question of carelessness on the part of defendant in caring for money by placing it in the iron safe of the store by the fact that the \$——— was stolen, nor are you to determine it from the fact that it might not have been stolen or lost had it been placed elsewhere, but the question of its carelessness in placing the money in the safe is to be determined by what a reasonably prudent man would have done concerning his own affairs under like conditions

<sup>64</sup> Bank of Vanduser v. Wells-Fargo Co., 120 S. W. 678, 139 Mo. App. 77.

<sup>65</sup> Bank of Vanduser v. Wells-Fargo Co., 120 S. W. 678, 139 Mo. App. 77.



or circumstances, as shown from a consideration of all of the evidence in this cause.<sup>66</sup>

### 11. *Claims for Damages and Notice of Loss*

#### § 1414. **Penalty for delay in settling**

The court instructs the jury that, Congress having taken charge of the subject of payment of claims by express companies for loss or damage to interstate shipment, the state statute on the subject is superseded. I, therefore, charge you that in no aspect of the case can plaintiff recover the penalty of \$—— prescribed by the state statute, \$—— being the largest amount he can recover should you answer the first issue "Yes."<sup>67</sup>

#### § 1415. **Time of presenting claim for damages**

You are instructed that, if you find from the testimony in this case that the car load of coal in question was delivered to the —— Railroad Company at ——, consigned to —— Coal Company at ——, and that said shipment was under a written contract, attached to the deposition of —— herein, and that, while said car of coal was in the custody of the said —— Railroad Company, said car was reconsigned by the said —— Coal Company to the plaintiff at ——, the plaintiff is bound by the terms of said contract, and, if you further find that the plaintiff did not make a claim in writing for the damages to his rice crop to the railroad company at the point of delivery or at the point of origin of said shipment within four months after the delivery of said shipment, as required by such contract his action for damages is barred by the terms of said contract.<sup>68</sup>

#### § 1416. **Waiver of provision with respect to giving notice of loss**

You are instructed that it is not contended by the plaintiffs that the notice as required by this provision of the contract was given, but they do contend that the defendant has waived all the benefits it is entitled to under it. We say to you that such a notice, under the facts as produced in this case was a reasonable one, and unless the defendant has waived its rights thereunder, as was competent for it to do, these plaintiffs are not entitled to recover in this action. It is important, therefore, to determine whether the notice has been waived, but we think this is a question for the jury to decide from this evidence and not a question that should be determined by the

<sup>66</sup> *Bank of Vanduser v. Wells-Fargo Co.*, 120 S. W. 678, 139 Mo. App. 77.

<sup>67</sup> *Morphis v. Southern Express Co.*, 83 S. E. 1, 167 N. C. 139.

<sup>68</sup> *Chicago, R. I. & P. Ry. Co. v. Foster*, 176 S. W. 682, 118 Ark. 409.

court. Such a waiver may be proved by, or inferred from the acts and conduct of the defendant, or its duly authorized agents.<sup>69</sup>

12. *Evidence in Actions for Loss or Injury of Goods*

§ 1417. Presumptions and burden of proof

§ 1417(1). Colorado

The court instructs the jury that, if you believe from a preponderance of the evidence that at the time the potatoes were delivered to the defendant they were matured, ripe, and in sound order, and that when the same were delivered to the consignee at ——— they were in a damaged condition, then you are instructed that the plaintiff has made out a prima facie case of liability, and the burden is upon the defendant to show that the damaged condition of the potatoes was due to no fault or negligence on its part, or that the damage was due to the inherent nature of the potatoes themselves.<sup>70</sup>

§ 1417(2). Minnesota

I charge you that, the plaintiff having made out a prima facie case, the burden is cast upon the defendant to prove by a fair preponderance of the evidence a contrary state of facts. I charge you that defendant must prove by a preponderance of the evidence that the weights of the grain involved in these actions, as shown by the bills of lading, or by the state certificates of weight, are incorrect and erroneous.<sup>71</sup>

§ 1417(3). South Carolina

The court instructs the jury that, if you are satisfied from the evidence that the plaintiff delivered to the defendant the merchandise in question that it is alleged was damaged by the defendant, and if the plaintiff has further shown that, when he called for the goods, he did not receive the same, or has shown that the same was damaged or destroyed by fire, then the burden is on the defendant to prove that it was not damaged through negligence on its part, and the defendant may show the manner of the damage or how it occurred; and the jury is instructed that where the plaintiff has shown delivery to the defendant, and that, when the property was delivered to him, it was damaged, then the burden is on the defendant to show how the damage occurred, and it is for the jury

<sup>69</sup> *Klair v. Philadelphia, B. & W. R. Co.* (Del.) 78 A. 1085, 2 Boyce, 274. In this case the notice provided for was to be given within five days from the removal of the stock from the cars.

<sup>70</sup> *Denver & R. G. R. Co. v. A. Peterson Grocery Co.*, 147 P. 663, 59 Colo. 125.

<sup>71</sup> *National Elevator Co. v. Great Northern Ry. Co.*, 163 N. W. 164, 137 Minn. 217.

to say under all of the evidence whether the damage occurred through any negligence of the defendant.<sup>72</sup>

**§ 1418. Presumption as to condition of goods when received by carrier**

You are instructed that, before you are authorized to return a verdict in favor of plaintiff for any sum, you must find from the evidence in this case, that when the shipment in question was tendered to the defendant at ———, it was in good condition, and such finding cannot be based upon a conjecture or guess as to the condition of the shipment at the time of delivery to the defendant. And if you find, therefore, that there is no evidence in this case, that the goods were in good condition, when delivered to the defendant at ———, then you cannot return a verdict in favor of the plaintiff.<sup>73</sup>

**§ 1419. Same—Effect of recitals in bill of lading**

**§ 1419(1). Georgia**

The jury are instructed that, when a carrier by its bill of lading has received goods as in good order, or in "apparent good order," the burden is on the carrier to show that they were not so.<sup>74</sup>

**§ 1419(2). Illinois.**

The jury are instructed that if the jury believe, from the evidence, that the defendant received the corn and oats claimed to be in a damaged condition when it arrived, and gave bills of lading acknowledging the receipt of such grain in apparent good order, then such bills of lading are prima facie evidence that the grain mentioned in such bills of lading was, at the time it was shipped, in good order and condition, and is binding on the defendant unless rebutted; and to overcome such prima facie evidence, it is incumbent on the defendant to introduce such evidence as will show, to the satisfaction of the jury, that such grain was not, in fact, in good order and condition.<sup>75</sup>

**13. Measure of Damages for Loss, Injury, or Delay**

**§ 1420. Measure of damages for loss or injury**

See, also, post, § 1449.

Measure of damages for conversion, see ante, § 1401.

**§ 1420(1). United States**

The jury are instructed that these damages will embrace two items: First, the amount, if any, of freight or passenger fare pre-

<sup>72</sup> *McCoy v. Atlantic Coast Line R. Co.*, 65 S. E. 939, 84 S. C. 62.

<sup>73</sup> *Michellod v. Oregon-Washington R. & Nav. Co.*, 168 P. 620, 86 Or. 329.

<sup>74</sup> *Central of Georgia Ry. Co. v. A. C. Dowe & Co.*, 65 S. E. 1091, 6 Ga. App. 858.

<sup>75</sup> *Illinois Central R. Co. v. Cobb, Blaisdell & Co.*, 72 Ill. 148.

paid on any goods and passengers you find were sent, together with interest at ——— per cent. on such sum from the time demand was made on said defendant for such sum to date. Second, the market value of such goods as you find were sent at the place of destination, ———, that is, such a sum as the plaintiff could have replaced the goods for at that point, together with interest at ——— per cent. on said sum from the time of demand on the defendant therefor to date.<sup>76</sup>

**§ 1420(2). Michigan**

I charge you that the measure of the plaintiff's damage in this case, if you find that the plaintiff is entitled to recover, is the loss it sustained by reason of using soft peaches in the factory, instead of using peaches in good condition, if you find that the peaches became soft because of the failure of the defendant to furnish refrigerator cars. Mark that, gentlemen, that is important.<sup>77</sup>

**§ 1421. Same—Where no market value**

The jury are instructed that the measure of damages for loss of household goods where the goods have no market value is the value of such goods to the owner, not any fanciful price that he might place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of the articles so specifically adapted to use of himself and family.<sup>78</sup>

**§ 1422. Liability for special damages on account of delay—Necessity of notice to carrier of special circumstances**

You are instructed, at the request of the defendant, that in order to make the defendant liable for the special damages claimed, that is, the price which divers persons had contracted to pay for said trees upon their delivery at ———, sought to be recovered in this case, the facts of the sale of said trees by plaintiff should have been brought to the attention of the ——— Railway Company at the time said trees were delivered to it for shipment; and unless you find that defendant was so notified, or knew at the time said trees came into its hands of the special circumstances which make a quick delivery necessary, or unless, from the nature and character of the freight, the defendant was charged with knowing that a quick and speedy delivery thereof was important and necessary,

<sup>76</sup> Northern Commercial Co. v. Lindblom (C. C. A. Alaska) 162 F. 250, 89 C. C. A. 230. In this case the place of destination was a point in the Arctic Ocean.

<sup>77</sup> Fremont Canning Co. v. Pere Marquette R. Co., 146 N. W. 678, 180 Mich. 283.

<sup>78</sup> St. Louis & S. F. R. Co. v. Dunham, 129 P. 862, 36 Okl. 724.

you should not allow plaintiff the special damages claimed by him.<sup>79</sup>

**§ 1423. Measure of damages for delay in giving notice of nondelivery of goods**

If you find for plaintiff, the measure of damages for you to determine from the evidence should be the difference between the market value of the goods at ———, at the time the owner should have been notified of their arrival and nondelivery, if due care had been taken, and the market value the goods had at same place at or about the time the shipper did receive such notice and was offered opportunity to receive the goods. You will ascertain the value, the market value of the goods at ———, at the time when the plaintiff's predecessors should have had notice of the nondelivery, and ascertain the value of the goods when the shippers were actually informed that the goods had been received and not delivered, and the difference in those values would be the measure of damages, if you find defendant was negligent under the instructions heretofore given and that the plaintiff is entitled to damages, and from the amount you thus arrive at, if you find for the plaintiff, you will deduct the amount it is admitted was paid to the plaintiff's predecessors, and state that balance in your verdict.<sup>80</sup>

**§ 1424. Duty of shipper to mitigate damages from delay**

**§ 1424(1). Michigan**

I charge you that it was the plaintiff's duty when the cars did not arrive on the days for which they were ordered, if you find this to be the fact, to do everything in its power to take care of the peaches which could not be shipped because of the failure to furnish cars, and, if you find from the evidence that the plaintiff, in good faith, and for the purpose of taking care of the peaches, and doing all it could to prevent loss, used the peaches in its canning factory, and that said peaches had deteriorated in value because of the failure to furnish refrigerator cars, and if you find from the evidence that the plaintiff did sustain damage in using peaches in their deteriorated condition, then you must determine from the evidence what that damage was, and return a verdict for the plaintiff for that amount.<sup>81</sup>

**§ 1424(2). Texas**

The court instructs the jury that it was the duty of the plaintiff, and the law required it of him, to exercise ordinary care to pre-

<sup>79</sup> St. Louis S. W. Ry. Co. v. Cates, 38 S. W. 648, 15 Tex. Civ. App. 135.

<sup>80</sup> Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co., 165 P. 363, 84 Or. 399, 4 A. L. R. 1275.

<sup>81</sup> Fremont Canning Co. v. Pere Marquette R. Co., 146 N. W. 678, 180 Mich. 283.

vent his cattle from suffering injury for want of feed, notwithstanding the defendant may have been guilty of negligence in transporting said cotton-seed hulls; and if you find that plaintiff, by the exercise of such ordinary care as a reasonably prudent man would have exercised under similar circumstances, could have procured other feed for his cattle after he saw that said cotton-seed hulls had not arrived, and if by his failure to procure such other feed he contributed to the injury of his cattle, you will find for the defendant. Or if you find that he failed to exercise ordinary care by delaying longer in ordering the car of hulls from ——— than an ordinarily prudent man would have done under similar circumstances, and thereby contributed to his cattle's injury, you will find for the defendant, notwithstanding you may find that defendant was guilty of negligence in failing to transport said hulls from ——— to ——— in a reasonable time.<sup>82</sup>

**§ 1425. Same—Duty to mitigate damages by accepting goods**

You are instructed, at the request of defendant, that if you believe from the evidence in this case that the trees in question were tendered to plaintiff after their arrival at ———, and that, if plaintiff had received them, he could have preserved them, or any part of them, by the use of proper care and attention, it was his duty to have done so; and, if he suffered loss on account of such failure to receive said trees, he cannot recover for such loss.<sup>83</sup>

You are charged, at the request of the defendant, that if you believe from the evidence that the plaintiff sustained any damages by any of said trees becoming wholly worthless before they arrived and were tendered to plaintiff at ———, if in fact they were so tendered, and while they were being transported to that place, or by any of said trees being partially damaged by reason of their delay in transportation while in defendant's hands, then the jury will estimate such damages as the evidence shows the plaintiff to have sustained, if any damages are shown, and return a verdict for such amount; but, if the jury believe from the evidence that only a portion of said trees were damaged, and that within a reasonable time after said trees arrived at ——— they were tendered to plaintiff, then it was the duty of plaintiff to accept said trees; and, if you believe such tender was made to plaintiff, then he can only recover damages for such trees as were shown to have been totally worthless, and damages for such other trees as were damaged at the time, if any were damaged.<sup>84</sup>

<sup>82</sup> *Belcher v. Missouri, K. & T. Ry. Co.* (Civ. App.) 47 S. W. 384.

<sup>83</sup> *St. Louis S. W. Ry. Co. v. Cates*, 38 S. W. 648, 15 Tex. Civ. App. 135.

<sup>84</sup> *St. Louis S. W. Ry. Co. v. Cates*, 38 S. W. 648, 15 Tex. Civ. App. 135.

### 14. *Freight Charges*

#### § 1426. **Effect of contract for rate less than rates filed with Interstate Commerce Commission**

The jury are instructed that, if you find from the evidence that the defendant filed with the Interstate Commerce Commission its tariff rates on ———, and that said tariff rates so filed covered the tariff rate on ——— from the station of ——— to the city of ———, and that said tariff rate on ——— was printed and publicly posted at said station of ——— for the information and inspection of the public, and that in accordance with such tariff rate so filed and so printed and posted, the rate on ——— was fixed and established at ——— per 100, with a minimum weight of ——— pounds per car, and that such tariff rate was on file with said Interstate Commerce Commission at the time the ——— in controversy was shipped, and that there had been no reduction in said tariff rate for a period of ——— days before the shipment of ——— in controversy, and if you further find that the defendant only collected from plaintiff an amount of money not exceeding the rate of ——— per 100, with a minimum of ——— pounds per car, then you must find for the defendant in this case.<sup>85</sup>

#### § 1427. **Liability to shipper for discrimination**

You are instructed that, if you believe from the evidence that defendants charged and collected from plaintiff a greater rate of toll or compensation for a shipment of freight over their railroads from ——— to ——— than they charged ——— for a like quantity of freight of the same class, from the same point to the same point, and in the same direction, and that such charge was willfully made, then such charge would be unlawful, and you will find for plaintiff.\*

The jury are instructed that until ———, if all the evidence is to be believed, the plaintiff, its competitors, and the defendant were all engaged in violating the law—the railroad in giving rebates unlawfully, and the plaintiff in soliciting and accepting the same rebates that its competitors solicited and accepted; and under those circumstances courts do not sit to measure the difference in degree of violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law will not be looked into, nor taken up, nor investigated by courts of justice. Courts of justice are not instituted to measure difference in money value to two people who

<sup>85</sup> Missouri, K. & T. Ry. Co. v. Bowles, 1 Ind. T. 250, 40 S. W. 899.

\* New York, T. & M. Ry. Co. v. Gallaher, 15 S. W. 694, 79 Tex. 685.



are engaged in violation of the same law, and therefore the court will not permit them to recover, not for the purpose of relieving the defendant, but because the plaintiff is just as culpable, and under this law, if any criminality attaches, has been just as much a violator of the law, as the defendant. That is the reason I say they cannot recover up to that time.<sup>86</sup>

**§ 1428. Sale of goods to satisfy charges—Right of carrier on consignee's refusal to pay**

The court instructs the jury that when a consignee of goods refuses to accept them, the common carrier, who has them in charge at the time of such refusal, becomes the agent of the consignor, if known to such carrier, and it is the duty of such carrier to store and care for said goods for and on account of the consignor, and to notify the latter of the consignee's refusal, if he knows his whereabouts; and that if they believe from the evidence that the defendant, as a common carrier, tendered the goods in controversy to the consignee, and that he refused to accept them, and that the defendant, knowing the plaintiff to be the consignor, sold said goods and converted the money received therefor to his own use, and that without having previously notified the plaintiff of such refusal; and that plaintiff's residence was known to defendant—they will find for the plaintiff, and assess his damages at the whole-sale value of the goods in ———, and legal interest from the time they were sold by defendant.<sup>87</sup>

You are instructed that a common carrier is entitled to a lien upon goods carried, for carriage and advances for carriage upon the same in his custody as such carrier; and if such carriage or advances be not paid within ——— days from the receipt thereof, to sell the same at public auction to the highest bidder for the purposes of paying the same, first giving ——— days' notice of such sale to the owner, consignee, or consignor, if known, and by advertisement in a daily paper, published where the sale takes place, for ——— days. But in case the goods aforesaid consist of articles that will perish or become greatly damaged by delay in disposing of the same, then the carrier, unless such charges and advances be paid, may sell the same at public or private sale for the best price reasonably obtained therefor; but before so doing he shall give notice to the owner or consignee, or agent of him, of his intent to sell and dispose of the same, and the time and place of sale, ——— hours before the same, either by letter or by personal notice.<sup>88</sup>

<sup>86</sup> *Pennsylvania R. Co. v. International Coal Mining Co.* (C. C. A. Pa.) 173 F. 1, 97 C. C. A. 383, reversed 33 S. Ct. 893, 230 U. S. 184, 57 L. Ed. 1446, Ann. Cas. 1915A, 315.

<sup>87</sup> *Martin v. McLaughlin* (Colo.) 6 P. 137.

<sup>88</sup> *Martin v. McLaughlin* (Colo.) 6 P. 137.

You are instructed that, if you find from the evidence, by a fair preponderance thereof, that plaintiff consigned and shipped from ——— to one ——— in ———, certain goods via the ——— Railroad, over the defendant's line, defendant being then a common carrier, and that said ———, the consignee thereof, refused to receive and pay the freight thereon; and if you further find from the evidence that one ——— notified the plaintiff by telegraph, or otherwise, and received instructions from plaintiff to pay charges and hold the goods for him; and if you further find that said ——— was then and there the agent of defendant, and acting within the scope of his authority as such agent; and, finally, if you find that defendant sold said goods without complying with the following instructions, strictly and fully—you will find for the plaintiff, and assess his damages at the wholesale value of said goods in ———, together with ——— per cent. interest per annum from date of sale by defendant.<sup>89</sup>

#### B. CARRIAGE OF LIVE STOCK

##### § 1429. Sufficiency of delivery to carrier to charge it with liability

You are instructed that, if you find that plaintiff brought his cattle to the stockyards of the defendant railroad company for transportation on the train from ——— to ——— in accordance with the directions of its agent, or in accordance with its recognized custom of receiving cattle for transportation, then this would constitute a sufficient delivery to compel the defendant to transport them within a reasonable time.<sup>90</sup>

##### § 1430. Scope of liability of carrier in general

###### § 1430(1). Iowa

You are instructed that, when the defendant contracted to carry the cattle of plaintiff to their destination, the law imposed upon it an obligation to carry them in a proper manner, and deliver them in good condition considering the ordinary perils of the road; and if it failed to deliver them in such condition, it is responsible in damages for such failure, unless it can excuse itself by showing that the damage was caused by some conditions beyond its power to know of and prevent.<sup>91</sup>

###### § 1430(2). Texas

You are instructed that common carriers are not insurers of live stock transported by them, but the law requires only the exercise

<sup>89</sup> Martin v. McLaughlin (Colo.) 6 P. 137.

<sup>90</sup> Blackwell v. Oregon Short Line Ry. Co., 161 P. 565, 82 Or. 303.

<sup>91</sup> Colsch v. Chicago, M. & St. P. Ry. Co., 117 N. W. 281.

of ordinary care in the transportation of freight, and that if from the evidence they find that the defendants exercised ordinary care in handling and transporting plaintiffs' cattle, considering all the facts and circumstances concerning the transportation, they should return a verdict for defendants as to the issue of delay and improper handling.<sup>92</sup>

**§ 1431. Liability for injuries in transit**

The court instructs the jury to find for plaintiff the damages sustained by him on account of the death and injury to the hogs in controversy, not exceeding the sum sued for, \$——, unless they shall believe from the evidence that the death of the hogs that were dead when they reached their destination, and the loss in weight, if any, of the remainder of said hogs, was due to the inherent nature and propensities of the animals themselves, or to their being overcrowded in the car by plaintiff, if they were overcrowded, considering the condition of the hogs, and the condition of the weather, at the time of the shipment, in which latter event they will find for the defendant.<sup>93</sup>

The court instructs the jury that, if you believe from the evidence that the plaintiffs, at the time and on the occasion mentioned, shipped from —— the head of horses in question, consigned to ——, by a contract of shipment previously made between the plaintiffs and defendant company, and that at ——, a station or yard on defendant's line of railway, and while in charge of defendant for transportation, under said contract, the defendant railroad company, or its agents, or servants, or employés struck or bumped the car in which plaintiffs' horses were being hauled against its engine or other cars in a negligent manner, and that the said negligence, if any, on the part of the defendant, caused one of the lanterns used by the plaintiffs or those in attendance to set fire to the contents of said car, and to injure the plaintiffs' horses, or any of them, you should find for the plaintiffs, unless you should believe from the evidence that the plaintiffs, or the attendants in charge of said horses, —— and ——, or either of them, were guilty of negligence, as explained in instruction No. ——.<sup>94</sup>

The court instructs the jury that, unless you believe from the evidence that, at the time and on the occasion mentioned, the defendant railroad company, or its agents, servants, or employés struck or bumped the car in which plaintiffs' horses were being hauled against its engine or other cars in a negligent manner, and

<sup>92</sup> Williams & Hawkins v. Gulf & I. Ry. Co. of Texas, 135 S. W. 390, 63 Tex. Civ. App. 543.

<sup>93</sup> Louisville & N. R. Co. v. Taylor, 205 S. W. 934, 181 Ky. 794.

<sup>94</sup> Louisville & N. R. Co. v. Woodford, 153 S. W. 722, 152 Ky. 398.

that the said negligence, if any, on the part of the defendant caused one of the lanterns used by the plaintiffs or those in attendance to set fire to the contents of said car, and to injure the plaintiffs' horses, or any of them, you should find for the defendant.<sup>95</sup>

You are instructed that, if the jury believe from the evidence that the defendant company received the stock in the evidence referred to in good condition at ———, for transportation to ———, and that it was delivered by the defendant or connecting carrier at its destination in a damaged condition, your verdict should be for the plaintiffs, unless you further believe from the evidence that said damaged condition was due to the inherent nature of the stock or the weather conditions prevailing between the date of its reception at ——— and its delivery at ———, which were beyond the control of the defendant company and its connecting lines, in either of which events the law is for the defendant, and the jury should so find.<sup>96</sup>

**§ 1432. Liability for injuries due to inherent propensities of animals**

We say to you that in the absence of negligence the defendant is not liable for injuries that may have happened to the cattle solely as a result of their inherent nature, or as has been said, through the vice or propensity of the animals themselves such as kicking, goring, wickedness and the like. This is true whether a contract to that effect has been entered into or not.<sup>97</sup>

**§ 1433. Strength and suitability of cars furnished to transport live stock**

You are instructed that, in the transportation of live stock by a carrier, the cars that are furnished by the carrier for that purpose must be properly constructed; and safe and suitable for the transportation of the stock offered for shipment; reference being had to the kind and character and value of such stock. That is, when a carrier takes live stock to ship, it must take into consideration the kind and character of live stock, and furnish a car that is safe and suitable for the transportation of that particular kind of stock. If it is large, heavy, strong horses, the car must be proportionately safe and strong. In other words, it would require a stronger and better car to transport large, heavy, strong horses than it would to transport, for instance, a load of sheep or hogs or calves. Every carrier must take notice of the fact that large, heavy, young,

<sup>95</sup> Louisville & N. R. Co. v. Woodford, 153 S. W. 722, 152 Ky. 398.

Louisville & N. R. Co., 150 S. W. 987, 150 Ky. 723.

<sup>96</sup> McCampbell, Figg & Burnett v.

<sup>97</sup> Klair v. Philadelphia, B. & W. R. Co. (Del.) 78 A. 1085, 2 Boyce, 274.

strong horses, or horses that are unbroken, require a stronger vehicle, a much more safe and sound vehicle in construction than it would some smaller or less powerful animal. They must furnish a car which is suitable and safe for the transportation of that particular kind of stock. They must take notice of the fact that horses and cattle are liable to exert a force upon the car, tax its strength in proportion to the size and strength of the animal, its disposition, its character, and whether it is broken, or whether it is unbroken and wild and vicious in disposition. Now the carrier is not bound to furnish the safest and most approved cars that can be found. It is enough that they are reasonably safe and suitable for the purposes for which they are furnished. The fact that the cars used are those which the carrier always uses is no defense, if in fact they are not suitable. So the question is up to the jury: Was the car furnished a car which was reasonably safe and suitable for the transportation of this stock, taking into consideration the kind and character and the nature of the stock to be transported?<sup>98</sup>

**§ 1434. Duty with respect to condition of stock yards or pens**

You are instructed that it is the duty of the carrier to use and exercise reasonable and ordinary care to maintain and keep such yards or pens in a reasonably safe, fit and suitable condition for the reception and yarding of such live stock for a reasonable space of time, to be determined in any given case by the time of arrival and departure of the trains on which it customarily receives and transports live stock from such station, the usual and customary manner and time of assembling such live stock at such station for loading and shipment, the common and general course of dealing between such carrier and shippers at such station, and from all the surrounding facts and circumstances in the case.<sup>99</sup>

**§ 1435. Duty to feed and water stock or to afford facilities therefor**

**§ 1435(1). Indian Territory**

You are instructed that defendant's conductor, ———, had a right to assume that plaintiff's hogs had been properly cared for by plaintiff, sufficiently watered, and were in good condition when loaded, unless he received knowledge to the contrary.<sup>1</sup>

**§ 1435(2). Missouri**

You are instructed that, if you find and believe from the evidence that on or about the day of ———, the plaintiff ——— ship-

<sup>98</sup> *Berry v. Chicago, M. & St. P. Ry. Co.*, 124 N. W. 859, 24 S. D. 611.

<sup>99</sup> *Zakrzewski v. Great Northern*

*Ry. Co.*, 154 N. W. 966, 131 Minn. 175.

<sup>1</sup> *St. Louis, I. M. & S. Ry. Co. v. Keys*, 98 S. W. 138, 6 Ind. T. 396.

ped two car loads of hogs over the defendant's railroad to ———, and that said hogs were unloaded at that station and placed in defendant's stockyards; that the facilities for watering stock at said stockyards were so defective and insufficient that plaintiff was unable, by the exercise of reasonable efforts, to water said hogs, and that plaintiff used due care, caution, and diligence in caring for said hogs and procured water for them from other sources, as soon as he could; that as a direct result of plaintiff's inability to get water for the hogs at defendant's stockyards some of the hogs perished and others depreciated in value, and that the death of said hogs and the depreciation in value would not have occurred had the facilities for watering been such that the hogs could have been watered before leaving the defendant's stockyards, and that the said loss to plaintiff was caused by the defective and insufficient condition of defendant's watering facilities at said stockyards, and, if you further find that defendant's agents in charge of the station and yards knew of the condition of said well and watering facilities, or (by the exercise of reasonable care) might have known of it, for a sufficient length of time prior to the arrival of plaintiff's hogs to have enabled them, in the exercise of reasonable diligence, to have had the watering facilities in a reasonably good condition, then the finding should be for plaintiff, provided the jury further believe from the evidence that in the conditions and surroundings defendant, in the exercise of reasonable diligence, might have obtained a reasonably good supply of water and have provided reasonably good watering facilities.<sup>2</sup>

§ 1435(3). New Mexico

The court instructs the jury that the law imposes upon a common carrier, such as the defendant, the duty to furnish reasonable facilities and opportunities to care for, feed, water, and tend to stock during transportation; and if you believe from the evidence in this case that, when the shipment in question arrived at ———, it was necessary for the safety of said cattle that they be unloaded and fed and watered, and that the defendant did not have at said place and at said time proper means and facilities for so doing, and that, by reason thereof, said stock was damaged, then you should allow the plaintiff such damages as he has sustained, unless you further find that the plaintiff, by his acts and conduct, waived such unloading, watering, feeding, etc., at ———.<sup>3</sup>

<sup>2</sup> Bilby v. Chicago, B. & Q. R. Co., 171 S. W. 39, 184 Mo. App. 644.

<sup>3</sup> Durrett v. Chicago, R. I. & P. Ry. Co., 146 P. 962, 20 N. M. 114. The specific objection to this instruction

was that the shipment in question, being an interstate one, was governed by the federal statute, which permitted the carrier to confine the stock for twenty-eight hours.



## § 1435(4). Texas

You are charged that it was the duty of defendant to use ordinary care to prevent injuries to plaintiff's cattle while same were in the pens awaiting shipment after they had been received and accepted by said defendant for transportation, and if after said cattle were received by said defendant for transportation, it became necessary that said cattle should be fed to prevent injury, and said defendant did not use ordinary care to feed said cattle, and such failure was negligence, and because of such failure, if any, plaintiff's cattle were injured, then said defendant would be liable to plaintiff for all damages if any, caused said cattle by such failure, if any, of said defendant.<sup>4</sup>

You are instructed that a railroad company transporting live stock must furnish reasonable and proper facilities and opportunities for feeding, watering, and resting the live stock in its care or while in course of transportation and supply them with proper food, water, and rest, along the route, and, if necessary, unload them for that purpose.<sup>5</sup>

## § 1435(5). Wyoming

You are instructed that under the law in force at the time of the shipment in question it was unlawful for any railroad company who was a common carrier for hire to confine in its cars for a period longer than ——— consecutive hours any cattle it had received for transportation without unloading the same in a humane manner, provided that, upon a written request of the owner on that particular shipment, they might be retained for ——— hours, and that holding cattle in excess of said ——— hours by any railroad company was unlawful, unless occasioned by storm or other accidental or unavoidable causes, which could not be anticipated or avoided by due diligence and foresight.<sup>6</sup>

## § 1436. Statutory duty to unload for rest, food, and water—Liability of connecting carrier

The court instructs the jury that practically the only serious question, the question about which the testimony is not clear, if you credit it, is as to whether or not the defendant here, the ——— Company, used reasonable care in finding out whether or not the stock was in fact unloaded and rested and fed and watered at ———, after the agent of the defendant told the agent of the ——— Company that it would not receive the car in its then condition. I advise you in that respect that it was the duty of the

<sup>4</sup> Fanhandle & S. F. Ry. Co. v. Vaughn (Civ. App.) 191 S. W. 142.

<sup>5</sup> Pecos & N. T. Ry. Co. v. Meyer (Civ. App.) 155 S. W. 309. This in-

struction does not impose an absolute duty.

<sup>6</sup> Chicago, B. & Q. R. Co. v. Simpson Bros., 151 Pac. 902, 23 Wyo. 342.



defendant company, through its agent, to make reasonable inquiry and to use reasonable care to find out whether or not the stock had been unloaded and otherwise cared for as provided by the statutes, before it would be warranted in confining the stock longer in the car after it accepted the car. If you find that it did use such reasonable care and was misled, was deceived, and because of being so misled, after using reasonable care, and because of such deception, it inadvertently and unknowingly confined the stock, or kept the stock confined, longer than the statutory period, then your verdict should be in its favor. If, however, you find that it was not so deceived or misled, then, if you find that the stock was confined in excess of the statutory period, you should find against the defendant.<sup>7</sup>

**§ 1437. Liability for negligence with respect to dipping cattle**

You are instructed that under the evidence in this case the defendant owed to the plaintiff the duty of exercising ordinary care in the dipping of the plaintiff's cattle; that is, such care as an ordinarily prudent and reasonable person would have exercised with reference to his own cattle under the same or similar circumstances. And if the defendant failed to exercise such ordinary care, it was guilty of negligence, and if, as the result thereof some of the plaintiff's cattle died, then and in that event your verdict should be for the plaintiff and against the defendant. And in this connection you are instructed that if you find and believe, from a fair preponderance of the evidence, that the cattle of the plaintiff, at the time they were dipped by the defendant company, were in a condition of extreme thirst, or were in a famished condition for the want of water, and that the employes of the defendant, whose duty it was to dip the said cattle, knew of the said condition of the cattle, and you further find and believe from a fair preponderance of the evidence, that cattle in the condition that the plaintiff's cattle then were in would drink of any liquid through which they were driven, or in which they were submerged, and that the employes of the defendant company, whose duty it was to dip the said cattle, knew or had notice of such fact, and you further find and believe from a fair preponderance of the evidence, that the said cattle, if watered at a reasonable time before dipping, would not drink of the arsenical solution in which they were to be dipped, and you further find and believe from the evidence that the employes of the defendant company knew, or in the exercise of ordinary care must have known, of such fact, then and in that event it was the duty of

<sup>7</sup> Oregon-Washington R. & Nav. Co. v. United States (C. C. A. Idaho) 205 F. 341, 123 C. C. A. 475.

the employés of the defendant company to water the said cattle, and if you further find and believe from a fair preponderance of the evidence in the case that, because of the failure of the employés of the defendant company to water the said cattle, some of the cattle of the plaintiff drank of the arsenical solution in which they were dipped by the defendant company, and died as the result thereof, then and in that event your verdict should be for the plaintiff and against the defendant.<sup>8</sup>

You are instructed that it is not claimed or charged by the plaintiff that the defendant company was guilty of any other negligence in the dipping of the plaintiff's cattle than the failure to water the said cattle before dipping the same, and before you would be warranted to find a verdict for the plaintiff you must find from a fair preponderance of the evidence that a person of ordinary prudence and intelligence, under the circumstances, would have watered the said cattle before dipping them, and that the defendant company failed to water the said cattle and that as the proximate result of such failure to water the cattle, the said cattle, or some of them drank of the arsenical solution in which they were dipped, and died as the result thereof.<sup>9</sup>

**§ 1438. Negligence of shipper or attendants**

**§ 1438(1). Kentucky**

The court instructs the jury that, if you believe from the evidence that the attendants in charge of said horses, or either of them, were guilty of negligence while in charge of said horses, and that such negligence, if any, directly or proximately contributed to the injuries to said horses, or any of them, and that but for such negligence, if any, on the part of said persons, or either of them, said horses would not have been injured, the jury should find for the defendant, even though you may believe from the evidence that the defendant, its agents, servants, or employés, in charge of the train by which said horses were being transported, were themselves negligent.<sup>10</sup>

**§ 1438(2). Texas**

You are charged that if you find from the evidence that it was the duty of plaintiff to attend his cattle during transportation, and that the plaintiff abandoned his cattle at ———, and if you further find that the said cattle were damaged or injured or killed during transportation from ——— to ——— after such time, and that such damage or injury was the proximate result of such abandonment.

<sup>8</sup> Missouri, K. & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36.

<sup>9</sup> Missouri, K. & T. Ry. Co. v. Williamson, 180 P. 961, 75 Okl. 36.

<sup>10</sup> Louisville & N. R. Co. v. Woodford, 153 S. W. 722, 152 Ky. 398.

then you are instructed that the plaintiff cannot complain of any injurious consequence of such abandonment, and you will find for the defendant as to such injury or damage.<sup>11</sup>

**§ 1438(3). Virginia**

You are instructed that, where an injury or loss is caused by the concurrent negligence of both plaintiff and defendant which has contributed as an efficient cause to the injury of which the plaintiff complains, as a general rule there can be no recovery, as courts will not undertake to balance the negligence of the respective parties where both have been at fault, in order to ascertain which one was most at fault. In this case if you believe from the evidence that any damage was caused by the negligence of the depot clerk ——— in hearing or transcribing the telephone message, and if you further believe the plaintiff ——— was likewise negligent in undertaking to communicate his shipping instructions to the railway company or its agent, and that it was the concurrent negligence of both parties that caused the injury, then there can be no recovery for the plaintiff, based solely upon the said acts.<sup>12</sup>

**§ 1439. Concealment by shipper of conditions requiring greater vigilance by carrier**

The jury are instructed that it was the right of defendant's agent, when plaintiff offered his cow for shipment, to make any inquiries as to her physical condition, and if, upon such inquiry being made, the plaintiff concealed her condition, and this prevented defendant from exercising the care required because of the fact that the cow was with calf, then plaintiff cannot recover.<sup>13</sup>

**§ 1440. Duty of shipper with respect to loading**

You are instructed that, if you believe from the evidence that plaintiff caused defendant's employes to overload said cars, if they were overloaded, and that such overloading, if any, of said cars caused any part of the damage to plaintiff's horses, if any, you will find a verdict for defendant as to such damage, if any, so caused by such overloading, if any, of said cars; but, on the other hand, if you believe from the evidence that plaintiff did not cause defendant's employes to overload said cars, if they were overloaded, then defendant would be liable for the damage, if any, resulting to plaintiff's horses from such overloading, if any.<sup>14</sup>

You are instructed that the defendant railway company would only be liable for damages and injury, if any, done to said cattle

<sup>11</sup> *Texas & P. Ry. Co. v. Thorp* (Civ. App.) 198 S. W. 335.

<sup>12</sup> *Southern Ry. Co. v. Forgey & Richardson*, 54 S. E. 477, 105 Va. 599.

<sup>13</sup> *McCune v. Burlington, etc., R. Co.*, 3 N. W. 615, 52 Iowa, 600.

<sup>14</sup> *Texas & P. Ry. Co. v. White*, 80 S. W. 641, 35 Tex. Civ. App. 521.

by reason of the negligence, if any, of said company while said cattle were in the possession of said company and on its own line of road. The court instructs you that if you believe from the evidence that the plaintiff negligently overloaded the cattle in the cars for transportation to ———, and that his negligence in that particular, if any, contributed to the damage suffered by his said cattle, if any, then you will return your verdict for defendants, even though you may believe from the evidence that the defendants were negligent in handling plaintiff's cattle.<sup>15</sup>

### § 1441. Liability for delay in transportation

#### § 1441(1). Iowa

The court instructs the jury that any delay in the shipment of the cattle in question at any one or more points along the route of shipment would not, in itself, be sufficient to entitle the plaintiff to recover, even though caused by the negligence of the defendant, if said cattle did in fact arrive in ——— in time for the same market upon which said cattle could have been offered or sold as they would have arrived for had no such negligence nor delay occurred; and if only such delay or negligence is shown the plaintiff cannot recover.<sup>16</sup>

#### § 1441(2). Texas

You are instructed that reasonable care and dispatch, as used in these instructions, means such care and dispatch as a reasonably cautious and prudent man would use under like circumstances.<sup>17</sup>

### § 1442. Duty of carrier to deliver on particular market day

#### § 1442(1). Iowa

The court instructs the jury that if the time for which the defendant was required to keep the cattle in question off of the cars at G., including the time necessarily consumed in unloading, feeding, and reloading said cattle, expired so late that defendant could not reach C. by carrying said cattle upon its first available regular train thereafter from G. to C., in time for the market upon the ——— day of ———, then it was not negligence for defendant to hold said cattle in G. longer than was made necessary by reason of the federal statute requiring the unloading and feeding of said cattle, providing same arrived in C. in due time for the opening of the market upon the morning of the following day.<sup>18</sup>

<sup>15</sup> Missouri, K. & T. Ry. Co. of Texas v. Chittim, 60 S. W. 284, 24 Tex. Civ. App. 599.

<sup>16</sup> Tiller & Smith v. Chicago, B. & Q. R. Co., 120 N. W. 672, 142 Iowa, 309.

<sup>17</sup> Gunn v. Railway Co. (Civ. App.) 142 S. W. 63.

<sup>18</sup> Tiller & Smith v. Chicago, B. & Q. R. Co., 120 N. W. 672, 142 Iowa, 309.

§ 1442(2). *Oklahoma*

You are instructed that, although you may believe from the evidence that the contract introduced in evidence by the defendant, and providing that live stock is not to be transported or delivered within any specified time nor in season for any particular market, was signed by one of the plaintiffs and was binding upon said plaintiffs, yet you are further instructed that that would not prevent plaintiffs from recovering in this case, and before you can find for the defendant the defendant company must prove by a preponderance of the evidence that the cause of the delay and injury to plaintiffs' cattle, if you find that there was such unreasonable delay and that plaintiffs were damaged thereby, was within some one of the exceptions contained in said contract pleaded by the defendant company.<sup>19</sup>

§ 1442(3). *Virginia*

You are instructed that, if you believe from the evidence that the defendant was not notified by the plaintiff that the shipment of the live stock mentioned in the evidence was made for any particular market, then the defendant did not guarantee the delivery of the said live stock upon any particular market; that is, any particular market day.<sup>20</sup>

§ 1443. *Duty to transport within reasonable time*

You are instructed that you have to get at what were reasonable conditions, what did actually take place. Did the defendant and its servants do what a reasonably prudent and careful man would have done to carry out the contract which it had undertaken, which was to deliver these horses within a reasonable time, and reasonable time meaning for the kind of shipment which parties contemplated at the time the horses were delivered to the defendant to be shipped?<sup>21</sup>

§ 1444. *Excuse for delay—Pressure of business*

The court instructs the jury that, if the jury believe, from the evidence, that the defendant received from the plaintiff, on ———, his cattle and hogs for transportation to, and delivery at, ———, and that, at the time of the receipt of the stock, the road of defendant, and its connecting lines running to ———, were so crowded with freight that they were unable to furnish cars within the usual time for the transportation of plaintiff's stock, then such

<sup>19</sup> *St. Louis & S. F. R. Co. v. Cox, Peery & Murray*, 138 P. 144, 40 Okl. 258. The court says that, while this instruction is not commended as in model form, it states the law correctly, viz. that the stipulation specified

would not permit the carrier to unreasonably delay the shipment.

<sup>20</sup> *Norfolk, etc., Ry. Co. v. Reeves*, 33 S. E. 606, 97 Va. 284.

<sup>21</sup> *Clapp v. American Express Co.*, 125 N. E. 162, 234 Mass. 174.

crowded condition of said road or roads would furnish no excuse for the defendant if plaintiff's stock were not delivered at ———, in a reasonable time, if the jury believe the defendant was so bound to deliver.<sup>22</sup>

**§ 1445. Act of God as excuse for delay—Conditions existing at time of accepting stock for shipment**

The court further instructs you that if you find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.<sup>23</sup>

**§ 1446. Duty of carrier pending delay**

You are instructed that, if there was delay in the transportation of the cattle, the defendant was required to use the highest degree of care during the delay for their safety. If the removal of the cattle from the car during the time of the delay, or at any time while in the defendant's possession, was necessary for their protection from injury, and it was possible to remove them, defendant was bound to do so, and was bound to give them whatever personal attention was necessary for their protection, during the whole time the cattle were in possession of defendant.<sup>24</sup>

**§ 1447. Presumption of negligence from fact of injuries**

The court instructs the jury that, if you find from the evidence that the cattle mentioned in the third count of plaintiff's petition were delivered to defendant at ———, in good condition, health, and strength, to be transported by defendant from ——— to ———,

<sup>22</sup> Toledo, Wabash & Western R. Co. v. Lockhart, 71 Ill. 627.

<sup>23</sup> Nelson v. Great Northern Ry. Co., 72 P. 642, 28 Mont. 297.

<sup>24</sup> Colsch v. Chicago, M. & St. P. Ry. Co. (Iowa) 117 N. W. 281. In

this case the plaintiff did not complain of the delay as such, but because of the negligence of the carrier in caring for the stock during the delay.



and that when said cattle were delivered to plaintiff at \_\_\_\_\_ some of them were bruised, scarred, crippled, and injured in such manner and to such extent that said injuries were visible to a person making an ordinary examination of said cattle, then the court instructs you that you may find that the injury to said cattle was due to the negligent manner in which defendant handled said cattle and the car containing same while in transit from \_\_\_\_\_ to \_\_\_\_\_, provided you further believe from the evidence that said injuries, if any, were not caused and inflicted upon said cattle by the cattle themselves.<sup>25</sup>

**§ 1448. Presumption that delay due to negligence of carrier**

**§ 1448(1). Missouri**

The court instructs the jury that if you find and believe from the evidence in the case that plaintiff delivered to defendant certain cattle to be by defendant transported from \_\_\_\_\_ to \_\_\_\_\_, and that defendant did not transport said cattle in a reasonable time and in the time usually and ordinarily required and consumed by defendant to transport cattle from \_\_\_\_\_ to \_\_\_\_\_, then the court instructs the jury that you may infer from such evidence that the delay in transporting said cattle was due to the negligence of the defendant, unless defendant has shown to your reasonable satisfaction that such delay was not due to negligence.<sup>26</sup>

**§ 1448(2). Oklahoma**

You are charged that, if the defendant delayed the train upon which the plaintiff's cattle were being hauled while said cattle were in transit an unreasonable time, then burden of proof shifts to the defendant to show that said delay was unavoidable and could not have been avoided by the use of ordinary care and diligence, and, if you find from the evidence that said cattle were delayed an unreasonable time in transit, and the defendant has failed to show that said delay was necessary and could not have been reasonably avoided, and that the plaintiff did not select a contract waiving any damages that may have been sustained, as hereinafter charged, then your verdict shall be for the plaintiff for such amount as you may find reasonable from all the evidence in the case.<sup>27</sup>

<sup>25</sup> *Cunningham v. Chicago & A. R. Co. (Mo.)* 215 S. W. 5.

<sup>26</sup> *Cunningham v. Chicago & A. R. Co.*, 215 S. W. 5.

<sup>27</sup> *St. Louis & S. F. R. Co. v. Peery*, 138 P. 1027, 40 Okl. 432.



**§ 1449. Measure of damages for injury or loss****§ 1449(1). Delaware**

You are instructed that, if you should find for the plaintiffs, their measure of damage is the difference between the value of the cattle in their damaged state and what would have been their value if delivered in good order, as the same may appear from the evidence with interest from the date of the delivery of said cattle by the defendant to the plaintiffs, and you should assess their damage at that amount. In this connection we say to you, however, that whatever may have been the real value of the cattle if they had been delivered in good condition, the plaintiffs cannot now claim a greater value than that agreed upon in the contracts admitted in evidence and now before you, so far as the agreed valuation is applicable to this case.<sup>28</sup>

**§ 1449(2). Indian Territory**

You are instructed that, if you find in favor of the plaintiff, the measure of his damage is the difference between the market value of the dead hogs at the time the load of hogs should have arrived in market by due course of shipment and their market value if they had arrived at ——— alive and in good condition.<sup>29</sup>

**§ 1449(3). Kentucky**

The court instructs the jury that, if you find for the plaintiffs, you should find for them such sum in damages as you believe from the evidence would fairly and reasonably represent the fair market value at ———, of the chestnut colt by ———, dam, ———, the chestnut colt, by ———, dam, ———, and the bay filly, by ———, dam, ———, at the time of the accident, and such further sum in damages as you may believe from the evidence would fairly and reasonably represent the difference, if any, between the fair market value of the remainder of said horses in the condition they were in immediately before the accident, and their value at such reasonable time after the accident, as the extent of their injuries, if any, traceable directly to the accident in question, has been or might have been ascertained, not exceeding in the aggregate \$———, the amount sought in the petition.<sup>30</sup>

You are instructed that, if the jury find for the plaintiffs, they should find for them in such sum in damages, not exceeding \$———, as is the difference between the market value of the mare, ———, before she was injured and the market value of said mare immediately after she was injured. The condition of the mare

<sup>28</sup> Klair v. Philadelphia, B. & W. R. Co., 78 A. 1085, 2 Boyce, 274.

<sup>29</sup> St. Louis, I. M. & S. Ry. Co. v. Keys, 98 S. W. 138, 6 Ind. T. 396.

<sup>30</sup> Louisville & N. R. Co. v. Woodford, 153 S. W. 722, 152 Ky. 398.

immediately after she was injured will be determined in the light of the testimony as to her condition after the extent of her injury was ascertained.<sup>81</sup>

§ 1449(4). Texas

The jury are instructed that, if you believe from the evidence that the cattle in question were, by the negligence of defendant, injured during transportation, then you are instructed that the measure of damages would be the difference in the market value of such cattle at the place of destination, at the time they arrived there in their injured condition, if injured, and their market value at such place of destination in the condition they would have been in when they should have arrived there, but for such injuries.<sup>82</sup>

§ 1450. Measure of damages for delay in shipment or failure to transport

§ 1450(1). Iowa

The jury are instructed that, if you find from the evidence that the plaintiffs are entitled to recover, then you will allow them such sum in damages as they have shown they are fairly entitled to under all the circumstances and the evidence in the case, and in this connection you are instructed that you should allow them the difference between the market value of the horses in question, if they had arrived at the place of destination without unreasonable delay, and the market value of said horses when they did actually arrive at the point of destination. If you find that any of said horses were injured during their transportation, and you find that defendant is responsible therefor, then you will allow plaintiffs such additional sum as the value of such horses were reduced by said injury. If you further find that there was unreasonable delay in the arrival of said horses at their destination, and that defendant was responsible for such delay, and that by reason thereof the plaintiffs were detained in ——— in securing a market for said horses, and that they were at expense for themselves and in keeping said horses until they secured such market, then you will allow them such further sum, as shown by the evidence, that they have expended for their own personal expenses for hotel bills, and for feeding and caring for the horses, until such market was secured, and also for the value of plaintiffs' time and services while detained in ——— in seeking a market for said horses, but you will only allow for the damages described in this paragraph after you have

<sup>81</sup> Southern Express Co. v. Fox & Logan, 115 S. W. 184, 131 Ky. 257, 133 Am. St. Rep. 241.

<sup>82</sup> Gulf, C. & S. F. Ry. Co. v. Miller, 59 S. W. 550, 24 Tex. Civ. App. 430.

found by the evidence, if you do, that plaintiffs could have readily sold said horses in the market if they had arrived at their destination without unreasonable delay. And in any event you will allow plaintiffs no more, if you allow them anything, than they claim herein.<sup>33</sup>

**§ 1450(2). Kentucky**

The jury are instructed that the testimony as to what prices the horses in question brought at the sale at ——— is not to be considered by them for the purpose of definitely fixing a standard by which to ascertain the depreciation in value, if any, but only as a fact to be considered with others in determining whether or not there was any depreciation in value, and, if so, its extent. In other words, if the jury find for the plaintiffs, the measure of damages is not the difference between what said horses brought at said sale and what their value would have been if uninjured by the trip, but is the extent, if any, to which their fair vendible value had been depreciated by any breach of duty (if there was such) on defendant's part.<sup>34</sup>

**§ 1450(3). Missouri**

The jury are instructed that, in the event your finding is for the plaintiff, you will assess his damages as follows: For loss by shrinkage in weight and value of said cattle, if any, caused by defendant's failure to transport and deliver said cattle as agreed, in such sum as the evidence may show he has sustained, not exceeding \$———. And if you further believe from the evidence that the market price at ———, on such cattle as the cattle in question declined between the date advertised for the first sale and the date of the second sale, and that the delay in selling said cattle was caused by the negligence and failure of defendant to transport said cattle to ———, then you will assess plaintiff's damages because of such decline in the market price of said cattle as the evidence may show he has sustained, not exceeding the sum of \$———. And if you further believe and find from the evidence that the plaintiff suffered loss by reason of incurring expense on the ——— day of ———, in driving said cattle to ———, in loading them into defendant's cars, and in driving said cattle back to the farm after they were returned to ——— by defendant, you will assess his damages at such sum as the evidence may show plaintiff sustained therefrom not exceeding the sum of \$———. <sup>35</sup>

<sup>33</sup> *Wisecarver & Stone v. Chicago, R. I. & P. R. Co.*, 119 N. W. 532, 141 Iowa, 121.

<sup>34</sup> *Adams Express Co. v. Hundley*, 139 S. W. 1084, 145 Ky. 7.

<sup>35</sup> *Hahn v. St. Louis, K. C. & C. R. Co.*, 125 S. W. 1185, 141 Mo. App. 453.

## § 1450(4). Texas

You are instructed that, if you find from the evidence that on account of such negligent delay, said cattle shrank in weight and presented a gaunt appearance, and that such shrinkage and bad appearance, if any, affected their selling price on the market, then you will find for the plaintiff in such sum as will represent the difference on account of such extra shrinkage and stale appearance, between amounts which was received by the plaintiff for said cattle and what he would have received if it had not been for such extra shrinkage and bad appearance, if any.<sup>36</sup>

You are instructed that, if you find a verdict in favor of the plaintiff for damages, you will fix the amount at the difference, if any, between the value of the plaintiff's cattle at ———, at the time and in the condition you find from the evidence they were delivered there, and what you find from the evidence the value would have been if they had been transported and delivered by defendant within a reasonable time and with ordinary care; and if you find that any of plaintiff's cattle were killed, and that the same was the direct and proximate result of negligence on the part of defendants, then you will assess the damage at what the value of said cattle, if any, would have been had they been delivered at ——— within a reasonable time and with ordinary care.<sup>37</sup>

You are instructed that if you believe from the evidence that from ———, until ———, inclusive, owing to the financial panic prevalent in the fall of ———, there was not a ready sale on the ——— live stock market for the various classes of live stock sold thereon, and that by reason thereof the prices of such stock declined, and if you further believe that the difficulty of making sales was as great on ——— as it was on the later date of ———, and if you believe that for such reasons he could not have made any quicker sales or obtained on the said earlier dates any better prices than he could have on the later date of ———, you will not award plaintiff anything for any damages claimed by him by reason of the fall in the market.<sup>38</sup>

## § 1450(5). West Virginia

The court instructs the jury that if they believe from the evidence that there was such unreasonable delay on the part of the defendant or its servants in transporting said cattle to the city of ———, they should find for the plaintiff; and, if they further believe from the evidence that the plaintiff was damaged by said de-

<sup>36</sup> Gulf, C. & S. F. Ry. Co. v. Rodriguez (Civ. App.) 185 S. W. 311.

<sup>37</sup> Gulf, C. & S. F. Ry. Co. v. Shults, 129 S. W. 845, 61 Tex. Civ. App. 93.

<sup>38</sup> Galveston, H. & S. A. Ry. Co. v. Word (Civ. App.) 124 S. W. 478.

lay, in assessing such damages they should take into consideration all damages naturally and proximately resulting from such delay.<sup>39</sup>

**§ 1451. Evidence of damage—Price brought at sale**

The court instructs the jury that, if at the time in question the horses were sold the jury believe from the evidence that they were in such condition as that a fairly prudent and reasonable man would not, under all the circumstances in proof, have offered them for sale, and that it could not have been reasonably expected that they would realize what they were reasonably worth even in their then condition, the jury should not take into consideration at all the prices which they brought at said sale, but should fix the damages (if they find for the plaintiffs) wholly irrespective of said prices.<sup>40</sup>

**C. CARRIERS OF PASSENGERS**

**1. *Existence of Relation of Carrier and Passenger***

**§ 1452. Liability as dependent on whether plaintiff a passenger or a trespasser**

The jury are instructed that the right of the plaintiff to recover in this case will be submitted to you from two aspects, viz.: (1) Was ———, at the time, a passenger on defendant's train? or (2) was he a trespasser? The law imposes upon the defendant company the duty of exercising the highest degree of care towards him, if he was a passenger for pay on defendant's cars at the time; but, if he was a trespasser on the defendant's train, the law imposes only the duty of ordinary care for his safety after discovering that he was such trespasser. Now, if, from all the facts and circumstances before you, you find that at the time ——— was killed he was a passenger on defendant's cars, and that his death was caused or occasioned by the carelessness of those in charge of the train at the time (that is, if you find that the head-end collision which resulted in ———'s death was brought about through the carelessness and negligence and want of proper care on the part of those operating the trains at the time), then the defendant company would be liable in this case. If you find and believe that ——— at the time was a trespasser on defendant's train; that he at the time was riding on what is commonly known as the "blind baggage," endeavoring to travel without paying for his passage; and you further find and believe that a person of ordinary prudence and caution would not have been in such position, and would not have

<sup>39</sup> Bosley v. Baltimore & O. R. Co.,  
46 S. E. 613, 54 W. Va. 563, 66 L. R.  
A. 871.

<sup>40</sup> Adams Express Co. v. Hundley,  
139 S. W. 1084, 145 Ky. 7.

acted as ——— did at the time he boarded the train—then, if you find this to be the case, the defendant company would not be liable, unless you further find and believe that the servants and agents of the defendant company knew of his position before the accident, and could have prevented the accident by the exercise of ordinary care. In this connection you are instructed that the law devolves upon the plaintiff the duty and burden of making out her case as alleged, and showing her right to a recovery by a fair preponderance of the evidence. When she has done this, then the burden is upon the defendant company to show that the deceased at the time did not act as a person of ordinary prudence and caution would have acted, or was in a place or position where an ordinarily prudent and cautious person would not have been, before plaintiff could be denied a recovery.<sup>41</sup>

**§ 1453. Inception of relation—Relation between carrier and intending passenger arriving before train time**

You are instructed that the plaintiff had no right on the depot grounds or premises of defendant company on this occasion except to become a passenger on defendant's train, and to accomplish this he had the right to go to said station a reasonable length of time before the schedule time for said train to arrive.<sup>42</sup>

The court charges the jury that if plaintiff went to said station an unreasonable length of time before the time for the arrival of the train on which he was to take passage, and was injured, and that said injury occurred an unreasonable length of time before said arrival time, although plaintiff may have been injured on the premises of defendant, still, in such event, he could not recover in this suit.<sup>43</sup>

**§ 1454. Place of getting on board**

**§ 1454(1). United States**

The jury are instructed that railroad companies engaged in the transportation of passengers for hire are common carriers, and in the course of their employment, are required to exercise as to passengers the utmost human care and foresight. In the protection of their passengers they are bound to exercise more than ordinary care; they must exercise extraordinary care and employ all reasonable skill and diligence—remembering always that the responsibility of a carrier of passengers is not, like that of a carrier of goods, a responsibility at all events, except for the acts of God and

<sup>41</sup> *Southerland v. Texas & P. Ry. Co.* (Tex. Civ. App.) 40 S. W. 193.

<sup>42</sup> *Central of Georgia Ry. Co. v. Campbell*, 64 So. 540, 10 Ala. App. 288.

<sup>43</sup> *Central of Georgia Ry. Co. v. Campbell*, 64 So. 540, 10 Ala. App. 288.



the public enemy, but a responsibility modified by this fact: that passengers are reasonable beings, exercising their own will, so that the carrier, though bound to take the highest care of the passenger, is not bound by any act of imprudence on the part of the passenger either violating proper regulations, or exposing himself imprudently to danger. Was the plaintiff a passenger on the train? As common carriers of passengers, railroad companies are required to carry, subject to reasonable regulations, all who offer. The purchase of a ticket is not necessary to constitute one as a passenger. The relation of passenger to the carrier ordinarily arises when a person intending to take passage presents himself at a proper time (a reasonable time before the train is scheduled to start), in a proper place (the usual place for passengers to enter), and then and there enters the train, with no notice to the contrary. That is the law. Now, you apply the facts of this case. Recall these as testified before you, and say: Where was the passenger coach lying on the day of the accident when the plaintiff entered it? Was it at the usual place for the passengers to enter it? Was it open, so as to permit passengers to enter it? Did passengers so enter it with no warning from any quarter to the contrary? If you answer these questions in the affirmative—if the facts be these—then a person entering the passenger car under these circumstances stands to the railroad company in the relation of a passenger, and is entitled to protection against negligence of the railroad company and of its servants.<sup>44</sup>

**§ 1454(2). South Carolina**

The court instructs the jury that the law requires common carriers of passengers to exercise the highest degree of care for the safety of their passengers. When a person goes to a railway station a reasonable time before the departure of a train, bona fide intending to become a passenger, he is in law a passenger, and entitled to the rights of a passenger, while there intending to become a passenger and while he is in the place provided by the company for waiting passengers, or on the place provided by the company for passengers to approach and get on its trains, or in the place where the company expressly or impliedly invites passengers to get on, if he is then approaching the train to get aboard, or if he is actually getting aboard the train, in a proper way and at the proper time. If he goes where he has no right to be, then he becomes a trespasser, and the company owes him no duty, except not to willfully or wantonly injure him. The company would be liable, however, if it willfully or wantonly injured even a trespass-

<sup>44</sup> *Columbia, N. & L. R. Co. v. Means* (C. C. A. S. C.) 136 F. 83, 65 C. C. A. 651.



ser. If a person goes where he is not invited to get aboard the train, but where passengers do get on and off with the knowledge, acquiescence, and permission of the company, then he would be a licensee, and would not be entitled to the degree of care required by the company for the safety of passengers, which, as I have said, is the highest degree of care but he would be entitled, under those circumstances to the exercise of ordinary care for his safety; that is, such care as an ordinary prudent person would exercise under the circumstances of the situation. Now, it is for you to say whether at the time of his alleged injury the plaintiff was a passenger, entitled to the highest degree of care, or a licensee, and entitled to the exercise of ordinary care, or a trespasser, to whom the defendant owed no duty, except not to willfully or wantonly injure him. <sup>45</sup>

**§ 1455. Necessity of knowledge by carrier of attempt to become passenger**

You are instructed that the defendant owed no duty to the plaintiff until the motorman knew plaintiff was offering himself as a passenger upon defendant's car. <sup>46</sup>

**§ 1456. Necessity of entering train**

The court instructs the jury that to become a passenger, and entitled to protection as such, it is not necessary that a person shall have entered a train or paid his fare; but he is a passenger as soon as he comes within the control of the carrier at the station, through any of the usual approaches, with the intent to become a passenger. And the court therefore further instructs the jury that if they believe from the evidence that the plaintiff, on ——— went to the defendant's depot at the town of ———, by one of the usual routes thereto, for the purpose and with the intention of taking the next train, and stepped upon the platform of said depot with the intention and purpose of becoming such passenger, the plaintiff then became, in contemplation of law, a passenger of the defendant, provided she came to said depot and platform within a reasonable time before the time for the departure of said train, whether or not she had purchased a ticket from the defendant or its agent. <sup>47</sup>

<sup>45</sup> *Du Bose v. Atlantic Coast Line R. Co.*, 62 S. E. 255, 81 S. C. 271.

<sup>46</sup> *Kentucky Traction & Terminal Co. v. Waits*, 180 S. W. 356, 167 Ky. 238.

<sup>47</sup> *Barker v. Ohio River R. Co.*, 41 S. E. 148, 51 W. Va. 423, 90 Am. St. Rep. 808.

**§ 1457. Effect of response, or apparent response, by carrier to signal to stop**

**§ 1457(1). Michigan**

In this case, I charge you that if you believe from the evidence that on the ———, the plaintiff in good faith came to the depot of the defendant and upon the platform of the defendant for the purpose of taking said car for passage to the city of ———, that at that time and place he signaled the defendant's trainman when about ——— feet or more away, and that said trainman answered said plaintiff's signal for the purpose of accepting him as a passenger, then I charge you that plaintiff then and there became a passenger, and it was the duty of the defendant in all ways to exercise a very high degree of care for his safety or protection in the operation of the car and the maintenance of its road, and in deciding whether or not the defendant performed that duty you have a right to consider the lighting of the platform, the rate of speed the car was running at the time of the accident, and all the surroundings at the place of the accident, and if you find that the defendant violated its duty to render that high degree of care for the plaintiff that an ordinarily prudent person engaged in the same kind of business would have done under the same or similar circumstances and conditions, then I charge you that the defendant is guilty of negligence, and the plaintiff is entitled to recover.<sup>48</sup>

**§ 1457(2). Virginia**

The court instructs the jury that, if the jury believe from the evidence that the plaintiff hailed the street car mentioned in the evidence for the purpose of embarking thereon as a passenger, and that the said car was in consequence thereof arrested, as if it was going to stop, or stopped by a servant or servants of the defendant company, and that the plaintiff endeavored to get upon said car, then the plaintiff, in so endeavoring to get upon said car, was a passenger, under the care of the defendant company; and if the jury further believe from the evidence that the plaintiff was injured by the negligent starting of the car, while he was in the act of getting thereon, in the exercise of such care as might reasonably be expected from a man of his age, under the circumstances, then they should find for the plaintiff. But if the jury believe from the evidence that the car slowed up in consequence of nearing a curve and down grade, and not in response to any signal from the plaintiff, then the plaintiff was not a passenger.<sup>49</sup>

<sup>48</sup> Rice v. Michigan Ry. Co., 175 N. W. 454, 208 Mich. 123.

<sup>49</sup> Reynolds v. Richmond & M. Ry. Co., 23 S. E. 770, 92 Va. 400.

### § 1458. Necessity of intention to pay fare

#### § 1458(1). Missouri

You are instructed that, if you find from the evidence that plaintiff's husband boarded the car with the intention of not paying his fare, or that when the conductor requested the payment of his fare he refused to pay same, then he was not a passenger in contemplation of law.<sup>50</sup>

The court instructs the jury that if they believe from the evidence that ——— got on the car merely for the purpose of riding a short distance, and then jumping off or getting off again, without any intention of paying his fare, and did not pay it, and did not offer to pay it, then he was not a passenger on the car, even though the driver knew he was on the car, unless the jury believe the driver consented to his being and remaining upon the car.<sup>51</sup>

#### § 1458(2). Nebraska

You are instructed by the court, if you find, from the evidence, that ——— on the ——— day of ———, was on the front platform of one of the passenger cars of a train operated by the defendant company, with the intention of riding upon said train without paying any fare, then and in that case he was not a passenger upon defendant's train, and the defendant railroad company as a common carrier owed him no duty.<sup>52</sup>

### § 1459. Necessity of paying fare

See, also, ante, §§ 1454(1), 1456.

#### § 1459(1). Illinois

The court instructs the jury that to establish the relation of carrier and passenger the payment of fare is not always necessary; that, if the carrier permits the passenger to get upon the car without requiring payment in advance, the obligation of the passenger to pay will stand for the actual payment, for the purpose of giving effect to the contract to carry, with all its obligations and duties. Taking his place upon the car with the intention of being carried creates an implied agreement upon the part of the passenger to pay when called upon to do so by the carrier.<sup>53</sup>

#### § 1459(2). Minnesota

Now, gentlemen, it is proper for you to consider all the testimony bearing upon the question as to whether this plaintiff paid his fare or not. Of course, it matters not whether he paid his fare with

<sup>50</sup> Garrett v. St. Louis Transit Co., 118 S. W. 68, 219 Mo. 65, 16 Ann. Cas. 678.

<sup>51</sup> Muehlhausen v. St. Louis R. Co., 2 S. W. 315, 91 Mo. 332.

<sup>52</sup> Pledger v. Chicago, B. & Q. R. Co., 95 N. W. 1057, 69 Neb. 456.

<sup>53</sup> Petersen v. Elgin, A. & S. Traction Co., 87 N. E. 345, 238 Ill. 403.

a nickel, or with pennies, or in any other way. If in fact he did pay his fare, then he became a passenger upon the car. But, of course, it is proper for you to carefully remember the proof he offers in regard to the payment of the fare, and what other witnesses have testified in regard to the payment of the fare; for, even while he may be mistaken in regard to the manner in which he paid his fare, still if in fact he did pay his fare he thereby became a passenger. But if he was mistaken—has given incorrect testimony in your presence—in regard to the manner of paying his fare, that is proper for you to consider upon the credibility which is to be given to his testimony and the testimony of the other witnesses in this regard. <sup>54</sup>

§ 1459(3). Missouri

You are instructed that, although the jury may find that the deceased, ———, had not paid any fare at the time of the injury, yet if the jury further find, from the evidence, that the deceased was on defendant's car with the knowledge and permission of defendant's employé in charge of said car, then the deceased was a passenger, and entitled to the same care and protection as if he had paid his fare. <sup>55</sup>

The jury are instructed that, even though the jury may believe from the evidence that plaintiff did not pay, and did not expect to pay, any fare for riding on defendants' hack on the day the breakdown occurred, they are instructed that said fact does not affect the issues in this case, and is no defense on the part of defendants, but the jury are instructed, that if they believe from the evidence that plaintiff was the conductor on the express train, that defendants run hacks and busses in connection with the coming in and departing of said trains, that defendants sold tickets on the train, and that plaintiff was in the habit of telegraphing, before arriving at ———, notifying defendants of the number of persons on his train, and of the number of conveyances they could expect to find employment to carry; that in consideration of said services so rendered by plaintiff, the defendants allowed him to ride in their conveyances without paying fare therefor, then plaintiff was not a free or gratuitous passenger. <sup>56</sup>

§ 1459(4). Texas

You are instructed that, if you believe from the evidence that on the ——— day of ———, plaintiff made an arrangement with the defendant, or its agents or employés who were empowered and

<sup>54</sup> Reem v. St. Paul City Ry. Co.,  
84 N. W. 652, 82 Minn. 98.

<sup>55</sup> Muehlhausen v. St. Louis R. Co.,  
2 S. W. 315, 91 Mo. 332.

<sup>56</sup> Lemon v. Chanslor, 68 Mo. 340,  
30 Am. Rep. 799.

authorized to make such arrangements, if any, and acting within the scope of their authority, whereby he was to be transported as a passenger from the city of ———, ———, to the city of ———, and if you further believe that by reason of said arrangement, if any, plaintiff boarded defendant's cars for the purpose of being so transported, and if you further believe from the evidence that, while en route on said cars and after said cars had reached the station of ———, there was a collision between the train on which plaintiff was riding and another train belonging to the defendant on the defendant's line of railroad, and that said collision was caused by reason of the failure on the part of the defendant to exercise that high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances, as defined in the first section of this charge, and by reason of said failure, if any, plaintiff was injured as alleged by him; or if you believe from the evidence that on said ——— day of ———, the plaintiff, believing that he had a right to do so, boarded one of defendant's trains to be transported on one of defendant's cars from the city of ——— to the city of ———, on defendant's line of railway, and if you further find from the evidence that he did this with the knowledge, acquiescence, or permission of defendant, or those in its employment who had authority to permit or prohibit such traveling by the plaintiff, and if you further find that on or about the said ——— day of ———, plaintiff while en route on said train to the city of ——— after it had reached the station of ———, there was a collision between the train on which the plaintiff was riding and another train belonging to defendant on defendant's line of railroad, and the said collision was caused by the negligence, if any, of defendant, as defined in the second section of the charge, and by reason of said negligence, if any, plaintiff was injured as alleged by him—then, in either event, you will find for the plaintiff, unless you find for the defendant under subsequent portions of this charge.<sup>57</sup>

§ 1459(5). West Virginia

The court instructs the jury that the relation of carrier and passenger commences when a person with good faith and intention of taking passage, with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities of transportation, which the carrier offers, that this relation does not arise merely when the passenger enters the train with a ticket

<sup>57</sup> St. Louis Southwestern Ry. Co. of Texas v. Fowler (Civ. App.) 93 S. W. 484.

already purchased, but when he enters upon the premises of the carrier with intention to take a train in due course, and that, if the jury believe that the plaintiff on the morning of ———, went to the station of the defendant railroad company at ———, as alleged in the declaration, with the intention to take the train of the defendant company and got aboard, or attempted to get aboard, the train of the defendant company at said station when it stopped for the purpose of letting off and taking on passengers, with intent to pay fare, and do whatever else was required to entitle him to transportation, he then and there became a passenger by implied acceptance.<sup>58</sup>

**§ 1460. Effect of entering car with ticket**

The court instructs the jury that, one who enters a railroad passenger coach with a ticket bought from an agent of the railroad giving him passage or transportation from the starting point to the point named in the ticket is a passenger upon said railroad, and is entitled to the rights of a passenger, and the railroad must use extraordinary care and diligence towards such passenger.<sup>59</sup>

**§ 1461. Effect of surrender of ticket**

You are instructed that, if the jury find from the evidence that on ———, the plaintiff purchased of the defendant, at its station at ———, a railroad ticket from ———, in the state of ———, to ———, in the state of ———, and entered upon defendant's train for the purpose of traveling to said station of ———, and surrendered her ticket to an agent of defendant on the train, then the plaintiff became a passenger, and was entitled to be transported to her destination, and to be informed by defendant when she reached her destination, and the defendant would have no right to cause her to leave its said train until she reached the point designated on the ticket.<sup>60</sup>

**§ 1462. Status of ejected passenger attempting to re-enter car**

The jury are instructed that, if you believe from the evidence that plaintiff was guilty of improper conduct on said car, and that he was ejected from said car, then as a matter of law the plaintiff had no right to again board said car, and in attempting to do so, if he did so attempt, he would not be a passenger on said car, but would be a trespasser.<sup>61</sup>

<sup>58</sup> *Howes v. Baltimore & O. R. Co.*, 87 S. E. 456, 77 W. Va. 362.

<sup>59</sup> *Louisville & N. R. Co. v. Forrest*, 65 S. E. 808, 6 Ga. App. 766.

<sup>60</sup> *Slatter v. Oregon Short Line R. Co.*, 118 P. 831, 39 Utah, 596.

<sup>61</sup> *Colbeck v. Sampsell*, 140 Ill. App. 566.

**§ 1463. When relation ceases—Reasonable time for getting off at destination**

**§ 1463(1). Maryland**

The court instructs the jury that, if the jury find that the plaintiff was a passenger on defendant's road, from ——— to ———, and that, when the train on which he was riding reached its destination at the ——— terminus, all the passengers except the plaintiff left the car, and that the plaintiff had reasonable time to get off, and that he failed to do so, then he ceased to be a passenger, and the obligation of the defendant towards the plaintiff as a passenger no longer existed.<sup>62</sup>

**§ 1463(2). Texas**

You are instructed that railway companies, in the transportation of persons in their cars from point to point on their lines for hire, are common carriers of passengers, and, when a person on a coach of such a railway company pays his fare to a point of destination on the line of such company, he becomes a passenger of such carrier, and remains such until the journey for which he has paid has ended, and until a reasonable time, to be determined from all the attendant circumstances, within which he should have left the carrier's premises has elapsed; and this is true without regard to the object of the passenger's journey, or his reason for stopping at the station which is the end of the journey.<sup>63</sup>

**§ 1464. Street cars**

See, also, ante, §§ 1455, 1457(2).

**§ 1464(1). Indiana**

The court instructs the jury that, to become a passenger upon the street car, it was not necessary that the plaintiff should have actually boarded the car, bought a ticket, paid his fare, or offered to do so; but it would be sufficient to make him a passenger if he was at a regular stop or station of said car, and was in the act of boarding the same with the intention of taking passage thereon, and if in so doing he was injured because of the carelessness and negligence of the company, and without any carelessness or negligence on his part proximately contributing thereto, the defendant would be liable.<sup>64</sup>

The court instructs the jury, if you find, however, that the plaintiff got on the step of said car or attempted to do so at a place not a regular or proper stopping place, while the car was in motion,

<sup>62</sup> *Maryland & P. R. Co. v. Tucker*, 80 A. 688, 115 Md. 43.

<sup>63</sup> *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

<sup>64</sup> *Mishler v. Chicago, S. B. & N. I. Ry. Co.*, 122 N. E. 657, 188 Ind. 189.



and without the knowledge or consent of the defendant, or of the employes in charge of said car, he could not thus become a passenger of the defendant company, and if while on said step or in attempting to board said car he was jolted or jarred therefrom by the action of said car and thereby injured, the defendant could not be liable therefor in this action.<sup>65</sup>

§ 1464(2). **Minnesota**

The jury are instructed that, if they find from the evidence that plaintiff was not on the step of the car when it started, but that she attempted to board it after it was in motion, she cannot recover; but if they find that, while the car was still waiting for and receiving passengers, she then presented herself as an intending passenger, and gained a position on the lower step before the car was set in motion, and the conductor, in the exercise of ordinary care in the discharge of his duty, ought to have seen her in that position, they will find that she was a passenger on the car at the time of the accident.<sup>66</sup>

§ 1465. **Same—Persons riding on platform**

§ 1465(1). **Alabama**

The jury are instructed that, if you are reasonably satisfied from the evidence that the plaintiff, when he got on this car, did so with the bona fide intention of becoming a passenger and paying his fare when demanded by the conductor, and had the money to pay his fare, then he was a passenger, in contemplation of law. If you are reasonably satisfied from the evidence that, at and before the time the plaintiff claims to have been injured, it was the established general usage and practice of the defendant, in the operation of its cars, to carry large numbers of passengers on its cars in excess of their seating capacity, and that defendant permitted persons to ride on the platform and steps of its cars, without objection, and demanded and collected fares from them, and that such was the usage and practice with reference to this particular car, then the fact, if it be a fact, that plaintiff, at the time he claims to have been injured, was riding on the steps of the car, would not alone prevent his being a passenger, if he was there with the bona fide intention of becoming a passenger, and intending to pay his fare when it was demanded of him, and had the money to pay it.<sup>67</sup>

§ 1465(2). **Missouri**

The jury are instructed that the simple fact that ——— was on board defendant's car will not authorize the jury to infer or con-

<sup>65</sup> *Mishler v. Chicago, S. B. & N. I. Ry. Co.*, 122 N. E. 657, 188 Ind. 189.

<sup>66</sup> *Gaffney v. St. Paul City Ry. Co.*, 84 N. W. 304, 81 Minn. 459.

<sup>67</sup> *Mobile Light & R. Co. v. Hughes*, 67 So. 278, 190 Ala. 216.

clude that he was a passenger for hire. But if they are satisfied from the evidence, that persons, without the previous consent of agents or servants of the defendant, were in the habit of getting on its cars and riding thereon, both outside and inside upon the platform and steps, and that, too, without reference to the number of persons so getting on and riding, and that defendant habitually collected the fare for carriage of such persons, and, further, that ——— got upon the defendant's car for the purpose of being carried as a passenger, then, in the absence of any prohibition against his becoming a passenger, the jury is justified in inferring there was a contract between the defendant and him, that the defendant would carry him as a passenger for the ordinary fare; and it is the right and duty of the jury to determine, from all the evidence in the case, whether there was any such contract between the defendant and ———; in other words to determine whether he was a passenger for hire on defendant's car, or not.<sup>68</sup>

#### § 1466. Recalling invitation to enter street car

You are instructed that, when a car stops on the street to receive passengers, it invites persons to enter the car and become passengers. Until that invitation is recalled, any person actually taking hold of the car and beginning to enter it is a passenger, and entitled to the protection of the principle that I have stated. It is true that the invitation may be recalled before the car starts. There may be circumstances under which the principle itself would require the recalling of the invitation. There may be such a pressure to enter the car that a load which it would be unsafe to move is accumulating, and it would be the duty of those in charge of the car to see that no more passengers should be received. The conductor does recall the invitation when he gives the signal for the car to move on, and he should not do that until he has reason to believe that all who have applied have reached the car in such a way that it is safe for the car to move. Nothing else appearing, no reason being shown why the conductor cannot know whether any person is attempting to board the car, it can be said that it is his duty to know.<sup>69</sup>

#### § 1467. Method of securing passage on freight train

##### § 1467(1). Oklahoma

You are instructed that if after a fair and impartial consideration of all of the testimony in this case you believe that the plaintiff has established, by a preponderance of the testimony, that he secured

<sup>68</sup> *Huelsenkamp v. Citizens' Ry. Co.*, 37 Mo. 537, 90 Am. Dec. 399.

<sup>69</sup> *Davey v. Greenfield & T. F. St. Ry. Co.*, 58 N. E. 172, 177 Mass. 106.

The court says that this instruction was sufficiently favorable to the defendant carrier,

his passage upon the freight train, paying the brakeman therefor by and with the consent of the conductor, and that this transaction was in the utmost good faith upon his part, the plaintiff in that event would not be a trespasser within the meaning of the law.<sup>70</sup>

You are instructed, upon the other hand, that if, after a fair and impartial consideration of all of the testimony in this case you find that the plaintiff was seeking to ride on the defendant's freight train, or was riding on said freight train without paying therefor, or that he paid the brakeman for riding on said freight train knowing that the said freight train did not carry passengers, or that he knew or had reason to believe the method which he was employing to ride said train was not the usual, ordinary, and proper method of securing passage, or was not permitted by the defendant, then and in that event you are instructed he would be a trespasser under the law.<sup>71</sup>

§ 1467(2). Wisconsin

The jury are instructed that, if you should find from the evidence that the night freight train in question was usually made up and started from the place where it stood when the party having charge of the plaintiff attempted to go on board, and that the defendant, its agents or servants, had previous to or about that time carried such passengers in this night train to and from ——— as went aboard of their own accord or upon application to some person having charge of the train, collecting from such persons the usual fare of passengers, and further find that the caboose, on the night in question, and at the time the party having charge of plaintiff went aboard, was open for passengers, and that the person so in charge of plaintiff believed, when he put the plaintiff on the said train, that the same was one of the freight trains of defendant which was authorized to carry passengers, and that he was not informed to the contrary before plaintiff was injured, then plaintiff was a passenger of defendant, and entitled to the rights and remedies of a passenger.<sup>72</sup>

§ 1468. Persons accompanying stock

Care required to prevent injury in transit to persons accompanying stock, see post, § 1624.

You are instructed that it is the duty of the defendant to operate its trains in such manner as to avoid injury to persons rightfully using the same, and if you find from the evidence that defendant, in making the coupling between its engine and the car

<sup>70</sup> Chicago, R. I. & P. Ry. Co. v. Shadid, 159 P. 913, 60 Okl. 188.

<sup>71</sup> Chicago, R. I. & P. Ry. Co. v. Shadid, 159 P. 913, 60 Okl. 188.

<sup>72</sup> Lucas v. Milwaukee, etc., R. Co., 14 Am. Rep. 735, 33 Wis. 41.

in which this plaintiff was caring for his stock on the occasion in question did so in a needlessly violent and careless manner, and this plaintiff was injured thereby, then you will find for plaintiff and assess his damages at such sum as you may think him entitled, not to exceed \_\_\_\_\_.<sup>73</sup>

#### § 1469. Duty towards mail clerk

##### § 1469(1). United States

You are instructed that the defendant owed the same degree of care to the plaintiff, as a mail clerk riding in the mail car in charge of the United States mail, as it did to passengers for hire upon said train, and that care is prescribed by law to be the highest degree of care, skill, and foresight consistent with the carrying on of its business.<sup>74</sup>

##### § 1469(2). Texas

You are instructed that, if you find and believe from the evidence that on \_\_\_\_\_, or at any time within one year next before \_\_\_\_\_, a train of cars operated by the defendant company, its agents, servants, or employes, was wrecked in \_\_\_\_\_, near \_\_\_\_\_, and that at the time of such wreck the plaintiff was traveling upon said train of cars as postal or mail clerk, in the employment of the United States government, and in charge of the mail matter on such train, then he would be entitled to recover of defendant company for such injuries as he may have received, provided they are such as are set forth in his petition, as resulted from the negligence (if there was negligence) of said company's servants, agents, or employes, not to exceed the amount of either kind of injury alleged in the different allegations in the plaintiff's petition.<sup>75</sup>

#### § 1470. Liability to express messenger

The jury are instructed that, if the jury believe from the evidence that the defendants were engaged in the transportation of passengers from \_\_\_\_\_ to \_\_\_\_\_, and from \_\_\_\_\_ to \_\_\_\_\_, before and during the month of \_\_\_\_\_; that during the same periods of time \_\_\_\_\_ employed the plaintiff to carry their express matter between said places, and paid the defendants to transport said express matter for a certain sum of money per month; and said plaintiff and said defendant entered upon said arrangement, and were engaged in the same during said period of time, and that it was understood and agreed between said defendants and said express company that the plaintiff, as their messenger, should be trans-

<sup>73</sup> St. Louis & S. F. R. Co. v. Kerns, 136 P. 169, 41 Okl. 167.

<sup>74</sup> Cavin v. Southern Pac. Co. (C. C. A. Cal.) 136 F. 592, 69 C. C. A. 366.

<sup>75</sup> Gulf, C. & S. F. Ry. Co. v. Wilson, 15 S. W. 280, 79 Tex. 371, 11 L. R. A. 486, 23 Am. St. Rep. 345.

ported with their said express matter from ——— to ———, and from ——— to ———, during said period of time; that the defendants made such transportation by cars propelled by steam and a steamer; that said cars started from the town of ———; that while thus engaged the plaintiff, during said period of time, came to said cars, at the depot thereof, for the purpose of going to ———; that he was standing on the platform of said defendants, near said cars, for the purpose of stepping into a car of defendants (and that said platform was usually used by passengers departing or arriving by said cars), when the boiler of the locomotive attached to said cars exploded, through the negligence or carelessness of the engineer employed by the defendants, who was then in charge of said locomotive, and the plaintiff was injured thereby (the plaintiff not being guilty of any negligence which contributed to his injury). then the plaintiff is entitled to recover damages for such injury.<sup>76</sup>

## 2. *Performance of Contract or Duty to Transport*

### § 1471. Duty to receive passengers

You are instructed that, if the jury believe that the plaintiff got upon the defendant's car for the purpose of riding as a passenger, and duly tendered, or was about to tender, his fare to the conductor, but that the conductor, without reason or excuse, refused to receive said fare, called him a "damn Jew," and forcibly and wantonly ejected him from said car, giving said plaintiff a kick as he ejected him, then the verdict should be for the plaintiff.<sup>77</sup>

### § 1472. Liability for refusal to issue transfer

You are instructed that, if you are reasonably satisfied from all the evidence in this case that plaintiff was a passenger of defendant on, to wit, the ——— day of ———, and, while such passenger, defendant's agents or servants, while acting within the scope of their authority, wrongfully failed to give plaintiff at her request a transfer to said ——— car line, and that it was the duty or customary for defendant to issue said transfers if so requested by passengers, then plaintiff would be entitled to recover a judgment against the defendant for any damages which the evidence may show that she suffered.<sup>78</sup>

### § 1473. Liability for breach of contract to carry at certain price

You are instructed that, if the ticket agent at ———, acting within the scope of his authority, made a contract with ——— to carry

<sup>76</sup> *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

<sup>77</sup> *Rosenkovitz v. United Railways*

& Electric Co. of Baltimore City, 70 A. 108, 108 Md. 306.

<sup>78</sup> *Birmingham Ry., Light & Power Co. v. Cohill*, 72 So. 126, 196 Ala. 278.

him for \$——, the railway company was bound to carry him for \$——, and if the passenger relied upon that promise and boarded the train for that purpose, and if the other agents of the defendant refused to carry him at that contract, whether they did so in good faith or not, and caused the plaintiff to quit the train before he reached ——, then the railroad company is liable in damages to the plaintiff. And, if the conductor did so consciously refuse to carry —— for the price the ticket agent had agreed to carry him for, then the act of those servants may be regarded by the jury as willful, and you may find such damages as you think right to compensate —— and punish the railway company. In other words, gentlemen, and in brief, if a principal, to wit, a railway company, has many agents, and it acts through one agent and makes a contract, another agent cannot consciously set that contract aside, and save the responsibility of the principal.<sup>79</sup>

**§ 1474. Liability for negligence in making representations as to best route**

You are instructed that, if you believe from the evidence that on or about ——, the plaintiff wanted to go with his family, a wife and two children, from ——, a station on defendant's road in —— county, ——, to ——, in —— county, ——, and that he did not know the route to ——, and that his wife was pregnant, and thereby in a delicate condition, and that he informed the defendant's local agent at —— of his desire to go to ——, and of his ignorance of the route to said place, and of the condition of his wife, and that he wished to go the best and most practical route to said place, and the one that would take him there the quickest, and with the least inconvenience to himself and family, and with the fewest lay-overs and the least exposure because of the condition of his wife, and that there were two ways to ——, one by way of B., the other by way of T., and that the way by B. was the best and most practical route, with fewer lay-overs, fewer changes of cars, fewer places to get on and off the cars at night, better connections, more convenient, and less exposures, and was the quickest route, and that the plaintiff applied to said agent at —— for information about the routes, and that said agent with full knowledge of all the above facts, withheld from plaintiff all knowledge about the route by way of B. and that said route was the best and quickest, and informed said plaintiff that the best, quickest, and most direct route was by T., and he knew that this was not true, and the plaintiff believed him, and relying on him was induced to buy tickets over said route by T.,

<sup>79</sup> *Tant v. Southern Ry. Co.*, 69 S. E. 158, 87 S. C. 184.



and that said route was not the best, quickest, and most practicable, and was the most inconvenient, had more stop-overs, more changes of cars, more exposures, more getting on and off cars at night, and a longer time to make the trip, and worse connections—all of which was known to said agent, or by the use of ordinary care could have been known to him; and if you further believe from the evidence that the plaintiff's wife ———, was injured, and that her injuries were directly caused by reason of the fact that she made the trip over the route by way of T., and that she would not have received such injuries if she had gone the route by way of B.—then you will find for the plaintiff on this particular charge of negligence.<sup>80</sup>

**§ 1475. Duty to discharge passenger at destination—Right to operate some trains which do not stop at every station**

The jury are instructed that the proof shows that the railroad company runs two daily trains between points named in plaintiff's ticket, and the regulation that one of these trains shall not stop at all stations is a reasonable regulation, and one they had a right to make, and a passenger who travels on said road with notice of such regulation cannot get on a through train, and demand to be carried to a point at which said through train does not stop, even if he has a ticket to such point, unless he goes on the train by direction of the railroad's agents. If the person who acted as agent, and sold the ticket, directed the plaintiff to get on the through train, he had the right to get on said train and travel upon it; but if, after getting on, he was, at a regular station, notified that the train would not stop at ———, it was his duty then to get off and take the proper train; for if the railroad agent at ———, made a mistake, the railroad had a right to correct the mistake at any regular stopping station for that train. If, then, he was informed at ——— of the mistake, it was his duty to get off, and, if he did not do so, the conductor had a right to put him off in a proper manner.<sup>81</sup>

The court instructs the jury that the proof in the case shows that defendant operated two daily passenger trains each way over its line of railway, passing ——— switch, plaintiff's destination, at the time in question. The regulation that one of these trains each way shall not stop at all stations is a reasonable one, and one the defendant had a right to make, and it would have been sufficient notice of that regulation to plaintiff if the agent at ———

<sup>80</sup> St. Louis Southwestern Ry. Co. of Texas v. White (Tex. Civ. App.) 86 S. W. 71. Under the circumstances of this case, making the liability of the carrier depend upon the knowledge of

its agent was more favorable to the carrier (the appellant) than was warranted.

<sup>81</sup> International & G. N. Ry. Co. v. Hassell, 62 Tex. 256, 50 Am. Rep. 525.



informed him of it when he purchased the ticket, or if the conductor in charge of the train, while yet at ———, informed him that his train would not stop at ———, and requested him to get off, and offered him the opportunity to do so at that place; and if plaintiff, after such notice, refused to get off at ———, he was then a trespasser on the train, and the conductor in charge had a right to eject him in a proper manner, had he seen fit to do so, and plaintiff would not be entitled to recover merely for being refused the privilege of having the train stopped at ——— for him to debark. If you believe from the evidence that plaintiff took offense unnecessarily at the language of the conductor, and that the language was not intended to offend, then plaintiff would not be entitled to recover for injury to his feelings resulting therefrom. A person who by his own fault or negligence has brought upon himself a loss or any injury can claim no compensation therefor.<sup>82</sup>

**§ 1476. Same—Duty of passenger to observe requirements as to changing cars**

Gentlemen of the jury, you are charged that defendant had the right to so arrange the running of its trains that passengers destined as was plaintiff could on some of them go through direct to B., without change of cars, while upon others it would be necessary that such passengers destined to B. should change cars at ———, and there await the departure of another or other trains for B.<sup>83</sup>

Gentlemen of the jury, you are charged that if you believe from the evidence that plaintiff, ——— learned between the stations of ——— and ——— that she must change cars before she arrived at ———, then you are charged that it was her duty to find out where she should make such change; and if she failed to inform herself as to where she should change cars, and, by reason of such failure on her part to find out where she would change cars, she was carried over the wrong line, then plaintiff cannot recover, and you will return a verdict for defendant.<sup>84</sup>

**§ 1477. Liability for putting passenger off at other than regular stopping place**

You are instructed that, if you believe from the evidence that the plaintiff boarded one of defendant's cars in the city of ——— on or about the ——— day of ———, and paid her fare and told the conductor in charge of said car that she desired to disembark

<sup>82</sup> Texas & P. Ry. Co. v. White (Tex. App.) 17 S. W. 419.

<sup>83</sup> St. Louis S. W. Ry. Co. v. McCullough, 45 S. W. 324, 18 Tex. Civ. App. 534.

<sup>84</sup> St. Louis S. W. Ry. Co. v. McCullough, 45 S. W. 324, 18 Tex. Civ. App. 534.

at the last stop in the city of ———, and that when said car arrived at the last stop in the city of ———, said car stopped, and said conductor informed plaintiff that she had arrived at the last stop in the city of ———, and plaintiff thereupon informed said conductor that she did not desire to get off at said stop, but at the next stop of said railway, then you will find for the defendant, even though you should believe from the evidence that the conductor in charge of the car did stop the car, and permitted the plaintiff to alight therefrom before he arrived at the next regular stop of said car, if he so stopped said car at the request of plaintiff.<sup>85</sup>

**§ 1478. Liability for causing passenger to get off at point other than destination**

**§ 1478(1). Alabama**

I charge you gentlemen of the jury, that if you believe from the evidence in this case that the conductor told the plaintiff's wife, at or before the time that she got off the train, that he would rather she would get off at ———, where she did get off, and she was induced by this statement to get off, then the plaintiff cannot recover in this case.<sup>86</sup>

**§ 1478(2). Utah**

The jury are instructed that, if the jury find from the evidence that on the ——— day of ———, the plaintiff purchased of the defendant, at its station at ———, a railroad ticket from ———, in the state of ———, to ———, in the state of ———, and entered upon defendant's train for the purpose of traveling to said station of ———, and surrendered her ticket to an agent of defendant on the train, then the plaintiff became a passenger, and was entitled to be transported to her destination, and to be informed by defendant when she reached her destination, and the defendant would have no right to cause her to leave its said train until she reached the point designated on the ticket.<sup>87</sup>

**§ 1479. Liability for negligently selling ticket to wrong destination**

You are instructed that the high degree of care owing by the carrier as to the means and measures of transportation does not apply to the matter of the making of the contract of carriage, and you are instructed that in this case, in no event, under the evidence, would the defendant's agent be required to exercise anything more than ordinary care in the sale of the ticket to plaintiff.<sup>88</sup>

<sup>85</sup> Texas Traction Co. v. Hanson (Tex. Civ. App.) 124 S. W. 494.

<sup>86</sup> Louisville & N. R. Co. v. Quinn, 39 So. 616, 145 Ala. 657.

<sup>87</sup> Slatter v. Oregon Short Line R. Co., 118 P. 831, 39 Utah, 596.

<sup>88</sup> Texas & N. O. R. Co. v. Wiggins (Tex. Civ. App.) 156 S. W. 1131.

**§ 1480. Obligation of carrier to transport beyond terminus of its own line**

You are instructed that, if you find from the evidence in this case that the plaintiff, or her husband in her behalf, applied to the agent or person in charge of the station office situated on the defendant's right of way at ——— for a ticket for her transportation to ———, and that such agent or person so in charge of said station office, in response to such application, sold her, or her husband in her behalf, a local book ticket for her transportation to ———, and that she boarded a passenger car running upon defendant's line of road, in pursuance of the direction of persons in charge of said car, or of the train of cars, and that the same was used for the ordinary carriage of passengers riding over said road, and continued in said car without changing cars until she reached her destination at ———, such facts would constitute a valid and binding contract and undertaking by the defendant to safely carry the plaintiff from ——— to ———, notwithstanding the fact that ——— is not situated upon defendant's line of railroad, and is situated upon the ——— Railroad, at a point several miles beyond the terminus of the defendant's road. In this connection you are instructed that the liability of this defendant in such case would be the same, neither greater nor less, than if such injury had occurred at a station on its own line of road.<sup>89</sup>

**§ 1481. Liability for carrying passenger beyond destination**

The court instructs the jury that, if you believe from the evidence that the station was called in the usual manner, and the train was brought to a stop at ———, and the plaintiff made no effort to disembark nor manifested any intention of disembarking, then your verdict must be for the defendant.<sup>90</sup>

**§ 1482. Same—Duty to passenger who fails to act on announcement of his station**

You are instructed that it was the duty of the defendant to give plaintiff reasonably sufficient notice of the approach and arrival of the train at C., and to afford him a reasonable opportunity to get off the train; that upon the arrival of said train at C., it was the duty of the plaintiff to alight from the train at said station. If, therefore, you find from the evidence that the employés of defendant in charge of said train gave notice of the approach and arrival of said train at C. in the usual manner, and that the notice of such approach was given in a manner reasonably calculated to inform plaintiff of the arrival of said train at said station; and if you further believe from the evidence that said train remained

<sup>89</sup> Omaha & R. V. R. Co. v. Chollette, 49 N. W. 1114, 33 Neb. 143.

<sup>90</sup> Central of Georgia Ry. Co. v. Crane, 65 So. 866, 11 Ala. App. 249.

at said station a sufficient length of time to enable plaintiff to alight therefrom, and that he failed to do so—then the plaintiff would not be entitled to recover, and you should find a verdict for the defendant.<sup>91</sup>

Gentlemen of the jury, you are instructed that it is the duty of a passenger on a railroad train to use his senses, and take notice of the usual announcement of stations, and if, by reason of his negligence, the passenger fails to hear notice given of the arrival of the train at his place of destination, and remains on the train, and is carried beyond, the fault is the passenger's and the carrier is not liable therefor. If, therefore, you believe, from the evidence, that defendant's servants in charge of the train gave the usual announcements of stations as the train approached C., and if, by reason of plaintiff's negligence, he failed to hear such announcement, and plaintiff remained on the train and was carried beyond, the fault was the plaintiff's and the defendant is not liable therefor, and you should return a verdict in its favor.<sup>92</sup>

**§ 1483. Same—Defense that passenger misled conductor**

The jury are instructed that, if the plaintiff deceived or misled the conductor of the train as to the plaintiff's destination, and such conduct would have misled or deceived a person of ordinary prudence, and that thereby the conductor was caused to carry the plaintiff beyond his destination, the defendant would not be liable for injuries resulting from the fact that the plaintiff was carried beyond his destination.<sup>93</sup>

**§ 1484. Same—Contributory negligence as defense to recovery for injuries suffered on return to destination**

You are instructed that in determining whether or not the boy or his father were guilty of any material negligence which contributed to his injury in attempting to cross upon the bridge, you may take into consideration what a reasonably prudent man would have done under like or similar circumstances, bearing in mind the kind of a day it was, the condition of the boy's health, their knowledge or lack of knowledge of a way across the creek back to their place of destination, and all other connecting circumstances therewith.<sup>94</sup>

<sup>91</sup> St. Louis S. W. Ry. Co. of Texas v. Ricketts, 54 S. W. 1090, 22 Tex. Civ. App. 515.

<sup>92</sup> St. Louis S. W. Ry. Co. of Texas v. Ricketts, 54 S. W. 1090, 22 Tex. Civ. App. 515. The action was for being carried past the destination of

plaintiff and compelled to get off at a depot without heat.

<sup>93</sup> St. Louis S. W. Ry. Co. of Texas v. Ricketts (Tex. Civ. App.) 62 S. W. 424.

<sup>94</sup> Terre Haute, I. & El. Traction Co. v. Hunter, 111 N. E. 344, 62 Ind. App. 399.

**§ 1485. Liability for delay in transportation**

You are instructed when a railway company has failed to carry a passenger to his destination by the time fixed in its published schedule, the burden is upon the railway company to prove that it has made every proper effort to prevent the delay. If it fail to prove this, it will be liable to the passenger for damages.<sup>95</sup>

**§ 1486. Liability for injuries caused by insufficient accommodations or unsanitary conditions****§ 1486(1). Kentucky**

You are instructed that it was the duty of the defendant to provide its train in question with coaches reasonably sufficient to seat and carry comfortably as many persons as in the exercise of ordinary care it should reasonably have anticipated would demand to be carried thereon; and if it failed to do this or did not furnish the plaintiff such reasonable accommodations as it reasonably could on said train, or if it required plaintiff to ride in the car set apart for colored people, they should find for her the damages she thereby sustained.<sup>96</sup>

You are instructed that, if you shall believe from the evidence that the plaintiff was not a member of the military company on the trip to, or return from, ——— on the occasion mentioned in the evidence, but that he voluntarily undertook to and did make said trips, and that he could without subjecting himself to any military discipline or penalty have left the coach which was occupied by said company on said trip after discovering that said coach was dirty or filthy, or gave out offensive odors, or was insufficiently heated, or the lamps gave insufficient light, or emitted foul or offensive odors, or the stoves in said coach gave out smoke, to the discomfort of plaintiff, if any such conditions existed, and could have taken passage on said trips in another coach free from such conditions and failed to do so, you should find for the defendant.<sup>97</sup>

You are instructed that, if the plaintiff voluntarily rode in the colored car, rather than risk getting a seat in one of the other cars, she can recover nothing on account of riding in that car. If she was not directed to ride in the colored car, and remained on the train knowing its crowded condition, she cannot complain if she was furnished such accommodations as could reasonably be furnished on it. If the train stopped at ——— the reasonable

<sup>95</sup> *Miller v. Southern Ry. Co.*, 48 S. E. 99, 69 S. C. 116.

<sup>96</sup> *Chesapeake & Ohio Ry. Co. v. Austin*, 126 S. W. 144, 137 Ky. 611, 136 Am. St. Rep. 307.

<sup>97</sup> *Louisville & N. R. Co. v. Scalf*, 110 S. W. 862, 33 Ky. Law Rep. 721, 26 L. R. A. (N. S.) 263.

and usual length of time for passengers to get on and plaintiff failed to present herself at the train, she can recover nothing for being left there, although she failed to so present herself by reason of the crowd at the station.<sup>98</sup>

**§ 1486(2). Texas**

You are instructed that, if you find and believe from the evidence that defendant's employes furnished to plaintiff's wife a car to take passage in from ——— to ———, which was not lighted, and was filthy and dirty, and that plaintiff's wife's fellow passengers were smoking, drinking whisky, cursing, and crowding up against plaintiff's wife, and you further find that the omissions and acts, if any, were negligence, as that term is herein defined, then you will find for plaintiff such damages, if any, as plaintiff may have suffered by reason of the loss of his wife's services, and such damages, if any, as plaintiff's wife may have suffered; and in estimating the damages, if any, you may take into consideration the loss of time of plaintiff's wife, the inconvenience, fright, alarm, and excitement, if any, together with her mental suffering and physical pain while sick, if she was sick, which was the proximate result of the negligence, if any, of defendant's employes in charge of its train, and therefrom you will ascertain and determine what amount of cash money will be a fair and reasonable compensation for such injuries, if any.<sup>99</sup>

**§ 1487. Same—Duty to keep waiting room warm**

**§ 1487(1). Arkansas**

The court instructs the jury that it was the duty of the defendant to exercise ordinary care to keep its depot and waiting room in a reasonably comfortable condition for its passengers, and that, if appellant failed to exercise ordinary care in keeping its waiting room at ——— comfortably warm, it was liable to the plaintiff in such sum as would reasonably compensate her for any and all injuries she may have sustained as a direct and proximate result of such failure to exercise such care.<sup>1</sup>

You are instructed that, if you find from the evidence that the plaintiff went to defendant's depot at ——— station on the day mentioned in the complaint to take passage on defendant's train, and at that time the weather was such as to require the waiting room to be heated in order to make it comfortable, it was defendant's duty to keep said depot open and to keep its waiting room in said depot comfortably heated.<sup>2</sup>

<sup>98</sup> Chesapeake & Ohio Co. v. Austin, 126 S. W. 144, 137 Ky. 611, 136 Am. St. Rep. 307.

<sup>99</sup> Texas & P. Ry. Co. v. Bratcher (Civ. App.) 78 S. W. 531.

<sup>1</sup> Kansas City Southern Ry. Co. v. Cobb, 178 S. W. 383, 118 Ark. 569.

<sup>2</sup> Chicago, R. I. & P. R. Co. v. Stanford, 106 S. W. 205, 84 Ark. 406. This was given for the party successful on



You are instructed that if you find, from the evidence, that defendant had a depot building at ———, erected for the accommodation of passengers, and it ran its trains over said lines both day and night, then it was its duty to keep the same open for the free and unrestricted use of its passengers, and the waiting rooms thereof at all proper times and seasons comfortably heated.<sup>3</sup>

**§ 1487(2). Texas**

The court instructs the jury that, if you believe from the evidence that on or about the ——— day of ———, the plaintiff while en route from ——— to ———, went to the passenger depot of the defendant ——— at ———, and there waited for the train scheduled to leave at ——— p. m. on said date, and that the defendant's agents and servants in charge of said depot failed for a period of one hour prior to the arrival of said train to keep the passenger waiting room in said depot comfortably warm, and that as a proximate result of such failure, if they did fail, the plaintiff was exposed to cold, became chilled and contracted cold, and was proximately caused to have la grippe, pneumonia, tuberculosis, and suffer in any or all of the ways alleged in his petition, then you will find for the plaintiff and assess his damages according to the rule hereinafter given you, unless you find for the defendant under other portions of this charge.<sup>4</sup>

You are charged that the obligation of the defendant to keep its depot warm does not mean that it must necessarily have fire in its depot, but the law only requires that a railroad shall have fire in its depot when a person exercising that degree of care that the court has charged you the defendant was required to use would, under the same circumstances, have had a fire or artificial heat in such depot. The undisputed evidence in this case shows that no fire in the depot was provided for the purpose of warming the depot where the passengers stayed, but whether the defendant was negligent in not having a fire in said depot on the occasion in question is a question of fact for you to determine from all of the evidence and circumstances before you, and the mere failure to have a fire would not be negligence on the part of the defendant, unless you further believe that one exercising the degree of care the court has instructed you defendant was required to exercise under the law would have had a fire in such depot on said night.<sup>5</sup>

**§ 1488. Measure of damages for carrying beyond destination**

You are instructed that, if you find for the plaintiff, you will fix her recovery at a sum not to exceed the amount claimed in her pe-

appeal, but no comment was made upon it.

<sup>3</sup> Chicago, R. I. & P. R. Co. v. Stanford, 106 S. W. 205, 84 Ark. 406.

<sup>4</sup> Texas & P. Ry. Co. v. Shaw (Civ. App.) 218 S. W. 814.

<sup>5</sup> Gulf, C. & S. F. Ry. Co. v. Turner (Civ. App.) 93 S. W. 195.



tition, and you may take into consideration in so doing the amount of money expended by her in addition to the sum she would otherwise have had to expend in reaching ———, as testified to in the evidence, and such damages as you may think is commensurate with the effect upon her mental and physical condition, caused by the negligence of the railway company defendant.<sup>6</sup>

**§ 1489. Measure of damages for failure to furnish proper accommodations**

The court instructs the jury that, if the jury find for the plaintiff, they should find for her such a sum as will reasonably compensate her for any humiliation of feelings she endured and for any personal discomfort she suffered, or any necessary expense she incurred which was the direct result of defendant's failure as set out in No. ——— or No. ———.<sup>7</sup>

**3. Rules and Regulations and Their Enforcement by Expulsion of Passenger or Otherwise**

Duty towards ejected passenger attempting to re-enter car, see ante, § 1462.

**§ 1490. Enforcement of rule as to separation of races**

You are instructed that, if you believe from the evidence that the conductor used no more force than was reasonably necessary to enforce in a proper manner a rule requiring colored passengers to sit in the front part of the car, then I charge you that your verdict must be for the defendant.<sup>8</sup>

You are instructed that, if you believe from the evidence that, at the time plaintiff claims she was ejected from the car, the defendant had in force on its ——— railroad a rule requiring colored passengers to sit in the front part of the car, and white passengers to sit in the rear part of the car, and if you further believe from the evidence that the conductor used no more force than was reasonably necessary to enforce such rule in a proper manner, you must find for the defendant.<sup>9</sup>

You are instructed that, if you believe from the evidence that the conductor requested the plaintiff to take a seat in the forward end of the car; that she refused to comply with the request; that she could have found in the forward end of the car a vacant seat; that at the time there was a rule in force requiring colored passengers to sit in the forward end of the car; that the conductor

<sup>6</sup> St. Louis & S. F. R. Co. v. Lilly, 153 P. 810, 52 Okl. 727.

<sup>7</sup> Chesapeake & Ohio Ry. Co. v. Austin, 126 S. W. 144, 137 Ky. 611, 136 Am. St. Rep. 307.

<sup>8</sup> Bowie v. Birmingham Ry. & Elec-

tric Co., 27 So. 1016, 125 Ala. 397, 50 L. R. A. 632, 82 Am. St. Rep. 247.

<sup>9</sup> Bowie v. Birmingham Ry. & Electric Co., 27 So. 1016, 125 Ala. 397, 50 L. R. A. 632, 82 Am. St. Rep. 247.

used no more force than was necessary to reasonably enforce such rule in a reasonable and proper manner—you must find for the defendant.<sup>10</sup>

I charge you, gentlemen of the jury, that if, under the evidence in this case, if you believe it, you should find that there was in force, at the time plaintiff claims to have been injured, a rule on the defendant's ——— line of street railroad requiring negro passengers to ride in the front end of the car, and white passengers to ride in the rear end of the car, such rule is reasonable, and you are not authorized from the evidence to find that it was the duty of the defendant to put in its car a partition to separate negro and white passengers, instead of such reasonable rule.<sup>11</sup>

**§ 1491. Wrongfully requiring passenger to ride in coach set apart for members of another race**

The court instructs the jury that the defendant was required by law to furnish separate coaches for the transportation of white and colored passengers, and that it was incumbent upon it to assign the white passengers to the coaches intended for them, and the colored passengers to the coaches intended for them; that if the brakeman, in requiring the plaintiff to leave the white coach, did not in good faith believe, or, in the exercise of ordinary care did not have the right to believe, that the plaintiff was a woman of color, or if he was insulting to her, they should find for the plaintiff; but that if he in good faith believed, and in the exercise of ordinary care had a right to believe, that she was a woman of color, and was not insulting her, the jury should find for the defendant.<sup>12</sup>

**§ 1492. Same—Damages**

The court instructs the jury that, if they find for the plaintiff, the measure of recovery is such sum as will fairly compensate her for the trouble in leaving the car and returning to it, unless the brakeman was insulting to her, and in this event they are not confined to compensatory damages, but may or may not, in their discretion, allow punitive damages, but not exceeding in all the amount claimed in the petition.<sup>13</sup>

**§ 1493. Duty towards passenger having custody of another**

The court instructs the jury that the plaintiff, as one of the bondsmen of L. for his appearance in the ——— county court, had

<sup>10</sup> *Bowie v. Birmingham Ry. & Electric Co.*, 27 So. 1016, 125 Ala. 397, 50 L. R. A. 632, 82 Am. St. Rep. 247.

<sup>11</sup> *Bowie v. Birmingham Ry. & Electric Co.*, 27 So. 1016, 125 Ala. 397, 50 L. R. A. 632, 82 Am. St. Rep. 247.

<sup>12</sup> *Southern Ry. Co. in Kentucky v.*

*Thurman*, 90 S. W. 240, 121 Ky. 716, 28 Ky. Law Rep. 699, 2 L. R. A. (N. S.) 1108.

<sup>13</sup> *Southern Ry. Co. in Kentucky v. Thurman*, 90 S. W. 240, 121 Ky. 716, 28 Ky. Law Rep. 699, 2 L. R. A. (N. S.) 1108.

the right to arrest and hold him in custody, and had also the right, while so holding him in custody, to carry him on defendant's train to ———, in ——— county, and was entitled to the same treatment and protection as other passengers on said train.<sup>14</sup>

You are instructed that, if the defendant's servants, after plaintiff got off the car, gave him a reasonable opportunity to get on the car with L., and he did not get on because L. refused to get on, the law is for the defendant, and the jury should so find.<sup>15</sup>

You are instructed that it was incumbent on the plaintiff to ride in the car, and to keep L., whom he had in custody, in the car when in motion. It was not the duty of the defendant's servants in charge of the train to assist plaintiff in holding L.; and when, after the train started, they found plaintiff in a struggle with him on the platform, they had the right to stop the train and require them either to go in the car or get off; and if, when the train stopped, plaintiff got off the car to hold L., who was attempting to escape, it was the duty of the defendant's servants to give plaintiff a reasonable opportunity to get on the car with L., and if they failed to do this, and by reason thereof, and not by reason of L.'s refusing obedience to him, plaintiff was left by the train, the jury should find for the plaintiff in such sum as will reasonably compensate him for the time he thus lost and any expenses he thereby incurred.<sup>16</sup>

#### § 1494. Disorderly conduct as ground for ejection

##### § 1494(1). Alabama

You are instructed that under the law in this state, the conductor of a railroad train is a police officer, and not only has the right, but it is his duty, to keep order on the train on which he is conductor, and to eject all persons who use obscene or abusive language in the presence and hearing of the passengers.<sup>17</sup>

##### § 1494(2). Missouri

The court instructs the jury that if they believe from the evidence that the plaintiff, on ———, while a passenger on one of defendant's cars near ——— street, used violent, boisterous, or profane language or was guilty of disorderly conduct in the presence of other passengers, who were then and there upon said car, then it became and was the duty of the defendant's conductor to remove the plaintiff from the car, and use such force as was necessary for that purpose.<sup>18</sup>

<sup>14</sup> Chesapeake & O. Ry. Co. v. Vaughn (Ky.) 115 S. W. 217.

<sup>15</sup> Chesapeake & O. Ry. Co. v. Vaughn (Ky.) 115 S. W. 217.

<sup>16</sup> Chesapeake & O. Ry. Co. v. Vaughn (Ky.) 115 S. W. 217.

<sup>17</sup> Moore v. Nashville, C. & St. L. Ry., 34 So. 617, 137 Ala. 495. This is correct as far as it goes.

<sup>18</sup> Ickenroth v. St. Louis Transit Co., 77 S. W. 162, 102 Mo. App. 597.

**§ 1495. Nonpayment of fare as ground for ejection**

I charge you, gentlemen, that it is the duty of the defendant, its agents and servants, to observe and take due notice and heed the reasonable explanations of the passengers in regard to their transportation and ticket. The rule requiring the conductor to heed the reasonable explanation of the passenger, instead of allowing him to demand the payment of fare, on pain of expulsion from the train, works less hardship, inconvenience, and expense on the carrier than the opposite rule would on the passenger, for it is generally an easy matter for the conductor to ascertain whether the explanation of the passenger is true or false, because the stations along the railroad are nearly all connected by telephone or telegraph lines, which the agents of the company may use with little trouble and at little or no expense. It is a serious matter to expel a passenger from a train. It subjects him to humiliation, and it is calculated to wound the feelings of any self-respecting passenger. Therefore the law allows punitive damages for the wrongful expulsion of a passenger, and also for compelling him to pay money under threat of wrongful expulsion. Consequently the law is that a carrier must be allowed to resort to so harsh and extreme a measure only at the peril of being able to justify it. Gentlemen, that is a matter of question for you whether or not the defendant, its agents and servants, acted reasonably under all the circumstances surrounding the situation.<sup>19</sup>

**§ 1496. Same—Failure to pay fare of third person**

The jury are instructed that, if you believe from the evidence that the plaintiff, at the time in question, conducted himself as being, and represented himself to be, in charge of the child, then your verdict must be for defendant. But if you believe from the evidence that he did not represent himself, or hold himself out, as the custodian of said child, then as a matter of law the defendant would have no right to eject plaintiff from the car of defendant, and you should find defendant guilty.<sup>20</sup>

**§ 1497. Same—Right of purchaser from another ticket holder of non-transferable ticket**

The jury are instructed that if you find, from the testimony, that the ticket in question in this case was a third-class or "emigrant" ticket which had been sold at a reduced rate to a person in F. other than the plaintiff, and said ticket was by its terms not transferable, and the purchaser thereof in F., in part consideration of such sale, at a reduced price, agreed that it should not be transfer-

<sup>19</sup> *Williams v. Atlantic Coast Line R. Co.*, 83 S. E. 604, 99 S. C. 397.

<sup>20</sup> *Mansfield v. Chicago, B. & Q. Ry. Co.*, 132 Ill. App. 552.

able; and you further find that the plaintiff purchased said ticket in O. from some person other than defendants, or their authorized agent, and offered and attempted to use it as entitling him to passage from O. to C. on the defendants' road, and refused to pay his fare on the defendants' road, and did not pay his fare, then the defendants were not under obligations to allow the plaintiff to ride upon such ticket, and upon such refusal to pay fare had a right to require the plaintiff to leave the train, and he can recover no damages based on the fact that he was so required to leave.<sup>21</sup>

The jury are instructed that the taking up of the plaintiff's ticket, was a wrongful act on the part of the defendants, for which they are liable to plaintiff.<sup>22</sup>

**§ 1498. Same—Threatening to put passenger off**

You are charged as the law of this case that the defendant's conductor had the right to tell Mrs. ——— that he could not carry the child without the payment of fare for it, and had the right to tell her that he would have to put the child off the train unless she paid fare for it, and he also had the right to explain to the said Mrs. ——— that the statute made it an offense for him to permit the child to ride without the payment of fare, and that it also made it an offense for any person to ride without the payment of fare, and, if you believe that he had such conversations with her and made such statements to her, you cannot find for her on that account, unless you should further believe from a preponderance of the evidence that his manner was harsh and rough, and that as a result of such manner on his part she suffered injury.<sup>23</sup>

**§ 1499. Refusal to honor transfer**

The court instructs the jury that, if they find from the evidence in this case that the defendant's servants in charge of its south bound car received the plaintiff as a passenger thereon, at ——— and ——— streets, in the city of ———, and if the jury further find from the evidence that the plaintiff had paid his fare entitling him to ride as a passenger on said car to his destination on defendant's line of railway, and if the jury find from the evidence that the plaintiff obtained from defendant's conductor in charge of its car on ——— street, at the time he paid such fare, a transfer ticket, entitling him to ride as such passenger on said ——— car to his destination, and if the jury further find from the evidence that the plaintiff tendered to the conductor of said ——— car such ticket unmutilated; in payment of his fare as such passenger on said car,

<sup>21</sup> Post v. C. & N. W. R. Co., 15 N. W. 225, 14 Neb. 110, 45 Am. Rep. 100.

<sup>22</sup> Post v. C. & N. W. R. Co., 15 N. W. 225, 14 Neb. 110, 45 Am. Rep. 100.

<sup>23</sup> Trinity & B. V. Ry. Co. v. Carpenter (Tex. Civ. App.) 132 S. W. 837.

then the defendant and its servants in charge of said car were bound in law to safely carry the plaintiff as such passenger upon said car to his said point of destination, if they could do so by the exercise of the high degree of care of careful railroad employes under the same or like circumstances.<sup>24</sup>

**§ 1500. Duty of passenger to surrender ticket—Right to retain where carrier refuses accommodations to which ticket entitles holder**

Now, then, gentlemen, I charge you as a matter of law, that if you find those to be the facts, if they showed their tickets, if the captain and the purser knew, or the purser knew, that they had those tickets, if he or they saw them, and if thereafter plaintiffs were told that they must go in the steerage because they were colored, that they only carried colored people there; if that was the reason and the sole reason why defendant's officers refused to give them the passage above the steerage, and they had second-class accommodations—why, then, plaintiffs had the right to hold on to those tickets; they had the right to keep them as an evidence of their rights. In short, if they were notified in advance that their tickets would not be honored, that they would not have accorded to them the rights which their tickets called for, why, then, they were not obliged to surrender into the hands of these officers of the defendant their evidence of that right—not obliged, under such circumstances, to deprive themselves of that evidence; they were under no obligations to acquiesce in such a demand. If, however, gentlemen, that vessel only carried at that time first-class and steerage passengers, if all the accommodations for first-class passengers were filled and occupied, and they had no room above the steerage for any second-class passengers, and could not accommodate them anywhere else, and these plaintiffs knew it or were informed of it and entered on that voyage under that information, why, then, of course, there would be on the vessel only first-class accommodations and the steerage, and the steerage would be the only second-class accommodations they had, and if the other rooms were all occupied, if that was true, so that they could not give them any second-class accommodations there, why, then, they would be forced, and it would have been their duty, to take the only second-class accommodations they had—if you should find those to be the facts. But the plaintiffs say they were relegated to the steerage, and told that they could not have second-class accommodations, because they were colored people. They say that defendant did carry

<sup>24</sup> *Carmody v. St. Louis Transit Co.*, 99 S. W. 495, 122 Mo. App. 338.



second-class passengers in that vessel. You have heard the evidence here as to when that vessel commenced carrying second-class passengers. Defendant's witnesses say it was built to carry first-class passengers only; it was built in ———, and about ——— years after that they commenced carrying second-class passengers also. This transaction occurred in ———. A man who had been in the employ of this defendant and who was on the vessel says he knows about it, and you have seen him; you have heard his testimony. He says at that time and on that voyage this vessel was actually carrying, and did carry, second-class passengers, so you, gentlemen, under this evidence are to ascertain and determine what the facts were. Under the evidence of the captain and the other officers, if their statements are correct and true, it was the duty of these plaintiffs on demand to have presented and surrendered up their tickets, because the presumption would be that the officers of the defendant company would give them the proper accommodations, such as their tickets called for. If, however, on the other hand, the plaintiffs are correct in their statement, and their tickets were exhibited, their evidence of a right to a second-class passage was exhibited, and they were told, in substance, that they would not be honored, that because they were colored they would have to go into the steerage, then they were justified in not surrendering them, and it was not their duty to abrogate their contract or forfeit their rights to the accommodations their tickets called for.<sup>25</sup>

**§ 1501. Duty of passenger to present ticket in reasonable time**

The court instructs the jury that, if you find from the evidence that the plaintiff had a ticket over the defendant's road from ——— to ———, and that the conductor of the train demanded the ticket, and did not wait a reasonable time under the circumstances for him to produce it, then you must find for the plaintiff. If you find from the evidence that plaintiff was a passenger on defendant's train, and had a ticket from ——— to ———, and that the conductor demanded same, and that he did wait a reasonable time under the circumstances, and plaintiff did not present his ticket, then the conductor had a right to put him off the train, and you will find for the defendant.<sup>26</sup>

The court instructs the jury that you are to judge from all the facts and circumstances what is a reasonable time. If a passenger has a ticket, and the conductor demands the same, or the payment of his fare, and waits a reasonable time, and the passen-

<sup>25</sup> *Billinger v. Clyde S. S. Co.* (C. C. N. Y.) 158 F. 511.

<sup>26</sup> *Seaboard Air Line Ry. v. Scarborough*, 42 So. 706, 52 Fla. 425.



ger neglects, fails, or refuses to produce same, the conductor has a right to put him off.<sup>27</sup>

**§ 1502. Right of passenger who has furnished ticket**

The court instructs the jury that if you find from the evidence, that the plaintiff had a ticket from ——— to ———, and you find such fact from the greater weight of the evidence, and that he gave his ticket to the conductor, then the court instructs you that he had a right to ride on defendant's train from ——— to ———, the destination called for in his ticket; and the court instructs you that, if he was ejected from the train (unless on account of his own wrongful conduct or disorderly behavior, and there is no evidence of such behavior), his ejection was wrongful and in violation of the duty which defendant owed him, and that he would be entitled to recover compensatory damages.<sup>28</sup>

**§ 1503. Ejection for refusal of passenger to observe rules as to identification**

**§ 1503(1). Michigan**

The court instructs the jury that it was the duty of the plaintiff, upon demand so to do, by the conductor in charge of the train, to either identify himself to the reasonable satisfaction of the conductor, or pay his fare, or leave the train. The act of the conductor of the defendant company in removing the plaintiff from the car was the act of the defendant company, and rendered it liable to the plaintiff for all his damages, providing such ejection was unlawful, or, if lawful, made with unnecessary force and violence. I instruct you that it was not within the province or authority of the conductor, to in any manner change or vary the terms of the ticket presented by plaintiff. Under the terms of that ticket, all that the conductor could do was to pass upon the question of the proper identification of the plaintiff, and if the conductor was reasonably satisfied of the identification of the plaintiff—that is, that he was the same person described in the ticket—then the conductor should have accepted the ticket and allowed plaintiff transportation on that train; but, if you find that, not being reasonably satisfied as to the identification, the conductor asked for the identification, and plaintiff refused to identify himself, then the conductor had no right to accept such ticket or allow transportation on the ticket. I instruct you that, as between the conductor and plaintiff, the right of the latter to travel or be transported by this train was governed entirely by the terms of the ticket, and if you find that the conductor reasonably believed, and

<sup>27</sup> Seaboard Air Line Ry. v. Scarborough, 42 So. 706, 52 Fla. 425.

<sup>28</sup> Edwards v. Southern Ry. Co., 78 S. E. 219, 162 N. C. 278.

had good reason to believe, that such a discrepancy existed, then it was proper for him to ask plaintiff to identify himself, and if you find that he did ask plaintiff to identify himself, and plaintiff refused so to do, then it was proper for the conductor to demand that plaintiff pay his fare in cash or leave the train; and, if you find that the plaintiff in turn refused to do either of these things, then it was proper and lawful for the conductor to use such force as was necessary to put plaintiff off the train; and, if you find that the conductor used only such reasonable force as was necessary, then your verdict must be for the defendant, no cause of action. If you find under the circumstances stated that the conductor used more force than was reasonably necessary, then the plaintiff can only recover for the damages resulting to him, if any, from such excess of force. In determining the question as to whether or not the conductor was justified in ejecting the plaintiff from his train, you should take into account all the evidence in the case bearing upon what occurred at the time the plaintiff first presented his ticket, and what afterward occurred when the conductor returned to the plaintiff while he was still in the train.<sup>29</sup>

The court instructs the jury that the provision printed upon the face of the ticket that the passenger shall, whenever requested by the conductor to do so, identify himself by writing his name or otherwise, is a reasonable regulation, and it would be the duty of ——— to comply with a request of the conductor to identify himself, by writing his name, or otherwise, at any time, even though the conductor had accepted and punched his ticket and returned the ticket to the plaintiff, thereby intending to signify his acceptance of the ticket, and thereby canceling the ticket to the end of his run at ———. Did the conductor request ——— to identify himself by writing or otherwise? And did ——— refuse to write his name, or to otherwise identify himself? If you find that he did refuse, after being requested so to do, to identify himself, then the conductor would be justified in ejecting him from the train, using however, no more force than was necessary to accomplish that object.<sup>30</sup>

§ 1503(2). Texas

You are charged that by the acceptance of a railroad ticket which purports to contain a contract between a passenger and more than one line of railroad, such as read in evidence in this case, the purchaser thereby assents to all its terms, and the same thereby becomes a contract between the parties. No agent or employé of

<sup>29</sup> Pierson v. Illinois Cent. R. Co.,  
112 N. W. 923, 149 Mich. 167.

<sup>30</sup> Pierson v. Illinois Cent. R. Co.,  
112 N. W. 923, 149 Mich. 167.

any one of the lines has the power to alter, modify, or waive any of the conditions contained in the joint contract, without the consent of all. By the terms of the ticket read in evidence as the contract between the plaintiff and defendant, the ——— Company, it is provided in subdivision No. ———, as one of the conditions upon which defendant agrees to be bound; and as one of the considerations for the reduced rates at which the said ticket is sold, that the original purchaser (the plaintiff in this case) agrees to sign his name, and otherwise identify himself as such, whenever called upon to do so by any conductor or agent upon the line or lines over which the ticket reads, and that, on failure or refusal to do so, the ticket shall become thereafter void, and that it may be taken up, and full fare collected, if presented at any time for passage by another person. The condition, rule, or regulation requiring an original purchaser of a ticket such as is shown in evidence in this case to sign his name thereto, and otherwise identify himself, when called upon by a conductor of a line over which the contract reads, is a reasonable one. If a passenger accepts a ticket containing such a condition in the body of the contract, and knows the provisions, or has an opportunity to know them, and uses it, and the connecting carrier company has resorted to no unfair means of deception, the passenger's assent to the same will be conclusively presumed. If, therefore, you find from the evidence in this case that the conductor of the defendant company called upon the plaintiff to sign his name to the said ticket, and gave him the opportunity to do so, and that plaintiff failed and refused to sign his name thereto, before the said conductor ejected him from the train, and that, failing to sign his name, the conductor called upon plaintiff, and requested him to pay his fare, and that plaintiff failed and refused to do so, you are instructed that in that event the conductor would have the right to eject plaintiff from the defendant's train; and if he did so, and used no more force than was sufficient to eject plaintiff from the train, the plaintiff cannot recover, and your verdict will be for the defendant.<sup>81</sup>

**§ 1504. Mistake as to right of transportation—Authority of agent to sell ticket**

The court instructs the jury that the burden of proof in this case is on the plaintiff to establish that he was a passenger on defendant's train on the day and date mentioned in his complaint, that he was entitled to passage thereon, and that he was forcibly ejected therefrom; and if you find from the preponderance of the evidence that the plaintiff purchased the ticket introduced in evidence

<sup>81</sup> *Ketcheson v. Southern Pac. Co.*, 46 S. W. 907, 19 Tex. Civ. App. 288.

from the agent of the ——— Railway Company at ———, and that said ticket was honored by the defendant on its train going from ——— to ———, then the remaining portion of said ticket did entitle the plaintiff to be carried as a passenger back from ——— to ———. And if you find that the plaintiff had the remaining portion of said ticket, and that he tendered the same to the conductor or auditor of the defendant's train, and having tendered said ticket was ejected from said train, then your verdict must be for the plaintiff.<sup>32</sup>

**§ 1505. Passenger given wrong ticket through fault of ticket agent**

I charge you that in proper cases the conductor must heed the statement and explanation of the passenger as to his rights, and that when he has requested and paid for a ticket to a certain place and he boards a train without fault, believing that he has obtained that which he sought, he is entitled to ride thereon, even though the agent has not furnished him with the proper evidence of his right to ride.<sup>33</sup>

**§ 1506. Passenger misled into taking wrong train**

The plaintiff contends that he made inquiry of ——— as to whether the passenger train No. ——— made connection at B. with the train running from ——— by way of B. to W., and he contends that in this inquiry ——— told him that he would make connection at B.; he contends and alleges that he relied upon that assurance given him by ———, and after buying a mileage book that the book was pulled from ——— to W., and that he received a ticket from ——— to W. in exchange for the mileage that he pulled, and he alleges and contends that some time after that ——— stated to him he would guarantee he would make connection at B. on this train No. ———, and that, relying upon this assurance, he boarded train No. ——— when it came to ——— and became a passenger thereon; and he contends that when the train reached a point a few miles from B., the agent of the defendant, the ticket collector, gave him information that he would not make his connection at B. for ———, and that he would be required to pay the sum of ——— cents in cash in order to continue his journey by way of ——— and ——— to reach ———; and he contends that when this was called to his attention by the auditor he informed him of what had happened between himself and ——— at ———, and that after his talk with the conductor and the ticket collector they still insisted he would have to pay ——— cents in order to continue his

<sup>32</sup> Chicago, R. I. & P. Ry. Co. v. Newburn, 136 P. 174, 39 Okl. 704.

<sup>33</sup> Levan v. Atlantic Coast Line R. Co., 68 S. E. 770, 86 S. C. 514.

journey. He contends also that, after making known to them what had occurred between himself and ———, and after they made demand upon him that he pay ——— cents in cash, he informed the auditor and conductor, one or both, that he was willing to let them have a sufficient number of miles off of his mileage book with which to make the sum demanded of him, to wit, ——— cents. He also contends that in his interview he offered to let his book be pulled to B. in order to make up this ——— cents; also that he made an offer that if they would let him ride on to ———, his mileage book might be used there so that enough could be pulled from the book to make up the ——— cents; but he says these offers made by him to use the book and take the mileage off of it instead of cash were refused by the conductor and ticket collector, and he insists you ought to find from the evidence also that, under these circumstances, when he got to B., the train not being there for him to go on the short route, they should not have put him off the train, but allowed him to go on under the circumstances by way of ——— and ———, he insisting that if there was not actually a contract between himself and the agent, ———, at ———, except as was understood by both him and ———, nevertheless he was misinformed and misdirected, and the conditions at B. were erroneously represented to him by ———, and therefore that he should not have been held to the exact terms of the contract as expressed on the ticket and put off the train. He, therefore, insists that he was wrongfully put off the train and that you should answer the second issue, "Yes." If the plaintiff has satisfied you by the greater weight of the evidence that his contentions to which I have called your attention are true, and that although this ticket was issued having upon it the terms that it does, it was good for transportation by way of the short route, that is to say, by way of B., and if you further find that he was actually misled at the time ——— issued the ticket to him by the erroneous representation, misdirection, or mistake of ——— at that time, that is to say, the time he boarded the train, and that thereby he was caused to become a passenger on the train; and if you further find that the plaintiff was not advised or informed as to the connection of this train at B. otherwise, or could not have been, in the exercise of reasonable care, and you further find that the plaintiff, while he was on the train and when the extra amount of ——— cents was demanded of him, informed the conductor and the collector, one or both, of what had occurred between himself and the agent, ———, at ———; and if you further find that the plaintiff then, under those circumstances, after making that explanation and offering to pay the ——— cents extra from his mile-

age book by the pulling of coupons therefrom at B. or at ——— or on the train, and you find that the conductor would not allow him to do this—if all these facts are found by you as contended by the plaintiff, and by the greater weight of the evidence, then the court instructs you that the conductor would not have been authorized, as the court understands the law, to have put him off the train.<sup>84</sup>

**§ 1507. Rights of passenger continuing journey on another train after stopping over**

The jury are instructed that, if the jury shall find from the evidence that the plaintiff, on the ——— day of ———, purchased at ——— a through ticket from that place to B. ———, over the ——— Railroad and the ——— Railroad, and on that day proceeded on his journey as far as P. ———, on the last-named road, where he left the train; and if the jury shall further find that after passing ———, the then conductor of the train took up said through ticket and gave plaintiff the check in lieu thereof, which has been offered in evidence; and if the jury shall further find that the plaintiff, on the ——— day of said ———, got upon the defendant's train for B. ——— at H. ———, and the then conductor refused to take said check, but informed the plaintiff that he must pay his fare to B. ———, or he would be obliged to stop the cars and put him off, and that the defendant refused to pay said fare, and the said plaintiff was then put off, then the plaintiff is not entitled to recover in this case, provided the jury shall find that no more force than was necessary was used in putting said plaintiff off the train, even if the jury shall further find, that on arriving at P. ——— on the train, on the said ——— day of ———, the plaintiff inquired from a man at the window of the ticket office of the defendant at that place whether said check would be good to take him on to B. ——— another day, and was told by said man that it would.<sup>85</sup>

**§ 1508. Good faith of conductor as defense to wrongful expulsion**

I instruct you that if the passenger has done what is necessary under the rules of the carrier to entitle him to transportation, the carrier will be liable for his expulsion, or threatened expulsion, by reason of the mistake, or want of judgment on the part of the conductor, although the conductor, under the circumstances, acts in good faith.<sup>86</sup>

<sup>84</sup> Hallman v. Southern R. Co., 85 S. E. 298, 160 N. C. 127.

<sup>85</sup> McClure v. Philadelphia, W. & B. R. Co., 34 Md. 532, 6 Am. Rep. 345.

<sup>86</sup> Union Traction Co. of Indiana v. Smith (Ind. App.) 123 N. E. 4.



**§ 1509. Ejection because of honest mistake as to validity of ticket**

The jury is instructed that a passenger who has paid his fare to a common carrier, and has received a ticket properly issued and delivered to him evidencing such payment, is entitled to have the same honored by the carrier, and that a refusal to honor it by an agent, or the agents of the carrier, even though honestly mistaken concerning its validity, does not relieve the carrier from responsibility for such refusal to honor it.<sup>87</sup>

The jury is instructed that if it believes from the evidence in this case that improper punch marks, or other mutilations, were made upon the railroad ticket submitted in evidence, and that they were made by any agent of defendant of his own volition, and without the consent of the rightful owner thereof, such fact constitutes no defense to defendant for refusing to honor such ticket.<sup>88</sup>

**§ 1510. Manner and place of ejection****§ 1510(1). Illinois**

The jury are instructed that, if you believe from the evidence that because of refusal to pay fare plaintiff was ejected by the conductor at a place other than the usual stopping place for passengers, you will find for plaintiff, and if you believe from the evidence that plaintiff was put off at a place other than the passengers' platform at said station, and that said platform was the usual stopping place for passengers riding on the freight train on which plaintiff had taken passage, then you will find for the plaintiff.<sup>89</sup>

**§ 1510(2). Iowa**

You are instructed that railroad companies have the right to demand and receive legal rates of fare from persons traveling on their trains, and in the event of the refusal of a passenger to pay his fare or show a ticket, conductors of a train have a right to eject such a passenger from the train without using any more force or violence than may be necessary to overcome any unlawful resistance which such passenger may offer. It is the duty of the conductor to bring the train to a full stop before compelling the party to be ejected to step from the train, and exercise such ordinary care in ejecting him as an ordinarily prudent man would exercise under similar circumstances as connected with this case. In this case it is not necessary that the train should be at a station in order to justify the ejection of a person refusing to pay fare; but a conductor has a right to eject such a person between stations at points

<sup>87</sup> *Forrester v. Southern Pac. Co.*, 134 P. 753, 36 Nev. 247, 48 L. R. A. (N. S.) 1.

<sup>89</sup> *Illinois Central R. Co. v. Nelson*,

59 Ill. 110.



where the situation of the ground is such as not to expose the person ejected to special risks of danger.<sup>40</sup>

§ 1510(3). Texas

You are instructed that, if you find and believe from the evidence that the plaintiff was a passenger on the train of the defendant company, as alleged, but that she refused to pay the fare of her son ———, then you are instructed that the defendant company would have the right to eject such boy from said train, and was entitled to the use of such force, if any, as may have been reasonably necessary to make such ejection if any; but in making such ejection, if any, the defendant company would be bound to exercise ordinary care not to injure the plaintiff, and the failure of the agents and servants of the defendant company to exercise such ordinary care would be negligence.<sup>41</sup>

§ 1511. Same—Use of abusive language or more force than necessary

See, also, ante, § 1503(1).

§ 1511(1). Illinois

The court instructs you that, though you may believe, from the evidence, that the plaintiff failed or refused to give the conductor a transfer or a cash fare, the defendant still owed her the duty not to wantonly or maliciously injure her, and not to use more force than was reasonably necessary in order to eject her from the car. Therefore, if you believe, from the evidence, that the defendant's conductor in charge of said car, acting within the scope of his employment, ejected or attempted to eject the plaintiff from said car, and that in so doing he used more force than was reasonably necessary in order to eject her, and thereby wantonly and maliciously injured and humiliated her, as charged in the declaration, you should find the defendant guilty.<sup>42</sup>

§ 1511(2). Missouri

The jury are instructed that if you find from the evidence that plaintiff refused to pay his fare, then the conductor had a right to put him off the car, but he had no right to use any more force than was necessary to put him off, nor to subject him to danger of injury by pushing him off the car while it was moving so rapidly as to endanger his safety. If you find from the evidence that the conductor violently pushed plaintiff from the car, and that at the time the car was moving so rapidly as to throw him to the ground,

<sup>40</sup> Brown v. Chicago, R. I. & P. R. Co., 1 N. W. 487, 51 Iowa. 235.

<sup>41</sup> Williamson v. Chicago, R. I. &

G. Ry. Co., 122 S. W. 897, 57 Tex. Civ. App. 502.

<sup>42</sup> Chicago Consol. Traction Co. v. Mahoney, 82 N. E. 868, 230 Ill. 562.

and that he was injured by being so thrown to the ground, then the plaintiff is entitled to recover.<sup>43</sup>

You are instructed that, if you find from the evidence that plaintiff caused a disturbance on said car, and that the conductor undertook to eject him from the car, then the conductor of said car was justified only in using as much force as was reasonably necessary under the circumstances to eject said plaintiff; and if you find that the said conductor did undertake to eject plaintiff from said car, and that in so doing he used more force than was reasonably necessary under the circumstances, then you will find for the plaintiff.<sup>44</sup>

§ 1511(3). North Carolina

The jury are instructed that, if the conductor had the right to eject the plaintiff, he had the right to use as much force as was necessary to accomplish the ultimate purpose to remove him, if he had not got a ticket, from the train. Now, you cannot weigh that in golden scales. You cannot say he did use exactly as much force as is necessary, or he did exceed it by the smallest grain. I do not think that would be reasonable interpretation, because a man, if it is necessary for him to lift a passenger up or drag him along, probably could not measure to an exact nicety just how much force it would require; but this word "unnecessary force" means here that it should be apparent to you, as triers of this case, that the conductor exceeded the force that was required, that he acted in a manner which showed the exercise in that sense of unnecessary force, that he did more than you could see and will say that it was necessary for him to have done, that he exceeded the rights which the statute gives him to do in such things as are reasonably necessary to accomplish the ultimate object.<sup>45</sup>

§ 1511(4). Texas

You are instructed that, if you believe from the evidence that in ejecting plaintiff from the train the conductor used abusive and insulting language, and unnecessarily vexed, annoyed, distressed, and humiliated plaintiff, and used more force than was necessary to eject him from the train, then and in that event you will find for the plaintiff, and assess such damages as will reasonably compensate him for damages suffered by reason of such abusive language and excessive force, unless plaintiff himself contributed to his own damage, as hereinafter indicated. And in this connection you are further charged that if you believe from the evidence in this case

<sup>43</sup> Gotwald v. St. Louis Transit Co., 77 S. W. 125, 102 Mo. App. 492.

<sup>44</sup> Ickenroth v. St. Louis Transit Co., 77 S. W. 162, 102 Mo. App. 597.

<sup>45</sup> McNairy v. Norfolk & W. R. Co., 90 S. E. 497, 172 N. C. 505.

that plaintiff was vexed, annoyed, and distressed, but that it was brought about by plaintiff's refusal to leave the train when requested so to do by the conductor, if he was so requested, and he did so refuse, then you will find for the defendant.<sup>46</sup>

**§ 1512. Same—Duty towards drunken passenger**

The court instructs the jury that, if they believe from the evidence that on or about ———, plaintiff's intestate, ———, was on one of defendant's trains running from the city of ——— to ——— in such a state of intoxication as to render him mentally or physically incapable of caring for himself, and that the defendant's servants or agents in charge of said train knew his helpless condition and his inability to care for himself at the time he was ejected, and with such knowledge negligently ejected him from the train at a time and place and under such circumstances as to necessarily or probably endanger his life by passing trains, and shortly thereafter plaintiff's intestate was killed by the train from which he was ejected or one following, they should find for the plaintiff such sum as will reasonably compensate his estate for the destruction, if any, of his power to earn money, if any, and in making their estimate the jury may take into consideration the age of plaintiff's intestate and probable duration of his life. The jury's finding, if any, cannot exceed in all the sum of \$———, the amount claimed in the petition. Unless the jury so believes, they shall find for the defendant.<sup>47</sup>

The court says to the jury that you cannot find for the plaintiff unless you believe from the evidence that the decedent at the time he was ejected from the train was in such a state of intoxication that he was rendered mentally or physically incapable of taking care of himself, and in such helpless condition that to put him off the train under the circumstances necessarily or probably exposed him to danger of death or great bodily harm from passing trains, and that the defendant's agents and servants in charge of the train at the time had notice of the then helpless condition and the danger to which he would be or probably be exposed by being then and there ejected from the train, and that defendant's agents and servants, with knowledge of such helpless condition, forcibly, willfully, and negligently ejected him therefrom.<sup>48</sup>

<sup>46</sup> Ketcheson v. Southern Pac. Co., 46 S. W. 907, 19 Tex. Civ. App. 288.

<sup>47</sup> Louisville & N. R. Co. v. Tuggle's Adm'r, 152 S. W. 270, 151 Ky. 409.

<sup>48</sup> Louisville & N. R. Co. v. Tuggle's Adm'r, 152 S. W. 270, 151 Ky. 409.

**§ 1513. Liability for injuries to bystanders resulting as incident to act of ejecting passenger**

The court instructs the jury that a conductor in charge of a passenger train has a right to defend himself from attack or wanton insult, but he has no right to strike a passenger over the head with a pistol for insulting him.<sup>49</sup>

The court instructs the jury to find for the plaintiff all damages he has sustained, unless they believe from the evidence that, at the time the conductor struck the negro with the pistol, he then had reason to believe and did believe his own life was in real or apparent danger, or that he was in real or apparent danger of great bodily harm at the hands of the negro with a deadly weapon.<sup>50</sup>

The court instructs the jury that if they believe from the evidence that the negro applied violent and abusive epithets to the conductor while he was putting him off the train, and that the conductor hit him with a pistol for using said language, and not in self-defense, then they will find for the plaintiff all damages he has sustained on account of the conductor hitting said negro.<sup>51</sup>

The court instructs the jury that the conductor was acting within the scope of his employment and about his master's business at the time the injury complained of by plaintiff was incurred; and unless they believe from the evidence that the conductor was acting in necessary self-defense, or was in imminent danger, real or apparent, of bodily harm at the hands of the negro with a deadly weapon, then they will find for plaintiff and assess his damages at such sum as shown by the evidence, not to exceed the amount sued for.<sup>52</sup>

**§ 1514. Gist of action for wrongful ejection—Necessity of showing willfulness**

The court instructs the jury that the gist of this action is the alleged wrongful ejection of the plaintiff from the defendant's car. He cannot recover upon proof of mere negligence, however gross such negligence. The cause of action alleged by the plaintiff is not for negligence, and does not require proof of plaintiff's freedom from negligence. The plaintiff's only right of recovery under his complaint is for willful injury, if proven. A willful injury is that which flows from an injurious act, purposely committed, with the intent to commit injury. In determining whether the injury, if any, was committed willfully you may consider, with other circumstances of the case, the manner of the conductor, the

<sup>49</sup> Coleman v. Yazoo & M. V. R. Co., 43 So. 473, 90 Miss. 629.

<sup>50</sup> Coleman v. Yazoo & M. V. R. Co., 43 So. 473, 90 Miss. 629.

<sup>51</sup> Coleman v. Yazoo & M. V. R. Co., 43 So. 473, 90 Miss. 629.

<sup>52</sup> Coleman v. Yazoo & M. V. R. Co., 43 So. 473, 90 Miss. 629.

force, if any, used by him, and the effects of his acts, together with the presumption that every person intends the natural and probable consequences of his wrongful acts; and an unlawful intent may be inferred from the conduct which shows a reckless disregard of consequences, and a willingness to inflict injury by purposely and voluntarily doing the act, with knowledge that some one is in a situation to be unavoidably injured thereby.<sup>53</sup>

**§ 1515. Burden of proof in action for wrongful ejection**

You are charged that under the issues presented in this case the burden of proof is upon the plaintiff, and, to entitle him to recover, he must have shown to your satisfaction that he has been injured substantially as alleged in his petition, and that such injury was not caused by the contributory negligence of himself, as hereinafter charged. If this has been shown to your satisfaction, the burden of proof then shifts to the defendant company, and it devolves upon the defendant to show that it is not liable for damages by reason of the contributory negligence of plaintiff as herein charged.<sup>54</sup>

**§ 1516. Damages for wrongful expulsion**

**§ 1516(1). Alabama**

I charge you, gentlemen of the jury, that if the plaintiff paid the conductor her fare from ——— to ———, then the conductor committed an assault and battery upon the plaintiff, for which the defendant is liable in any damages the plaintiff may have suffered, if any, not exceeding the amount claimed in the complaint; and in assessing damages the jury are authorized, in their best judgment, to award a fair and reasonable compensation for any physical pain or mental suffering that the jury believe the plaintiff suffered, and also as a punishment to the defendant, if the jury believe such damages should be awarded.<sup>55</sup>

**§ 1516(2). Florida**

On the question of damages, the court instructs you, if you find that the defendant unlawfully put the plaintiff off the train, then it was incumbent on the plaintiff to exercise all reasonable care and prudence for his personal safety and comfort and such as a reasonably prudent man would have done under the same circumstances. If you find that he was unlawfully put off the train, and after being put off the train he did not act as a reasonably prudent and cautious man, unnecessarily exposed himself to the weather,

<sup>53</sup> Citizens' St. R. Co. of Indianapolis v. Willooby, 33 N. E. 627, 134 Ind. 563.

<sup>54</sup> Ketcheson v. Southern Pac. Co., 46 S. W. 907, 19 Tex. Civ. App. 288.

<sup>55</sup> Birmingham Ry., Light & Power Co. v. Lee, 45 So. 164, 153 Ala. 386.

and was made sick, suffered bodily pain, then the defendant is not liable for any damages for said sickness and bodily pain; but, if unlawfully put off, as explained to you, then the company would be responsible for damages to the value of the ticket. If you find that he was unlawfully put off, as I explained to you, and the plaintiff acted as a prudent and reasonable man under the circumstances, and in the exercise of such reasonable and prudent conduct was exposed to inclement weather and suffered bodily pain and sickness, then these are matters you are to consider in assessing damages.<sup>56</sup>

**§ 1516(3). Illinois**

The jury are instructed that if you shall, under the evidence, find the defendant guilty of the trespass charged against it, then, in assessing plaintiff's damages, you are at liberty, not only to assess the damages at such a sum as to compensate the plaintiff for such pecuniary injury as he has suffered in consequence of such trespass, if the jury believe from the evidence that plaintiff has suffered any pecuniary injury, but also to compensate him for the feeling of shame or humiliation which plaintiff endured in consequence of being thus put off and expelled from a public conveyance, provided the jury shall believe from the evidence that plaintiff did in fact endure and experience such feelings of shame and humiliation in consequence of such treatment at the hands of defendant.<sup>57</sup>

**§ 1516(4). Kentucky**

You are instructed that, in case you find for plaintiff, you will award her such sum in damages as you may believe from the evidence will fairly compensate her for any mortification or humiliation, for any inconvenience or discomfort, and for any sickness which you may believe from the evidence she suffered as the direct or proximate cause of being ejected from said train.<sup>58</sup>

**§ 1516(5). North Carolina**

The court instructs you that compensatory damages cover and include a reasonable and fair compensation for loss of time, loss of money, physical inconvenience, and mental suffering and humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. Of course, you must find that the plaintiff sustained the wrong and that it was the proximate cause of the damage sustained, if you find that there was damage, and as to this you have been instructed above.<sup>59</sup>

The court instructs the jury that the amount or quantity of

<sup>56</sup> *Seaboard Air Line Ry. v. Scarborough*, 42 So. 706, 52 Fla. 425.

<sup>57</sup> *Chicago & N. W. R. Co. v. Chisholm*, 79 Ill. 584.

<sup>58</sup> *Louisville & N. R. Co. v. Summers*, 118 S. W. 926, 133 Ky. 684.

<sup>59</sup> *Edwards v. Southern Ry. Co.*, 78 S. E. 219, 162 N. C. 278.



damage which plaintiff would be entitled to recover in this view would depend upon the facts as you find them to be from the evidence. If you find from the evidence, and, from its greater weight, that the defendant's conductor, after taking up the plaintiff's ticket, went to plaintiff and again demanded a ticket and stated that unless he paid his fare he (the conductor) would put him off the train, and that this was stated to plaintiff in the presence of other passengers and in a manner to humiliate and wound the feelings of plaintiff, and that defendant's conductor actually did eject plaintiff from its train, then you will consider these facts as elements of compensatory damages. And if you further find that defendant's conduct in ejecting and putting plaintiff off its train was calculated to humiliate plaintiff, then you will consider his humiliation and the suffering entailed thereby as elements of damages, as above explained to you. And if you further find that the plaintiff was actually humiliated by the conduct of the defendant in putting him off the train in an out of the way place, if you find that he was put off at an out of the way place, after he had bought and turned in his ticket to the conductor, and that he suffered mental pain on account of such conduct by defendant, then he would be entitled to compensation in damages, notwithstanding the conductor may not have had any intention of causing him humiliation and pain. The question is, Was the conduct of defendant (if you find it to be wrongful as explained to you above) calculated to entail mental suffering upon the plaintiff by humiliation and mortification, and did he actually suffer in that manner?<sup>60</sup>

§ 1516(6). South Carolina

The court instructs the jury that, if you come to the conclusion that the plaintiff has satisfied you by the preponderance of the evidence that her rights as a passenger—if she was a passenger—have been invaded in a high-handed, wrongful manner, wanton manner, that she was ejected unlawfully from the train, then she is entitled, not only to actual damages, but what is known as punitive damages, by way of punishing the railroad company for any high-handed or willful conduct in the invasion of her rights as a passenger. I charge you that an unlawful ejection is an invasion of a passenger's right, and it would be the duty of the jury, if they conclude that she was unlawfully ejected, to write a verdict for punitive damages.<sup>61</sup>

§ 1516(7). Texas

You are instructed that, if you find from the evidence that by reason of being put off the train, and as the probable and reasona-

<sup>60</sup> Edwards v. Southern Ry. Co., 78 S. E. 219, 162 N. C. 278.

<sup>61</sup> Williams v. Atlantic Coast Line R. Co., 83 S. E. 604, 99 S. C. 397.



ble consequence thereof, the plaintiff had to walk to ———, you may allow him what you believe is right and fair as compensation for having to do so; and if, as the natural and probable consequence of being put off the train, the plaintiff suffered mental distress, you may allow him what, in your judgment, if anything, he ought fairly to have by way of compensation.<sup>63</sup>

**§ 1517. Damages for wrongfully taking up ticket which carrier refuses to honor**

The jury are instructed that the measure of damage to which the plaintiff is entitled for the taking of such ticket would be the value thereof, which would not exceed the price of a third-class or emigrant passage from ——— to ———, with interest to the first day of this term.<sup>63</sup>

**§ 1518. Proximate cause of damages**

The court instructs the jury that, if a railroad ticket, by mistake of the agent who issued it, does not conform to the contract which in fact was made, nevertheless, as between the passenger and conductor, the terms of the ticket are conclusive, and the right of the passenger to ride on the train is to be determined by the face of the ticket, and if the conductor ejects the passenger by reason of such passenger's failing to recognize the terms of the ticket, using only such force as is necessary to eject him, the conductor commits no tort or trespass, and the passenger is limited, in any suit for such ejection, to such damages, and only such damages, as resulted proximately from the agent's mistake, and cannot recover for damages which he sustains as the result of his own negligence or wrongful act alone, or as the result of a concurrence of his own negligence or wrongful act with the negligence or wrongful act of the defendant.<sup>64</sup>

The court instructs the jury that the plaintiff cannot recover in this action for any injuries to which his own negligence or default proximately contributed.<sup>65</sup>

**§ 1519. Duty of passenger to mitigate damages**

See, also, ante, § 1516(2).

The court charges the jury that if you believe from the evidence that plaintiff, when the conductor on the ——— Railroad Company told him that he would have to pay his fare on the train from ——— to ——— or get off the train, and that he could not honor

<sup>63</sup> *Houston & T. C. R. Co. v. McNeel*, 76 S. W. 206, 33 Tex. Civ. App. 153.

<sup>64</sup> *Post v. C. & N. W. R. Co.*, 15 N. W. 225, 14 Neb. 110, 45 Am. Rep. 100.

<sup>65</sup> *Virginia & S. W. Ry. Co. v. Hill*,

54 S. E. 872, 105 Va. 729, 6 L. R. A. (N. S.) 899.

<sup>66</sup> *Virginia & S. W. Ry. Co. v. Hill*, 54 S. E. 872, 105 Va. 729, 6 L. R. A. (N. S.) 899.

the ticket presented by plaintiff for passage from ——— to ———, and that plaintiff at said town had the money to pay said fare and to continue his journey and reach his destination, and that for plaintiff to have paid his said fare under said circumstances would have been a reasonable means of mitigating his damages, and would have mitigated his damages, then it was plaintiff's duty to have paid his fare and continue his journey, and, if the jury believe from the evidence that plaintiff failed and refused to pay his fare and continue his journey, then, for any injury and damage to plaintiff proximately caused by plaintiff's said failure, this defendant would not be liable.<sup>66</sup>

**§ 1520. Exemplary damages**

See, also, § 1495.

**§ 1520(1). Illinois**

The jury are instructed that if you believe, from the evidence, that defendant's conductor, while acting for the defendant in the scope of his employment, without provocation assaulted and injured the plaintiff, as charged in the declaration, and that such assault was a malicious, aggravated, and wanton one, and resulted in physical injury to the plaintiff, without fault on her part, and if the jury further believe, from the evidence, that justice and the public good require it, then the law is that the jury are not confined in their verdict to the actual damages proven, if any; but they may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant and to deter others from the commission of like offenses.<sup>67</sup>

The jury are instructed that if you find the defendant guilty, and believe from the evidence that the assault and battery was unprovoked, was willful or malicious, and was perpetrated in a rude, insulting, and aggravated manner, evincing an intent to wound and injure the plaintiff's feelings and bring him into contempt and disgrace in the estimation of the public, then the case is one justifying the imposition by the jury of exemplary or vindictive damages as a punishment for the offense.<sup>68</sup>

**§ 1520(2). Missouri**

The jury are further instructed that if they believe, from the evidence, that the defendant, by its conductor, agents, or servants, unlawfully, wrongfully, and maliciously put the plaintiff out of the cars and off the train of said defendant, as averred in the petition of said plaintiff in this cause, then, in addition to assessing damages

<sup>66</sup> Seaboard Air Line Ry. Co. v. Patrick, 65 So. 437, 10 Ala. App. 341.

<sup>68</sup> Chicago, etc., R. Co. v. Bryan, 90 Ill. 126.

<sup>67</sup> Chicago Consol. Traction Co. v. Mahoney, 82 N. E. 868, 230 Ill. 562.

by way of compensation for injuries received by said plaintiff, they may assess such further amount, by way of exemplary damages against defendants, as the jury in their judgment may see proper, not exceeding the sum of ——— dollars, as claimed in plaintiff's petition.<sup>69</sup>

§ 1520(3). *South Carolina*

I charge you in this case that this action is predicated, not on the negligence of the selling agent, but on the negligence, willfulness, wantonness, recklessness, and maliciousness of the ejecting agent. I charge you that, if the agent at ——— represented to the plaintiff that that ticket was good on train No. ——— on the main line, and the plaintiff paid his money on that representation believing it, he had the right to ride on No. ———, and I charge you further, that it is the duty of the conductor in charge of one of the defendant company's trains to heed the reasonable explanations of a passenger, where the passenger is found to be in possession of an irregular ticket, and, if he acts without heeding the reasonable explanation of a passenger, he runs the risk of the passenger's being right, and, if the passenger is right, he subjects this company to damages—to a cause of action for damages—and, if he recklessly, willfully, or wantonly refuses to heed them, he subjects his company to punitive damages if the passenger be injured through the wrongful ejection; and I charge you, if the passenger bought the ticket on the representation of that agent that it was good for a particular train, and the passenger honestly believed that, paid his money for it on that belief and took that train, if he was ejected, he was wrongfully ejected.<sup>70</sup>

You are instructed that, if the jury believe that the defendant willfully, wantonly, or recklessly ejected plaintiff from its train on the occasion alleged in the complaint, then plaintiff is entitled to recover vindictive or punitive damages in such sum as would, in the opinion of the jury, punish the defendant for its willful, wanton, or reckless conduct.<sup>71</sup>

§ 1520(4). *West Virginia*

The court instructs the jury that if they shall find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the bodily and mental pain and anguish resulting from the defendant's acts as proved, and the humiliation put upon the plaintiff; and if they shall further believe from the evidence that the conduct and acts of the defendant's servant toward the plaintiff

<sup>69</sup> Perkins v. Missouri, K. & T. R. R., 55 Mo. 201.

<sup>70</sup> McKeown v. Southern Ry. Co., 82 S. E. 437, 98 S. C. 338.

<sup>71</sup> Dagnall v. Southern Ry. Co., 48 S. E. 97, 69 S. C. 110.

were wanton, willful, and in utter disregard of his rights, then the jury are told that they are not bound to adhere, in computing it, to the money loss or damage, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct.<sup>72</sup>

§ 1520(5). Wisconsin

You are instructed that the plaintiff is not entitled to exemplary or punitive damages in this case, if you find that the conductor was guilty of no intentional offense or wrong, and, if you find that there was no oppression, malice, or wanton or reckless injury done to the plaintiff.<sup>73</sup>

D. LIABILITY FOR PERSONAL INJURIES TO PASSENGERS OR PERSONS ACCOMPANYING OR MEETING THEM

1. *Scope of Liability in General*

§ 1521. Carrier not an insurer

§ 1521(1). Arkansas

You are instructed that the defendant is not an insurer of its passengers, but that it is only liable for negligence. Therefore, if you find from the evidence that the defendant's servants acted with due care at the time, the plaintiff cannot recover, and your verdict should be for the defendant.<sup>74</sup>

§ 1521(2). Missouri

You are instructed that if you find, from the evidence, that the deceased's conduct in boarding a moving train was the sole cause of the accident, and that defendant's servants in charge of the cars by which he was injured were free from negligence in the premises, both before and after danger became apparent, then your verdict should be for the defendant, without reference to deceased's age or capacity.<sup>75</sup>

§ 1521(3). Texas

The jury are instructed that railroad companies are not insurers of their passengers, and are not liable for injuries which their passengers may receive while being carried, unless the carrier is guilty of negligence which was the proximate cause of the injury received, and the passenger was free from negligence which contributed proximately to the injury of which he complains.<sup>76</sup>

<sup>72</sup> Turk v. Norfolk & W. Ry. Co., 84 S. E. 569, 75 W. Va. 623, L. R. A. 1915E, 145.

<sup>73</sup> Vassau v. Madison Electric Ry. Co., 82 N. W. 152, 106 Wis. 301.

<sup>74</sup> Abelson v. St. Louis, I. M. & S. Ry. Co., 105 S. W. 81, 84 Ark. 181.

<sup>75</sup> Sly v. Union Depot Ry. Co., 36 S. W. 235, 134 Mo. 681.

<sup>76</sup> Houston & T. C. R. Co. v. Dotson, 38 S. W. 642, 15 Tex. Civ. App. 73.

§ 1521(4). **Utah**

You are instructed that the defendant companies are not insurers of the life and safety of their passengers, and that in order to render them liable it is necessary for the plaintiff to show that the defendants neglected the performance of some duty which in the exercise of reasonable care, prudence, and diligence, they owed to the passengers on their cars.<sup>77</sup>

§ 1522. **Unavoidable accident**§ 1522(1). **Delaware**

We may say in this connection that, no matter how great and imminent may have been the danger or serious the injuries to the plaintiff, he would not be entitled to recover if they were the result of an unavoidable accident; that is, if the accident could not have been prevented by the exercise of care and caution. A pure accident, without negligence on the part of the defendant, is not actionable; and, if the jury should believe that the accident in question was of such a character, it would come under the head of unavoidable accident, and the plaintiff could not recover.<sup>78</sup>

§ 1522(2). **Illinois**

The jury are instructed that if you believe, from the evidence, that the accident in question was unavoidable so far as the defendant was concerned, the defendant should be found not guilty.<sup>79</sup>

§ 1522(3). **Kentucky**

You are instructed that if you believe from the evidence that the car was at a standstill, and that, while plaintiff was alighting, she put her hand upon the gate, and that her finger, or the ring upon her finger, caught in the wire mesh of the gate, and that her weight, as she was alighting, caused the injury to her hand, and that there was no movement of the car as she alighted, then the law is for the defendant, and you should so find.<sup>80</sup>

§ 1522(4). **Missouri**

You are instructed that an accident is such an unavoidable casualty as occurs without anybody being to blame for it; that is, without anybody being guilty of negligence in doing or permitting it to be done, or in omitting to do, the particular things that caused such casualty.<sup>81</sup>

You are instructed that if the jury believe, from the evidence,

<sup>77</sup> *Connell v. Oregon Short Line R. Co.*, 168 Pac. 337, 51 Utah, 26.

<sup>78</sup> *Clayton v. Philadelphia, B. & W. R. Co.*, 106 A. 577, 7 Boyce, 343; *Eaton v. Wilmington City Ry. Co.*, 75 A. 369, 1 Boyce, 435.

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<sup>79</sup> *Chicago City Ry. Co. v. Flynn*, 131 Ill. App. 502.

<sup>80</sup> *Louisville Ry. Co. v. Schwemmer*, 205 S. W. 685, 181 Ky. 641.

<sup>81</sup> *Briscoe v. Metropolitan St. Ry. Co.*, 120 S. W. 1162, 222 Mo. 104.

that the injuries sustained by the plaintiff were merely the result of inevitable accident, then your verdict will be for defendant.<sup>82</sup>

You are instructed that, even though the plaintiff was hurt without fault on his part, still under no circumstances can a verdict be rendered against the defendant, unless the jury find that the train went down the incline by reason of the negligence of defendant's agents, servants, and employés. If the car, by reason of an unavoidable casualty, got from the control of the gripman, then there was no negligence, and your verdict must be for the defendant.<sup>83</sup>

You are instructed that if you believe, from all the evidence in this case, that the injuries which caused the death of ——— were the result of a mere accident or misadventure, and that the same were not caused by the negligence of either the deceased or the defendant, then you should return a verdict for the defendant.<sup>84</sup>

### § 1523. Liability for negligent acts of employees

#### § 1523(1). Indiana

The jury are instructed that, if the plaintiff was a passenger upon one of the defendant's cars, as charged in the complaint, and defendant's obligation was to carry her safely and properly, and if the defendant intrusted this duty to the servants of the company, the law holds the defendant responsible for the manner in which they execute it. And it is the established law that a carrier is responsible for the negligence and wrongful conduct of its servants, suffered or done in the line of their employment, whereby a passenger is injured.<sup>85</sup>

#### § 1523(2). Oklahoma

In this connection you are instructed that the defendant in this case is chargeable with any act of negligence on the part of any of its employés operating the car upon which the plaintiff was riding just as fully as if the defendant itself or its principal officers were in charge of or operating such car at that time, and that defendant company is liable for any act of negligence, if any there be, on the part of any of the employés of said defendant company on said train upon which said plaintiff was riding, providing said acts of negligence on the part of such employés resulted in causing the injuries received by the plaintiff.<sup>86</sup>

You are instructed that it is the duty of the defendant to afford

<sup>82</sup> Feary v. Metropolitan St. Ry. Co., 62 S. W. 452, 162 Mo. 75.

<sup>83</sup> Feary v. Metropolitan St. Ry. Co., 62 S. W. 452, 162 Mo. 75.

<sup>84</sup> Sly v. Union Depot Ry. Co., 36 S. W. 235, 134 Mo. 681.

<sup>85</sup> Terre Haute Traction & Light Co. v. Payne, 89 N. E. 413, 45 Ind. App. 132.

<sup>86</sup> Chicago, R. I. & P. Ry. Co. v. Dizney, 160 P. 880, 61 Okl. 176.

protection to passengers on its cars, and this protection extends to the prevention of injuries to passengers from the negligent acts of the servants and employés of the defendant. And you are instructed that the defendant is liable to make compensation for any injury caused to the passengers by the negligent act of any employé of the defendant acting within the course of his employment.<sup>87</sup>

**§ 1523(3). Texas**

The jury are instructed that a railroad company is not responsible for the willful trespass or unlawful acts of its agents, or for acts done clearly outside of the scope of their employment; but where a brakeman on a train undertakes to direct and assist passengers in getting on and off the cars, in the absence of proof to show that this was outside of the scope of his duties, there would be no presumption that such was the fact.<sup>88</sup>

*2. Degree of Care Required to Protect Passenger from Injury*

**§ 1524. Rules as to degree of care stated**

Liability of carrier by water, see post, § 4811.

**§ 1524(1). United States**

The jury are instructed that the defendant, on the ——— day of ———, accepted plaintiff and ——— as passengers on one of its trolley cars running from the wharf up to ———, and thereby it became liable to exercise a high degree of care, the highest degree of care which reasonably prudent and careful men would, under such circumstances, exercise, to carry the passengers safely.<sup>89</sup>

**§ 1524(2). Alabama**

The court charges the jury that the law imposes on common carriers the duty of exercising the highest degree of care, skill, and diligence in the transportation of passengers, and holds them responsible for the consequences of the slightest negligence resulting in injury to persons sustaining that relation to them.<sup>90</sup>

The court charges the jury that, if they are reasonably satisfied from the evidence in this case that the plaintiff was a passenger upon the street car of the defendant at the time of his injuries, then it was the duty of the employés of the defendant, then in control of said car, to exercise the highest degree of care, skill, and diligence known to very careful, skillful, and diligent persons engaged in like business, to avoid injury to plaintiff; and it is for the jury to

<sup>87</sup> Shawnee-Tecumseh Traction Co. v. Newcome, 158 P. 1193, 59 Okl. 271.

<sup>88</sup> Houston & T. C. Ry. Co. v. Gorbett, 49 Tex. 573.

<sup>89</sup> Thompson v. Green (C. C. A. N. J.) 174 F. 404, 98 C. C. A. 621.

<sup>90</sup> Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211.



determine, under the evidence, whether or not such care, skill, and diligence was exercised by the employes then in control of the said car.<sup>91</sup>

The jury are instructed that a common carrier of passengers by street car owes to its passengers the duty to exercise the highest degree of care, skill, and diligence known to very careful, skillful, and diligent persons engaged in a like business, consistent with the practical operation of the business.<sup>92</sup>

The jury are instructed that the law requires the highest degree of care, skill, and diligence, by those engaged in the carriage of passengers by railroads, known to careful, diligent, and skillful persons engaged in such business.<sup>93</sup>

The jury are instructed that the law exacts of common carriers of passengers the highest degree of care and prudence for the safety of passengers.<sup>94</sup>

I charge you that the law imposes upon common carriers of passengers the duty of exercising the highest degree of skill, care, and diligence in the transportation of passengers, and holds them responsible for the consequences of the slightest negligence approximately resulting in injury to persons sustaining the relation of passengers.<sup>95</sup>

The court charges the jury that the law requires the highest degree of care, diligence, and skill by those engaged in the carriage of passengers by railroads, known to careful, diligent, and skillful persons engaged in such business, and if you are reasonably satisfied from the evidence in this case that the deceased was a passenger on defendant's train, and while such a passenger lost his life as a direct and proximate consequence of the defendant's failure to exercise the care and diligence required by law, you must find for the plaintiff, unless you are further reasonably satisfied from the evidence that deceased was also guilty of negligence which contributed proximately to his death, and the burden of proof of such contributory negligence is upon the defendant.<sup>96</sup>

You are instructed that the railroad company owed to its passengers the duty to exercise the highest degree of care, skill, and diligence known to very careful, skillful, and diligent persons in like business.<sup>97</sup>

<sup>91</sup> Mobile Light & R. Co. v. Hughes, 67 So. 278, 190 Ala. 216.

<sup>92</sup> Birmingham Ry., Light & Power Co. v. Scisson, 66 So. 2, 188 Ala. 348.

<sup>93</sup> Louisville & N. R. Co. v. Glasgow, 60 So. 103, 179 Ala. 251.

<sup>94</sup> Louisville & N. R. Co. v. Glasgow, 60 So. 103, 179 Ala. 251.

<sup>95</sup> Louisville & N. R. Co. v. Glasgow, 60 So. 103, 179 Ala. 251.

<sup>96</sup> Louisville & N. R. Co. v. Dilburn, 59 So. 438, 178 Ala. 600.

<sup>97</sup> Louisville & N. R. Co. v. Church, 46 So. 457, 155 Ala. 329, 130 Am. St. Rep. 29.

The jury are instructed that the defendant, under the law, if you find that plaintiff was a passenger, was bound to exercise the strictest vigilance and the highest degree of care, in receiving him as a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances would permit.<sup>98</sup>

§ 1524(3). Arkansas

You are instructed that defendant, as a carrier of passengers, was required to use the highest degree of care consistent with the practical operation of its trains for the safety of the plaintiff while a passenger on its train and while embarking and debarking from the train.<sup>99</sup>

You are instructed that railroad companies are required in the carriage of passengers to use the utmost care and foresight and are held responsible for even a small degree of negligence causing an injury to a passenger, and are required to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains to prevent injury to passengers.<sup>1</sup>

The jury are instructed that railroad companies, in the carriage of passengers, are required to use the utmost care and foresight, and are held responsible for the slightest negligence. The first and most important duty incumbent on them is to provide for the safety of their passengers. To this end they are required to provide all things necessary to their security reasonably consistent with their business, and appropriate to the means of conveyance employed by them, and to exercise the highest degree of practicable care, diligence, and skill in the operation of their trains.<sup>2</sup>

The jury are instructed that the care required by railroad carriers has been defined to be the highest practicable care which capable and faithful railroad men would exercise in similar circumstances.<sup>3</sup>

The court instructs the jury that, while the law demands the utmost care for the safety of passengers, it does not require railroad companies to exercise all the care, skill, and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils. The plaintiff in this case necessarily took upon himself all the usual and ordinary perils of travel; and if they find from the evidence that defendant had exercised all the care, skill, and diligence required by law, as defined

<sup>98</sup> Southern Ry. Co. v. Cunningham, 44 So. 658, 152 Ala. 147.

<sup>99</sup> St. Louis, I. M. & S. Ry. Co. v. Plott, 157 S. W. 385, 108 Ark. 292.

<sup>1</sup> St. Louis, I. M. & S. Ry. Co. v. Hartung, 128 S. W. 1025, 95 Ark. 220.

<sup>2</sup> St. Louis, I. M. & S. Ry. Co. v. Stewart, 61 S. W. 169, 68 Ark. 606, 82 Am. St. Rep. 311.

<sup>3</sup> St. Louis, I. M. & S. Ry. Co. v. Stewart, 61 S. W. 169, 68 Ark. 606, 82 Am. St. Rep. 311.

in these instructions, and that, nevertheless, the accident occurred, the defendant would not be responsible therefor, and your verdict should be for defendant.<sup>4</sup>

The jury are instructed that railroads are public carriers, and the utmost care is required of them for the safety of passengers upon their trains.<sup>5</sup>

**§ 1524(4). Colorado**

You are instructed that common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers; that the utmost degree of care which the human mind is capable of inventing is not required, but the highest degree of care and diligence which is reasonably practicable under the circumstances of the case is required.<sup>6</sup>

The court instructs the jury that the defendant company is a carrier of passengers, operating its cars by means of electricity, and is bound to use extraordinary care, and is liable for slight negligence.<sup>7</sup>

**§ 1524(5). Connecticut**

You are instructed that a common carrier of passengers by street car is required to exercise the highest degree of care and skill which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended. A carrier is not an insurer of the safety of its passengers and is not bound absolutely and at all events to carry them safely and without injury. The passengers take the risk of their own negligence (there is none claimed in this case) and take the risk of dangers which could not be averted by the carrier by the exercise of the degree of care which the law requires.<sup>8</sup>

**§ 1524(6). Delaware**

You are instructed that this suit is based on negligence, and the plaintiff cannot recover at all unless the jury are satisfied from the preponderance of the testimony that her injuries were caused by the negligence of the defendant company. Negligence is the want of ordinary care, that is, such care as an ordinarily prudent and careful person would use under similar circumstances; and in the present case it was the care that such a person would have used

<sup>4</sup> St. Louis, I. M. & S. Ry. Co. v. Stewart, 61 S. W. 169, 68 Ark. 606, 82 Am. St. Rep. 311.

<sup>5</sup> Little Rock, etc., R. Co. v. Atkins, 46 Ark. 423.

<sup>6</sup> Colorado Springs & Interurban

Ry. Co. v. Allen, 135 P. 790, 55 Colo. 391.

<sup>7</sup> Denver Tramway Co. v. Reid, 35 P. 269, 4 Colo. App. 53.

<sup>8</sup> Anthony v. Connecticut Co., 92 A. 672, 88 Conn. 700.

under the conditions existing at the time, including the company's knowledge, if any it had, of the physical and mental condition of the plaintiff.<sup>9</sup>

You are instructed that a street railway company, in letting its passengers on and off its cars, is bound to stop at its usual stopping places, and to wait a reasonable time for passengers to get off or on, and also to use all reasonable care to secure the safety of its passengers. It is admitted in this case that the defendant, at the time of the said accident, was a common carrier engaged in the business of transporting passengers for hire. A common carrier of this character is held to strict care in the safe transportation of its passengers, but it is not an insurer of their safety under all circumstances, being only responsible for its negligence.<sup>10</sup>

You are instructed that a common carrier of passengers is liable for injuries to the latter in case of the carrier's negligence. The law exacts great care, diligence, and skill from those to whose charge as common carriers passengers are committed. They are responsible for any negligence resulting in injury to passengers, and are required in the preparation, conduct, and management of their cars, or means of conveyance, to exercise every degree of care that a reasonable man would use under like circumstances. But while the common carrier is held to strict care in the safe transportation of its passengers, it must nevertheless be borne in mind that it is not an insurer of their safety, but responsible only for its own negligence.<sup>11</sup>

#### § 1524(7). Georgia

You are instructed that our law provides that, if a passenger is injured by the running of a car of the defendant, the defendant shall be liable for that injury, unless the defendant shows that its agents had exercised all extraordinary and reasonable care and diligence in connection with those things that are charged to be negligence by the plaintiff in her petition.<sup>12</sup>

#### § 1524(8). Illinois

You are instructed that a common carrier of passengers, through its servants in charge of its cars, is required to do all that human care, vigilance, and foresight can reasonably do to avoid injury to a passenger, having in view the character and mode of conveyance adopted and consistent with the practical operation of the road.<sup>13</sup>

The court instructs the jury that common carriers of persons are

<sup>9</sup> Clayton v. Philadelphia, B. & W. R. Co. (Super.) 106 A. 577, 7 Boyce, 343.

<sup>10</sup> Coyle v. People's Ry. Co., 80 A. 638, 7 Pennewill, 454.

<sup>11</sup> Braunstein v. People's Ry. Co. (Super.) 78 A. 609, 2 Boyce, 55.

<sup>12</sup> Georgia Ry. & Electric Co. v. Gilleland, 66 S. E. 944, 133 Ga. 621.

<sup>13</sup> Sandy v. Lake Street Elevated R. Co., 85 N. E. 300, 235 Ill. 194.

required to do all that human care, vigilance, and foresight can reasonably do, consistently with the character and mode of conveyance adopted and the practicable prosecution of the business, to prevent accidents to passengers riding upon their trains, or alighting therefrom.<sup>14</sup>

You are instructed that it is the duty of common carriers to do all that human care, vigilance, and foresight can reasonably do under the circumstances, and, in view of the character of the mode of conveyance adopted, to reasonably guard against accidents and consequential injuries; and, if they neglect so to do, they are to be held strictly responsible for all consequences which flow from such neglect; that, while the carrier is not an insurer for the absolute safety of the passenger, it does, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger, if the passenger is at the time of the injury exercising ordinary care for his or her own safety; and this care applies alike to the safe and proper construction and equipment of the road, the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties.<sup>15</sup>

§ 1524(9). *Indiana*

The jury are instructed that, while a common carrier is not an insurer of the absolute safety of its passengers in legal contemplation, it does undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect, resulting in injury to the passenger, if the passenger is at the time of the injury exercising ordinary care for her own safety.<sup>16</sup>

You are instructed that the common carrier of passengers owes them not merely the duty of transportation, but also that of exercising for their safety the highest care and diligence compatible with the nature of the carriage. The carrier owes the passenger the duty of warning him and protecting him against danger when it is at hand and known to the carrier. Common carriers are required to exercise the highest degree of care to secure the safety of their passengers, and are responsible for the slightest neglect, if injury is caused thereby.<sup>17</sup>

You are instructed that, while a common carrier of passengers is

<sup>14</sup> *Chicago & A. R. Co. v. Byrum*, 38 N. E. 578, 153 Ill. 131.

<sup>15</sup> *Chicago & A. R. Co. v. Byrum*, 38 N. E. 578, 153 Ill. 131.

<sup>16</sup> *Terre Haute Traction & Light*

*Co. v. Payne*, 89 N. E. 413, 45 Ind. App. 132.

<sup>17</sup> *Pittsburg, C., C. & St. L. Ry. Co. v. Richardson*, 82 N. E. 536, 40 Ind.

App. 503.

not an insurer of their safety, still, in consideration of the great danger to human life consequent upon the neglect of duty upon the part of the carrier, the law exacts of it the exercise of the highest practicable care for the safety of its passengers in the operation of its cars, and stopping and starting its cars to enable passengers to get on and off the same, and for any failure to exercise such care, and for slight neglect of its duty in this respect resulting in an accident or injury it is liable to a passenger who is himself without fault, for an injury sustained as the proximate result of such negligence.<sup>18</sup>

The jury are instructed that the street car company is a common carrier, and is bound to the use of the highest degree of care for the safety of passengers, from the time they enter the car until they leave it, and that such company is liable for an injury to a passenger caused by a failure to exercise such care, provided that such passenger was not guilty of any fault or negligence on his part which contributed to the injury.<sup>19</sup>

§ 1524(10). Iowa

The jury are instructed that the defendant is what is known as a common carrier of passengers, and it is defendant's duty, by itself and its employes, to use extraordinary care and precaution to protect its passengers from injury. Therefore, in determining whether the defendant, by its employes, was guilty of negligence which caused the accident to the plaintiff, you should hold it to the exercise of extraordinary care and caution to prevent injury to her. But in determining whether the plaintiff was guilty of negligence which contributed to the accident, you should hold her only to the exercise of ordinary care and caution.<sup>20</sup>

§ 1524(11). Kansas

The jury are instructed, as a matter of law, that it is the duty of a railroad company to use the highest degree of care and caution consistent with the practical operation of the road to provide for the safety and security of the passenger while being transported, and by the "highest degree of care," as used in this instruction, is meant that the railroad company, as a common carrier of passengers, is required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, and this rule of law is applicable to all cases where the relation of passenger and carrier exists.<sup>21</sup>

<sup>18</sup> Indianapolis St. Ry. Co. v. Brown, 69 N. E. 407, 82 Ind. App. 130.

<sup>19</sup> Conner v. Citizens' St. R. Co., 45 N. E. 662, 146 Ind. 430.

<sup>20</sup> Hutchels v. Cedar Rapids & M.

C. Ry. Co., 103 N. W. 779, 128 Iowa, 279.

<sup>21</sup> Wetherla v. Missouri Pac. Ry. Co., 136 P. 221, 90 Kan. 702, 51 L. R. A. (N. S.) 899.



**§ 1524(12). Kentucky**

You are instructed that if you believe, from the evidence, that on the occasion in question the plaintiff's intestate ——— had purchased a ticket over defendant's road from ——— to ———, and had taken a seat in one of the coaches for the purpose of riding to ———, then he was a passenger on the train, and it was the duty of the defendant's agents in charge of the train to exercise the highest degree of care which prudent persons engaged in a like business usually exercise to carry him safely as a passenger to his destination, and to allow him to alight safely from the train. The failure to exercise said care was negligence on their part.<sup>22</sup>

**§ 1524(13). Maryland**

The jury are instructed that, if the jury believe the defendant was the owner of the railroad mentioned in the declaration, and sold plaintiff a ticket, and received and accepted him as a passenger, to be carried as therein stated, then defendant was bound to exercise on said trip for plaintiff's safety the highest degree of care and skill which was consistent with the nature of its undertaking.<sup>23</sup>

**§ 1524(14). Minnesota**

The court instructs the jury that the plaintiff had a right, therefore, as a passenger of the defendant, to be safely carried and safely delivered at her destination by the defendant company; and it was the duty of the defendant company to use the highest degree of care and skill in carrying the plaintiff from ——— to ———, and to use the highest degree of care and skill in seeing that she was safely delivered at her destination in ———.<sup>24</sup>

**§ 1524(15). Missouri**

The court instructs the jury that the defendants were bound to run and operate their car with the highest practicable degree of care of a very prudent person engaged in like business, in view of all the facts and circumstances, as shown in the evidence, and to exercise such practicable degree of care of a very prudent person as would be commensurate with the danger, if any, to which you may believe from the evidence any of the passengers on said car were exposed at that time.<sup>25</sup>

You are instructed that it is the duty of a carrier of passengers to exercise the highest degree of care that can reasonably be expected of prudent men engaged in that line of business to carry its

<sup>22</sup> Illinois Cent. R. Co. v. Dallas' Adm'x, 150 S. W. 536, 150 Ky. 442.

<sup>23</sup> Philadelphia, Wilmington & B. R. Co. v. Anderson, 72 Md. 519, 20 A. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483.

<sup>24</sup> Olson v. Chicago, M. & St. P. Ry. Co., 102 N. W. 449, 94 Minn. 241.

<sup>25</sup> Cooley v. Dunham, 195 S. W. 1058, 196 Mo. App. 399.



passengers safely, and a failure on the part of such carrier to use such care is negligence on its part.<sup>26</sup>

The court instructs the jury that a common carrier of persons, such as a street railway company, carrying passengers for profit, is bound to exercise a high degree of care for the safety of its passengers, that is, such care as a very prudent person would exercise under similar circumstances.<sup>27</sup>

The jury are instructed that by the terms "highest degree of care," and "highest reasonably practicable degree of care," and "care and foresight," as used in the other instructions, is meant the reasonably practicable degree of care and diligence, in view of all the facts and circumstances shown in evidence, that a very prudent and careful person engaged in a like business would ordinarily and reasonably take and exercise, or would be fairly and reasonably expected to use, under like or similar circumstance.<sup>28</sup>

You are instructed that, if defendant's servants and employes exercised all the care and foresight that was reasonably practicable, then there was no negligence, and, in determining any issue as to negligence on defendant's part submitted to you in these instructions, you are instructed that, if there was exercised all the care that was reasonably practicable, then there was no negligence.<sup>29</sup>

You are instructed that the degree of care which defendant and its employes were bound to exercise towards plaintiff (if you find from the evidence he paid his fare as a passenger at any time during his said trip on the car, as he alleges) was this: Defendant was bound to run and operate its cars with the highest degree of care of a very prudent person in view of all the facts and circumstances at the time of the alleged injury.<sup>30</sup>

#### § 1524(16). Nevada

The jury is instructed that the law requires a common carrier of passengers to exercise the highest practicable degree of care that human judgment and foresight are capable of, to make its passenger's journey safe. Whoever engages in the business of a common carrier impliedly promises that its passengers shall have this degree of care.<sup>31</sup>

#### § 1524(17). Oklahoma

You are instructed that a carrier of persons for reward must use the utmost care and diligence for their safe carriage, and must pro-

<sup>26</sup> *Wellman v. Metropolitan St. Ry. Co.*, 118 S. W. 31, 219 Mo. 126.

<sup>27</sup> *Gilroy v. St. Louis Transit Co.*, 92 S. W. 1152, 117 Mo. App. 663.

<sup>28</sup> *Logan v. Metropolitan St. Ry. Co.*, 82 S. W. 126, 183 Mo. 582.

<sup>29</sup> *Feary v. Metropolitan St. Ry. Co.*, 62 S. W. 452, 162 Mo. 75.

<sup>30</sup> *O'Connell v. St. Louis Cable & W. Ry. Co.*, 17 S. W. 494, 106 Mo. 482.

<sup>31</sup> *Forrester v. Southern Pac. Co.*, 134 P. 753, 36 Nev. 247, 48 L. R. A. (N. S.) 1.

vide everything necessary for the purpose, and must exercise to that end a reasonable degree of skill.<sup>32</sup>

§ 1524(18). **Oregon**

You are instructed that a railway carrying passengers is required to use the utmost care in the management and operation of its trains, and in the construction and keeping in repair of its track, which can be exercised by human prudence, skill, and diligence. A railway company is not an insurer against accident, nor responsible for accident, which is unavoidable, but is held to that degree of care which is termed the utmost care which can be exercised by human prudence, skill, and diligence.<sup>33</sup>

§ 1524(19). **South Carolina**

I charge you that the defendant, its agents, and servants are required to exercise the highest degree of care in the transportation of its passengers.<sup>34</sup>

§ 1524(20). **Texas**

On the claim of plaintiff for damages for personal injuries, you are instructed that railway companies, as carriers of passengers, are required to exercise the highest degree of care possible for the safety of their passengers, both while they are being carried on its trains and while alighting therefrom, and a failure to exercise such care is negligence. They are not, however, to be regarded as insurers of the safety of their passengers.<sup>35</sup>

You are instructed that the defendant railroad company was not an insurer of the safety of the plaintiff on the occasion complained of by him; but it was required to exercise such a high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances in providing the safest appliances that had been known and tested, to enable him to alight, and a failure to exercise such care is negligence.<sup>36</sup>

You are instructed that while railroad companies are not to be regarded as insurers of the safety of their passengers, still they are required to use the utmost care to provide for their safety.<sup>37</sup>

<sup>32</sup> *Chicago, R. I. & P. Ry. Co. v. Disney*, 160 P. 880, 61 Okl. 176.

<sup>33</sup> *Graham v. Corvallis & Eastern R. Co.*, 142 P. 774, 71 Or. 477. This instruction, while not considered erroneous, is held to go to the limit of the law in the obligations imposed by it upon the carrier.

<sup>34</sup> *Williams v. Atlantic Coast Line R. Co.*, 83 S. E. 604, 99 S. O. 397.

<sup>35</sup> *St. Louis Southwestern Ry. Co. of Texas v. Woodall* (Civ. App.) 159 S. W. 1012.

<sup>36</sup> *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 122 S. W. 574, 57 Tex. Civ. App. 411.

<sup>37</sup> *Ft. Worth & D. C. Ry. Co. v. Rogers*, 60 S. W. 61, 24 Tex. Civ. App. 382.

You are further instructed that while the plaintiff was a passenger on defendant's train the defendant owed to her the duty to exercise that high degree of care for her personal safety that a very prudent person would exercise under the same circumstances, and a failure, if any, to use such care would be negligence, in the sense that the word "negligence" is used in the foregoing portions of this charge.<sup>38</sup>

You are instructed that the defendant railroad company is not in law required to be insurers of the safety of their passengers from injury; but they are required by law to exercise great care and diligence in running their trains for the transportation of passengers, or in starting or stopping the trains where passengers get on board or alight from their trains. If the defendant railroad company does this, they are not guilty of negligence. If they do not do so, they are guilty of negligence.<sup>39</sup>

You are instructed that it is the duty of railroad companies to use such a high degree of care and foresight in protecting its passengers from possible damages, and to exercise such a high degree of prudence in guarding against them, as would be used by cautious, prudent, and competent persons under the same or similar circumstances; and, while railroad companies are not to be regarded as insurers of the safety of their passengers, still they are required to use the utmost care to provide for their safety, and a failure to use such care and prudence as above defined is negligence.<sup>40</sup>

The jury are instructed that "negligence," when applied to carriers of passengers, means the absence, in the performance of a duty imposed by law for the protection of others, of that high degree of care, in acting or refraining from acting, which very cautious, prudent, and competent persons usually exercise under the same or similar circumstances.<sup>41</sup>

You are instructed that railway companies, in transporting passengers upon their trains operated and managed by its employes must, while thus transporting such passengers, exercise a high degree of care in order to avoid accident or injury to such passengers; and the failure to exercise such care as a person of ordinary prudence under like circumstances would use is negligence.<sup>42</sup>

The jury are instructed that a railroad company, in the con-

<sup>38</sup> Missouri, K. & T. Ry. Co. of Texas v. White, 55 S. W. 593, 22 Tex. Civ. App. 424.

<sup>39</sup> Missouri Pac. R. Co. v. Foreman (Civ. App.) 46 S. W. 834.

<sup>40</sup> Gulf, C. & S. F. Ry. Co. v. Brown, 40 S. W. 608, 16 Tex. Civ. App. 93.

<sup>41</sup> Houston & T. C. R. Co. v. Dotson, 38 S. W. 642, 15 Tex. Civ. App. 73.

<sup>42</sup> Gulf, C. & S. F. Ry. Co. v. Wilson, 15 S. W. 280, 79 Tex. 371, 11 L. R. A. 486, 23 Am. St. Rep. 345.

duct and management of its trains, is required to employ skillful and competent agents, and to use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually exercise in similar cases, and, should an injury result to a passenger from a failure to use such a degree of care and prudence, the company will be responsible for such injury, unless it appears that the passenger so injured, by the use of ordinary care and prudence (that is, the ordinary care and prudence usually exercised by persons of ordinary caution in his condition and circumstances), could have avoided the injury. But a railroad company is not responsible for an injury to a passenger which is the result of a mere accident or casualty, where there is no want of care or skill on the part of the company or its agents.<sup>43</sup>

§ 1524(21). *Virginia*

The court instructs the jury that a common carrier of passengers is bound to use the utmost care and diligence for the safety of passengers, and is liable for an injury to a passenger occasioned by the slightest neglect against which human prudence and foresight might have guarded.<sup>44</sup>

The jury are instructed that the ——— Railroad Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting the plaintiff upon his journey.<sup>45</sup>

The court instructs the jury that, when common carriers undertake to convey passengers by the powerful but dangerous agency of electricity, public policy and safety require that they be held to the greatest possible care and diligence, and any negligence or default of such railway company, or common carrier, its agents or employes in such cases will make such company or carrier liable in proper and adequate damages under the statute, if the jury believe that such duty, as so defined, was owing to plaintiff, and that the failure to perform it was the proximate cause of plaintiff's injuries, unless the jury believe from the evidence that the plaintiff was guilty of contributory negligence.<sup>46</sup>

§ 1524(22). *Washington*

You are further instructed that the defendant at the time of the alleged accident was the owner of and was operating an electric railway for the purpose of transporting passengers for hire, and

<sup>43</sup> *Houston & T. C. Ry. Co. v. Gorbett*, 49 Tex. 573.

<sup>44</sup> *Reynolds v. Richmond & M. Ry. Co.*, 23 S. E. 770, 92 Va. 400.

<sup>45</sup> *Shenandoah Val. R. Co. v. Moose* 3 S. E. 796, 83 Va. 827.

<sup>46</sup> *Washington, A. & Mt. V. Ry. Co. v. Vaughan*, 69 S. E. 1035, 111 Va. 785.

was bound to exercise the highest degree of care, skill, and benefits practicable, consistent with the operation of said electric railway and the cars used in operation thereof, and taking into consideration the circumstances and conditions existing at that time and place in question, in order to prevent and avoid injury to the plaintiff, if you find that the plaintiffs were passengers upon the car as alleged in their complaint, and that the defendant is liable for the slightest negligence in its operation.<sup>47</sup>

**§ 1524(23). West Virginia**

The court instructs the jury that the law in tenderness of human life and limbs holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carriers liable in damages under the statute, provided, however, such negligence is the proximate cause of the injury complained of.<sup>48</sup>

**§ 1524(24). Wisconsin**

The jury are instructed that, if the injury to plaintiff was occasioned without his fault, by the least negligence or want of skill or prudence on the part of defendant, or its employees in charge of the train on which plaintiff attempted to become a passenger, the defendant is liable.<sup>49</sup>

**§ 1525. Care required with respect to children**

The jury are instructed that it is also the duty of the defendant to use greater care and caution in transporting passengers of tender age than when carrying adults or passengers of mature years, but in this case there is no presumption of negligence from the mere fact that said ——— was a passenger and received an injury while being carried by the elevator.<sup>50</sup>

*3. Right of Carrier to Limit Liability for Negligence*

**§ 1526. Gross negligence**

You are instructed that the acts of Congress relative to interstate commerce authorize and permit carriers to issue free passes to dependent members of the family of employes of railroad

<sup>47</sup> *Mueller v. Washington Water Power Co.*, 106 P. 476, 56 Wash. 556.

<sup>48</sup> *Farley v. Norfolk & W. Ry. Co.*, 67 S. E. 1116, 67 W. Va. 350, 27 L. R. A. (N. S.) 1111.

<sup>49</sup> *Curtis v. Detroit, etc., R. Co.*, 27 Wis. 158.

<sup>50</sup> *Quimby v. Bee Bldg. Co.*, 127 N. W. 118, 87 Neb. 193, 138 Am. St. Rep. 477.

companies, and to stipulate in such passes that the person using the same for transportation shall assume all risks of accident, injury, and damage, whether resulting from the ordinary negligence of the servants and agents of the company issuing the pass, or otherwise; but in this connection, you are instructed that the law does not permit the defendants to contract against injury resulting from the acts of their employes amounting to gross negligence, or a wanton disregard of the rights of others.<sup>51</sup>

You are therefore instructed that, should you find from the evidence in this case, by a fair preponderance thereof, that the plaintiff was riding upon a passenger train of the ——— Railroad Company on the ——— day of ———, over the railroad line of the defendant ——— Railroad Company, and that the servants, agents, or employes of the defendants, or either of them, were not in the exercise of slight care and diligence to keep the lines and appliances in and about the yard in the city of ——— in a reasonably safe condition for traffic, but were guilty of gross negligence, as defined by these instructions, in opening and permitting to remain open a certain switch, and that said train ran into said open switch and collided with a freight train standing upon said switch or side track, and that thereby plaintiff was injured, it will be your duty to find for the plaintiff, and, if you fail so to find, you will return a verdict for the defendants.<sup>52</sup>

You are instructed that, under the law of this state, gross negligence, as is used in these instructions, is defined as the want of slight care and diligence. It is the doing of some act or thing which a person of ordinary prudence and intelligence would not do under the circumstances, or the failure to do some act or thing which a person of ordinary prudence and intelligence would do under like circumstances. Should such conduct or acts be of such a nature as to amount to a gross want of care and regard for the rights of others, it amounts to willfulness, and it is not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill will directed specially towards the plaintiff, or to have known that she was in such position as to be likely to be injured.<sup>53</sup>

You are instructed that slight care and diligence as used in these instructions is such care and diligence as persons of ordinary prudence usually exercise about their own affairs of slight importance.<sup>54</sup>

<sup>51</sup> Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A. L. R. 840.

<sup>52</sup> Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A. L. R. 840.

<sup>53</sup> Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A. L. R. 840.

<sup>54</sup> Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A. L. R. 840.



**§ 1527. Persons riding on passes—Pass given as part consideration for services rendered**

The jury are instructed that if you believe, from the evidence, that it was one of the express or implied terms of plaintiff's contract of employment that defendant should furnish him free transportation upon its cars, and that the employee's ticket, introduced in evidence, was not given him as a pure gratuity, without any valuable consideration therefor, then the stipulation or condition on the back of said ticket, to the effect that the person accepting and using said ticket agrees that defendant shall not be liable under any circumstances for any loss or injury sustained by said ticket holder while riding on said ticket was not and is not binding upon the plaintiff.<sup>55</sup>

**4. Care Required with Respect to Particular Instrumentalities of Conveyance**

**§ 1528. Steam railroads**

You are instructed that the law, in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful, but dangerous, agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carriers liable.<sup>56</sup>

**§ 1529. Emigrant car**

You are charged that railroad companies are not insurers of the safety of their passengers or stock, but it is the duty of the railway company to exercise that degree of care in transporting an emigrant train that an ordinarily careful and prudent person would exercise under similar circumstances to stop it and start it, and couple onto it, in such a manner as not to injure animals or persons lawfully entitled to be, and actually on said car, and a failure, if any, to exercise such care is negligence.<sup>57</sup>

**§ 1530. Freight train**

See, also, post, § 1603.

**§ 1530(1). United States**

The jury are instructed that, under the laws of the state of ———, the defendant is required to carry passengers for hire upon its

<sup>55</sup> *Klinck v. Chicago City R. Co.*, 177 Ill. App. 165.

<sup>56</sup> *Shenandoah Val. R. Co. v. Moose*, 8 S. E. 796, 83 Va. 827.

<sup>57</sup> *Missouri, K. & T. Ry. Co. of Texas v. Aycock* (Tex. Civ. App.) 135 S. W. 198.



local freight trains. But the defendant is not required to equip its cabooses or cars on local freight trains as passenger cars are equipped on passenger trains. The person who travels upon local freight trains is bound to know that such trains cannot be moved, stopped, and started with the same slow and easy movement with which passenger trains are moved, stopped, and started; and a traveler upon such local freight trains is further charged with the knowledge that local freight trains are subject to more violent jerks in stopping and starting than passenger trains; therefore the plaintiff, in entering upon this local freight train, assumed the risk of any injury that might occur to him by reason of any usual or ordinary jerk which might occur in the stopping of said local freight train. If the plaintiff's injury, if he has suffered any injury, is due to a sudden stopping of the caboose caused by the usual and customary handling of the local freight train, then the plaintiff cannot recover. The defendant has the right, as a matter of law, to operate its local freight trains in the usual and ordinary manner. If it operated the train on which plaintiff was riding in the usual and ordinary manner, and if the sudden stopping was an incident of usual and ordinary handling of such trains, the plaintiff cannot recover.<sup>58</sup>

**§ 1530(2). Arkansas**

The court instructs the jury that although a person, in taking passage on a freight train, assumes such risks as are ordinarily incident to such mode of conveyance when properly handled by the trainmen, still, if the defendant in the case at bar undertook to carry passengers on this train, and if plaintiff was a passenger thereon, then it became and was the duty of the defendant to exercise the highest degree of care, skill, and diligence in the practical operation of its said train, which a reasonably prudent and cautious man would exercise and which is reasonably consistent with the mode of conveyance and the practical operation of its said train and road, and for any omission of these duties, whereby injury results to the passenger, defendant would be liable.<sup>59</sup>

**§ 1530(3). Indiana**

You are instructed that a railroad company has the right to set aside certain of its trains for carrying passengers, and certain others for the transportation of freight. So, if you find from the evidence in this cause that the train upon which the plaintiff was riding at the time he received the injury in question was a freight train set apart for the transportation of freight exclusively, being

<sup>58</sup> *Kansas City Southern Ry. Co. v. Clinton* (C. C. A. Ark.) 224 F. 896, 140 C. C. A. 340.

<sup>59</sup> *Abelson v. St. Louis, I. M. & S. Ry. Co.*, 105 S. W. 81, 84 Ark. 181.

composed exclusively of freight-cars and caboose attached for the accommodation of train employes, and such persons as might desire to attend and take care of live-stock being transported in such trains, of which regulation the plaintiff had knowledge, and that plaintiff was being carried on said train as an attendant upon, and to feed, water, and care for, the car-load of hogs which he was shipping by said train, not having paid any fare for so being carried, then as to the plaintiff the defendant was not required to exercise that high degree of care and skill with reference to the equipment, operation, and management of said train as was required of it with reference to the equipment, operation, and management of its passenger trains. But if you find from the evidence that the defendant did receive and undertake to carry the plaintiff upon its freight train as a passenger, it will be bound by all the obligations of a common carrier of passengers upon a regular passenger train.<sup>60</sup>

§ 1530(4). **Kansas**

I instruct you that the same degree of care required of a railroad company towards passengers who travel upon passenger trains is not required of the company towards passengers who travel upon freight trains. Freight trains are mainly used for carrying freight, and there are many hazards on such trains that passengers are not subject to on passenger trains. One who chooses to travel on freight trains must be held to have done so with the knowledge of the hazards and inconveniences incident to the operation of such trains, and towards passengers riding in such trains the railroad company is required to exercise only slight care, and is liable only for injuries resulting from gross negligence. Negligence is the violation or disregard of a duty, and the term "gross negligence" means the failure to exercise a slight degree of care. Unless, therefore, you believe from a preponderance of the evidence that the injury and damage complained of by the defendant or its employees were due to such negligence, that is, by their failure to exercise even a slight degree of care, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant.<sup>61</sup>

§ 1530(5). **South Carolina**

You are instructed that, in boarding a freight train, passengers assume the increased risks and diminution of comfort incident thereto, and, if the train is managed with the care usual and

<sup>60</sup> *Pennsylvania Co. v. Newmeyer*, 28 N. E. 800, 129 Ind. 401.

<sup>61</sup> *Binder v. Union Pac. R. Co.*, 194 P. 314, 108 Kan. 47. This instruction

is based upon a statute specifying "slight care" as the degree of care to be exercised towards persons taking passage on freight trains.

requisite for such trains, it is all that those who voluntarily board them have a right to expect.<sup>62</sup>

§ 1530(6). Texas

You are instructed that a person taking passage on or riding on freight trains, where the railroad runs passenger trains on its road for the benefit of travelers, assumes the extra danger, if any, as is necessarily incident to traveling on freight trains.<sup>63</sup>

§ 1531. Logging train

The jury are instructed that, if the railway company had contracted with the lumber company to transport plaintiff with others on this train for a consideration paid by the lumber company, plaintiff was a passenger, and entitled to the exercise of that degree of care required in the carriage of passengers in the kind of vehicle used, always taking into consideration the character of the conveyance and the obviously greater danger in riding on a logging car than in an ordinary passenger car.<sup>64</sup>

§ 1532. Mixed trains

See, also, post, § 1604.

§ 1532(1). United States

The jury are instructed that if you find that the plaintiff was a passenger, in the sense I have stated, you next inquire, was he injured by the negligence of the railroad company? You have heard the testimony on this point. Did that part of the train made up of freight cars come down on the passenger coach at unnecessary speed or with unnecessary violence? Did this speed or violence cause the fall of the plaintiff? Was that the proximate cause—the thing that caused the injury? And in this connection you must say whether the imprudence of plaintiff himself—his carelessness in being on his feet when the shock came—also caused the injury. If you find that the imprudence or carelessness of the plaintiff was one of the immediate causes of the accident, he cannot recover.<sup>65</sup>

§ 1532(2). Arkansas

You are instructed that while a passenger riding upon a freight train assumes the risks and hazards that are incident to the operation of a freight train, yet it is the general duty of the carrier to use due care for the safety of the passengers, and freight trains carrying passengers cannot be operated carelessly without subjecting

<sup>62</sup> Steele v. Southern Ry. Co., 33 S. E. 509, 55 S. C. 389, 74 Am. St. Rep. 756.

<sup>63</sup> Ft. Worth & D. C. Ry. Co. v. Rogers, 60 S. W. 61, 24 Tex. Civ. App. 382.

<sup>64</sup> Knox v. Robbins (Tex. Civ. App.) 151 S. W. 1134.

<sup>65</sup> Columbia, N. & L. R. Co. v. Means (C. C. A. S. C.) 136 F. 83, 68 C. C. A. 651.

the company to liability any more than a passenger train, and the operatives in charge of a freight train cannot any more overlook the due care of their passengers than can the operatives of a passenger train, and, although plaintiff in this case was a passenger upon a freight train, yet if you find from the evidence that defendant's operatives in charge of said train failed to use due care for plaintiff's safety, or negligently or carelessly operated said train, or moved the caboose connected therewith in which plaintiff was a passenger, and that by reason thereof he was injured, your verdict should be for the plaintiff.<sup>66</sup>

The jury are instructed that railway companies in the transportation of passengers upon freight or mixed trains are only required to exercise such care and skill and diligence as is reasonably consistent with the transportation of passengers upon mixed trains, as they cannot, in the nature of things, exercise the same care in stopping and starting trains as they can passenger trains, and whenever a passenger embarks upon a mixed train, he assumes the risks incidental to the stopping and starting of such trains, provided the carrier exercises all care and skill that is reasonably consistent in operating its trains.<sup>67</sup>

You are instructed that, when a passenger takes passage on a mixed train, which carries both freight and passengers, such passenger assumes the ordinary risks and inconveniences that are incident to the travel on such trains. But the railway company owes to such passenger the duty to exercise the highest degree of care consistent with the practical operation of such train to protect the passenger from injury.<sup>68</sup>

You are instructed that a railway company operating a mixed train which carries passengers, and which has drawn up to a station for the purpose of receiving passengers, is bound to anticipate the presence of passengers aboard the passenger car and to exercise care not to injure them.<sup>69</sup>

You are told that while the plaintiff, in taking passage upon a mixed train, assumed the risk of necessary and usual jolts and jars, this did not relieve the railroad company from exercising the same high degree of care in the handling of its train as if she was riding on a regular passenger train, to avoid injuring her. The risk of usual jolts and jars assumed by plaintiff is the risk incident to the mode of conveyance, and does not relax the rule as to the high de-

<sup>66</sup> St. Louis Southwestern Ry. Co. v. Wyman, 178 S. W. 423, 119 Ark. 530.

<sup>67</sup> St. Louis Southwestern Ry. Co. v. Wyman, 178 S. W. 423, 119 Ark. 530.

<sup>68</sup> St. Louis, I. M. & S. Ry. Co. v. Wright, 150 S. W. 706, 105 Ark. 269.

<sup>69</sup> St. Louis, I. M. & S. Ry. Co. v. Hartung, 128 S. W. 1025, 95 Ark. 220.

gree of care to be exercised by the servants of the defendant to avoid injuring passengers. So in this case, if you believe that the plaintiff was without fault and would not have been injured if the defendant's servants had exercised such high degree of care, your verdict should be for the plaintiff.<sup>70</sup>

**§ 1532(3). Kentucky**

The court instructs the jury that the defendant did not assume the absolute safety of the plaintiff while a passenger on its train, but it was the duty of the defendant's agents in charge of its train upon which plaintiff was a passenger to exercise the highest degree of care and diligence consistent with the mode of transportation adopted to protect him from injury.<sup>71</sup>

You are instructed that the riding upon mixed trains composed of freight and passenger cars is unavoidably accompanied with more discomfort and danger than upon the trains devoted exclusively to passengers, and the passenger who accepts carriage upon such a train must be deemed thereby to have assumed the risk of such additional discomfort and danger due to the nature of the train. Now, if you believe from the evidence that the train upon which the plaintiff was riding was such a train, and while he was a passenger thereon the car in which he was riding was forced against the one in front so as to cause the injury complained of, yet, if the train and cars were properly equipped and were carefully handled, and there was no more jarring or jolting than is usually unavoidable in the handling of such trains, then the jury will find for the defendant.<sup>72</sup>

**§ 1532(4). North Carolina**

You are instructed that, where one takes passage upon a mixed train, as in this case this train was—that is, hauling freight and passengers—he assumes the usual risk incident to travel upon such train when the same is managed by competent and prudent engineers or one who is operating the train in a careful manner. Whatever injuries result to him from the operation of a train in this way, why he assumes that risk when he takes passage upon such train, but he does not assume risk, gentlemen, if caused by the negligence of the defendant in starting the train. In other words, gentlemen of the jury, the question is whether or not this train started with a sudden jerk, and, if so, was this sudden jerk caused by the slack in the train, and was it necessary in the proper operation of the train that this jerk should have occurred, or was the

<sup>70</sup> Arkansas Southwestern R. Co. v. Wingfield, 126 S. W. 76, 94 Ark. 75.

<sup>72</sup> Chesapeake & O. Ry. Co. v. Jordan, 76 S. W. 145.

<sup>71</sup> Chesapeake & O. Ry. Co. v. Jordan, 76 S. W. 145.

jerk due to improper management of the engine by one of the defendant's engineers? Now, if it were due to careless handling of the engine and starting of the train, if the jerk was due to that, why, then, that would be negligence on the part of the defendant; but if the jerk was due simply to drawing the slack out of the train, and not to any carelessness on the part of the engineers, why, then, it would not be negligence upon the part of the defendant, even though the plaintiff was hurt, because that would be one of the risks assumed by him when he took passage upon the train.<sup>73</sup>

**§ 1532(5). Oklahoma**

You are instructed that, when fare is taken by any railroad corporation for transporting passengers on any mixed train, passenger, or freight cars, or in baggage, wood, gravel, or freight cars, the same care must be taken and the same responsibilities are assumed by the corporation as for passengers on passenger cars.<sup>74</sup>

You are told that, where the passenger chooses a mixed or freight train instead of a regular passenger train, the passenger submits himself to the inconvenience and dangers necessarily attendant on that mode of travel; that when a passenger chooses to ride upon a freight train, or a mixed train, instead of a regular passenger train, he cannot expect, or require the convenience or all the safeguards against danger, that may be demanded and expected upon trains devoted exclusively to passenger service.<sup>75</sup>

**§ 1533. Street cars**

**§ 1533(1). New Jersey**

The jury are instructed that, as to passengers, it is the duty of the trolley company to use a high degree of care to protect them from danger while upon its cars.<sup>76</sup>

**§ 1533(2). Texas**

The jury are instructed that negligence on the part of the driver of the street car of defendant company is the want of such care and prudence as reasonably skillful and prudent street-car drivers observe under similar circumstances; and in transporting passengers the car driver should exercise such degree of care and prudence to avoid injury to passengers as reasonably prudent street-car drivers observe under similar circumstances, and the failure to exercise such prudence would be negligence, and if by such negligence a passenger is injured the company would be liable in damages for such injury.<sup>77</sup>

<sup>73</sup> Coon v. Southern Ry. Co., 88 S. E. 510, 171 N. C. 759.

<sup>74</sup> Ramsey v. McKay, 146 P. 210, 44 Okl. 774.

<sup>75</sup> Ramsey v. McKay, 146 P. 210, 44 Okl. 774.

<sup>76</sup> Brackney v. Public Service Corp., 71 A. 149, 77 N. J. Law, 1.

<sup>77</sup> Durnett v. Gulf City Ry. & Real Estate Co. (Civ. App.) 37 S. W. 336.



**§ 1534. Horse railroads**

The court instructs the jury that if they believe, from the evidence, that the plaintiff was, at the time of the event in question, a passenger on one of defendant's cars, then the defendant owed to the plaintiff the duty of exercising the utmost care and vigilance to carry him over its road safely, and is responsible to the plaintiff for any neglect or want of proper care which the jury may find from the evidence, if they so find, causing the injury in question arising from the management of the car and horses by the defendant's servants or employés, or from the use of skittish or unsuitable horses, causing the injury in question.<sup>78</sup>

**§ 1535. Stagecoaches****§ 1535(1). Kansas**

You are instructed that a stagecoach proprietor who carries passengers for compensation is responsible for all accidents and injuries happening to passengers which might have been prevented by human care and forethought. He is bound to furnish gentle and well broken horses, skillful, prudent, and sober drivers, and the smallest degree of negligence in those particulars will render such proprietor liable for any injury to passengers therefrom.<sup>79</sup>

**§ 1535(2). Missouri**

You are instructed that, if the jury believe from the evidence that on the ——— day of ———, the defendants, in conjunction with their livery stable, were engaged in the business of running hacks, coaches, and omnibuses to and from the ——— Railroad to and from the different points in ———, for the conveyance of persons for hire, then they were bound to provide safe, staunch and roadworthy conveyances, with careful drivers, so far as human foresight, skill and knowledge and care could provide, and they are responsible for all injuries arising from slight negligence on the part of themselves, their agents or servants; if, therefore, the jury believe from the evidence that, on the said day, plaintiff took passage in one of the coaches of defendants, that while the same was being driven at a moderate gait it suddenly broke down by reason of the front axle breaking, or other cause, and that the hack was turned over and the plaintiff injured thereby, then it rests on the defendants to prove to your satisfaction that said hack was safe, sound, roadworthy, not overloaded and carefully driven, and that said axle broke, and said accident arose from and was caused by inevitable accident or defect that could not have been seen, detected, or known to defendants, their servants or agents, by

<sup>78</sup> Dougherty v. Missouri R. Co., 8 S. W. 900, 97 Mo. 647.

<sup>79</sup> Lewark v. Parkinson, 85 P. 601, 73 Kan. 553, 5 L. R. A. (N. S.) 1069.



the exercise of the utmost skill, knowledge, foresight, care, inspection, and examination of said coach by defendants, their agents or servants, and unless the jury so believe they will find for plaintiff.<sup>80</sup>

### § 1536. Elevators

Duty as to equipment of elevators, see post, § 1570.

#### § 1536(1). Indiana

The court instructs the jury that a company operating a passenger elevator in its office building for the use of its tenants and their patrons is a common carrier of passengers for hire, and as such is required to exercise the most perfect care of prudent and cautious men, and its undertaking and liability to its passengers go to this extent: That as far as human foresight can reasonably go, it will transport them safely. It is not liable for injury happening from sheer accident or misfortune, when there is no negligence or fault, and where no want of caution, foresight, or judgment would prevent the injury, but it is liable for the smallest negligence in itself and its servants. It is also responsible for defects in the vehicle which it furnishes, which might have been discovered by a proper examination.<sup>81</sup>

#### § 1536(2). Nebraska

You are instructed it was the duty of the defendant, the \_\_\_\_\_ Company, to use the greatest amount of human care and skill consistent with the operation of said elevators to prevent injuries to its passengers while they were being transported from one part of the building to the other.<sup>82</sup>

#### § 1536(3). Virginia

The court instructs the jury that it was the duty of the defendant in carrying the plaintiff's intestate upon its elevator to use the highest degree of care for his safety known to human prudence and foresight, and it is liable for the slightest negligence against which human care and foresight might have guarded. This degree of care is required and applies not only to the manner in which the elevator was being run and controlled by the operator, but also to the machinery, appliances and equipment of said elevator, and the manner in which same were constructed and maintained; and if you believe from the evidence that the defendant failed to exercise such care in any of these particulars, and that such failure proximately caused the death of the plaintiff's intestate while in the

<sup>80</sup> *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

<sup>81</sup> *Ohio Valley Trust Co. v. Wernke*, 84 N. E. 999, 42 Ind. App. 326.

<sup>82</sup> *Quimby v. Bee Bldg. Co.*, 127 N. W. 118, 87 Neb. 193, 138 Am. St. Rep. 477.

exercise of ordinary care on his part, then your verdict must be for the plaintiff.<sup>83</sup>

The court further instructs the jury that defendant hotel company is not an insurer of passengers using elevators, and only owed to the plaintiff's intestate the exercise of the highest degree of practical care to provide safe equipment and operation; and if you believe from the evidence that the defendant in this case exercised such care in the equipment and operation of the elevator in question, they will find for the defendant.<sup>84</sup>

### § 1537. Freight elevators

#### § 1537(1). Alabama

The court instructs the jury that the owner of a freight elevator is not required to exercise the highest degree of care in supplying and maintaining guards and safety appliances in connection with said elevator for the protection of persons riding thereon with freight, but is merely required to exercise reasonable care, such as would be exercised by a reasonably prudent person under similar circumstances.<sup>85</sup>

#### § 1537(2). Missouri

You are instructed that the expression "due care," as used in these instructions, is defined to be care commensurate with the instrument or means being used, and danger to be apprehended, and, while the plaintiff in entering a freight elevator in the ——— Building, to be carried up and down the building in it, accepted and acquiesced in the usual incidents and conduct of a freight elevator, yet the party or parties in control of said ——— Building was or were bound to exercise, in the repair, guarding from accident, and management of said freight elevator, that high degree of care which prudent and competent men exercise under like circumstances, and the failure by the party or parties in control of said ——— Building to use that high degree of care which is exercised by prudent and competent men under like circumstances, would be a failure to exercise due care.<sup>86</sup>

### § 1538. Same—Permitting trucks to be carried in car with passenger

The court charges the jury that the mere presence of the trucks upon the car in which plaintiff was riding would not entitle the plaintiff to recover, and before the plaintiff can recover against the defendant on account of the presence of these trucks on the car, it

<sup>83</sup> *Murphy's Hotel, Inc., v. Cuddy's Adm'r*, 97 S. E. 794, 124 Va. 207.

<sup>84</sup> *Murphy's Hotel, Inc., v. Cuddy's Adm'r*, 97 S. E. 794, 124 Va. 207.

<sup>85</sup> *O'Rourke v. Woodward*, 77 So. 679, 201 Ala. 265.

<sup>86</sup> *Orcutt v. Century Bldg. Co.*, 99 S. W. 1062, 201 Mo. 424.

must be reasonably established that the trucks were placed in such a manner in the car that they were caused to fall from the movement or operation of the car, and unless the trucks were caused to fall by the movement or operation of the car, the defendant would not be liable to the plaintiff.<sup>87</sup>

The court instructs the jury that unless the jury believe from the evidence that the trucks on the elevator were so placed in the elevator that they would likely be caused to fall by a jar or movement of the car, and unless the jury are further reasonably satisfied from the evidence that the trucks were caused to fall by the movement or operation of the car on the occasion complained of, the jury should return a verdict for the defendant.<sup>88</sup>

The court charges the jury that under the evidence and issues in this case the defendant had a right to operate the elevator in question with the pair of trucks upon it in that part of the elevator in which, under the evidence, they were carried, if said trucks were placed in said place in such a position that they would not be caused to fall by the movements or operation of the elevator.<sup>89</sup>

### 5. *Care Required in Selection of Servants*

#### § 1539. Employment of unfit elevator operator

The court instructs the jury that they must disregard all testimony given by ——— relating to instructions given or not given by him to the elevator boys under his control and further you are instructed that the mere retention in service of a careless employé does not give rise to a cause of action against the employer, but there must be evidence of some intervening negligence which is the proximate cause of the injury, and the mere employment or retention of an unfit servant cannot be the proximate cause of an accident. There must result some specific act of negligence or incompetency before any liability can attach.<sup>90</sup>

### 6. *Duty to Care for, Assist, and Protect Passengers*

#### § 1540. Duty to render personal attention and services

You are instructed that the contract of a carrier of passengers for reward is that it will carry the passengers safely and in a proper carriage, and afford such persons safe and convenient means for entering cars and alighting therefrom; but such carrier is not bound to render a passenger personal attention or services beyond that, except where such passengers by reason of illness, great age, or

<sup>87</sup> O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.

<sup>88</sup> O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.

<sup>89</sup> O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.

<sup>90</sup> Murphy's Hotel, Inc., v. Cuddy's Adm'r, 97 S. E. 794, 124 Va. 207.

other infirmities are unable to help themselves, and whether or not the plaintiff in this case came under that class is a question for you to determine by the evidence; the burden being upon her to establish this by a preponderance of the evidence.<sup>91</sup>

**§ 1541. Duty to sick passenger or one under disability**

Duty to assist passenger in alighting, see post, § 1651.

**§ 1541(1). Texas**

You are instructed that it was the duty of the defendant's servants in charge of said train to exercise such a degree of care as would reasonably insure the safety of such passengers in view of their physical condition, and a failure on the part of the defendant through its said servants to discharge said duty was negligence.<sup>92</sup>

**§ 1541(2). Virginia**

You are instructed that, if the husband of the plaintiff provided for her removal from the train, with her acquiescence and consent, and without any request on her or his part to the agents of the company to remove her, then the railroad company is not responsible for the acts of plaintiff's husband or of such persons as he requested to assist him in so removing her.<sup>93</sup>

You are instructed that if the baggage master, the agent of the railway company, assisted in the removal of plaintiff from the train and failed to exercise all the precautions which a man of ordinary prudence would have exercised under like circumstances and conditions and his act was an efficient cause in the injury to plaintiff, then if plaintiff herself was without fault, the railroad company is liable to compensate her for the injuries sustained even though the husband and his assistants may have also been guilty of negligence.<sup>94</sup>

**§ 1541(3). Washington**

You are instructed that a street railway company is not bound to accept for transportation without an attendant one who, because of physical or mental disability, is unable to take care of himself. Yet, if its servants do voluntarily accept such a person unattended, they should render to him such special care and assistance as his condition requires, in order that he may be safely transported; and this principle applies to persons who are known to be partially helpless on account of intoxication.<sup>95</sup>

<sup>91</sup> Chicago, R. I. & P. Ry. Co. v. Brooks (Okla.) 179 P. 924. Instruction correct as far as it goes.

<sup>92</sup> Gulf, C. & S. F. Ry. Co. v. Coopwood (Civ. App.) 96 S. W. 102.

<sup>93</sup> Walters v. Norfolk & W. Ry. Co., 94 S. E. 182, 122 Va. 149.

<sup>94</sup> Walters v. Norfolk & W. Ry. Co., 94 S. E. 182, 122 Va. 149.

<sup>95</sup> Benson v. Tacoma Ry. & Power Co., 98 P. 605, 51 Wash. 216, 130 Am. St. Rep. 1096.

**§ 1542. Duty to pregnant woman**

See, also, post, § 1651(1).

You are instructed that the defendant was not an insurer of the personal safety of the plaintiff's wife, while she was a passenger on the defendant's train, but owed to her the duty to exercise that high degree of care for her reasonable personal safety which a very prudent person would use under the same circumstances about the same matter; and a failure of the defendant, if any, to exercise such degree of care, would be negligence.<sup>96</sup>

**§ 1543. Duty to persons of unsound mind**

You are instructed that, if you find and believe from the evidence that the plaintiff in this case, when in a condition of unsound mind, was a passenger on a train of the defendant, and that his mental condition was such that it was reasonably probable that, if left unrestrained to follow his own course, it would result in physical harm and injury, either to others or to himself; and the defendant or its agents or employes charged with the duty of looking after the safety of its passengers had notice or knowledge of such mental condition on the part of plaintiff, and failed to exercise the high degree of care that would be exercised by a very cautious, prudent, and competent person under similar circumstances to restrain the said plaintiff and to keep him in safety, and through the failure, if any, of the defendant, or its agents or employes, to exercise such degree of care, the said plaintiff was permitted to leave, and did leave, the train of defendant at or about the station at ———, and as the proximate result of being thus permitted to place himself at large, or as the proximate result of the agents or employes of the defendant at ——— failing, if they did fail, to exercise the care of ordinarily prudent persons to prevent the plaintiff from going upon the track of the defendant at ———, under the circumstances in which he did, if you find that they had knowledge of his demented condition, if he was in a demented condition, or as the direct and proximate result of both such causes united, the plaintiff was run upon by an engine of the defendant and received personal injuries as alleged in his petition, then you will return a verdict in favor of the plaintiff.<sup>97</sup>

**§ 1544. Duty to protect passengers from violence or insult**

§ 1544(1). Alabama

The court charges the jury that the carrier's obligation is to carry his passengers safely and properly, and to treat them respectfully,

<sup>96</sup> St. Louis S. W. Ry. Co. of Texas v. Ferguson, 64 S. W. 797, 28 Tex. Civ. App. 460.

<sup>97</sup> Chicago; R. I. & G. Ry. Co. v. Sears (Tex. Civ. App.) 155 S. W. 1003.

other infirmities are unable to help themselves, and passengers from violence the plaintiff in this case came under that class and he is bound to determine by the evidence; the burden being upon judgment and to establish this by a preponderance of the evidence that his journey safe and

### § 1541. Duty to sick passenger or one

Duty to assist passenger in alighting, see post. A breach of the carrier's duty to passengers to use profane language is a breach of the contract.

#### § 1541(1). Texas

You are instructed that it was the duty of a female passenger. The carrier's duty to passengers the contract would reasonably insure the safety of the carrier the duty, not only to carry their physical condition, and through its said servants to the termini of the route embraced the duty to conserve by every reasonable

#### § 1541(2). Virginia

You are instructed that the carrier is of course, upon the carrier's agents for her removal from the train, and without any reasonable excuse, and from insult and indignity and from personal company to remove the passenger from the train, and from material from whence the disturbance of safety for the accident, and comfort and personal security and safety requested to be removed; it may be from another passenger, or from another stranger, or from another servant of the carrier. In all such cases the carrier is liable in damages to the injured passenger.

You are instructed that a common carrier's obligation is to carry its passengers safely and properly, and to treat them reasonably, and if it intrusts this duty to its servants the law holds it responsible for the manner in which they execute the trust. The law is well settled that the carrier is obliged to protect its passengers from violence and insult from whatever source arising. The carrier is not an insurer of its passenger's safety against every possible source of danger, but it is bound to use all such reasonable precautions as human judgment and foresight are capable of to make its passenger's journey safe and comfortable. The carrier must not only protect its passengers against violence and insults of strangers and copassengers, but also against the violence and insults of its own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted, through the negligence or willful misconduct of the carrier's servants, the carrier is necessarily responsible.<sup>2</sup>

<sup>1</sup> Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211.  
<sup>2</sup> Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211.

<sup>1</sup> Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211.

<sup>2</sup> Forrester v. Southern Pac. Co., 134 P. 753, 38 Nev. 247, 48 L. R. A. (N. S.) 1.



**Protect passenger from wrongful arrest**

that if you believe, from the evidence, that facts and circumstances known to him to a person of ordinary prudence, that the arrest, was unlawful, and that he exercised the highest degree of care to protect, if any, you will find for plaintiff.<sup>3</sup>

**Acts of police officer in connection with making arrest**

acted that if the plaintiff violated the law on defendant's car, so as to justify his arrest by the conductor, and taken into custody by regular officers of ——— county, the conductor, under the law, was not required to anticipate that the officers would mistreat the plaintiff; therefore you are charged that if plaintiff was properly arrested and turned over to proper legal officers of ——— county, and that he was not subject to any improper indignities or suffering in the presence of the conductor, and a reasonably prudent man in the position of the conductor would not have anticipated any such mistreatment, then you would answer the first issue, "No."<sup>4</sup>

**§ 1547. Duty to protect from injury by fellow passengers**

See, also, post, § 1607.

**§ 1547(1). Kentucky**

You are instructed that if the jury believe, from the evidence, that the conduct of the negroes, by whom plaintiff claims to have been insulted and assaulted on the occasion in the evidence referred to, was such on defendant's car, and prior to the happening of the alleged assault, as would induce a reasonably vigilant and prudent conductor to have anticipated that such assault might be made, then it became the duty of such defendant's conductor, in the exercise of the utmost vigilance, to use all reasonable means to protect the plaintiff from indignity and assault from said negroes, and if you shall believe from the evidence that the defendant's conductor under such circumstances failed to use all reasonable means to prevent such indignity to or assault upon the plaintiff, and that by reason of such failure on the part of defendant's conductor the plaintiff sustained insult, assault, or injury from said negroes on the occasion in the evidence referred to, the law is for the plaintiff, and the jury should so find.<sup>5</sup>

<sup>3</sup> Louisville & N. R. Co. v. Byrley, 153 S. W. 36, 152 Ky. 35, Ann. Cas. 1915B, 240.

<sup>4</sup> Carver v. Carolina, O. & O. Ry. Co., 85 S. E. 293, 169 N. C. 204.

<sup>5</sup> Louisville Ry. Co. v. Wellington, 126 S. W. 370, 137 Ky. 719.



and that the carrier is obliged to protect his passengers from violence and insult, from whatever source arising, and he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable.<sup>98</sup>

You are instructed that it is an actionable breach of the carrier's duty to negligently permit other passengers to use profane or insulting language in the presence of a female passenger.<sup>99</sup>

The court charges the jury that as to passengers the contract of carriage imposes upon the carrier the duty, not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey, and this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort, and from insult and indignity and from personal violence. And it is not material from whence the disturbance of the passenger's peace and comfort and personal security and safety comes or is threatened; it may be from another passenger, or from a trespasser, or other stranger, or from another servant of the carrier. In all such cases the carrier is liable in damages to the injured passenger.<sup>1</sup>

§ 1544(2). Nevada

The jury is instructed that a common carrier's obligation is to carry its passengers safely and properly, and to treat them respectfully, and if it intrusts this duty to its servants the law holds it responsible for the manner in which they execute the trust. The law is well settled that the carrier is obliged to protect its passengers from violence and insult from whatever source arising. The carrier is not an insurer of its passenger's safety against every possible source of danger, but it is bound to use all such reasonable precautions as human judgment and foresight are capable of to make its passenger's journey safe and comfortable. The carrier must not only protect its passengers against violence and insults of strangers and copassengers, but also against the violence and insults of its own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted, through the negligence or willful misconduct of the carrier's servants, the carrier is necessarily responsible.<sup>2</sup>

<sup>98</sup> Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211.

<sup>99</sup> Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211.

<sup>1</sup> Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211.

<sup>2</sup> Forrester v. Southern Pac. Co., 134 P. 753, 36 Nev. 247, 48 L. R. A. (N. S.) 1.

**§ 1545. Duty to protect passenger from wrongful arrest**

You are instructed that if you believe, from the evidence, that the conductor knew, or the facts and circumstances known to him were sufficient to apprise a person of ordinary prudence, that the arrest of plaintiff, if there was an arrest, was unlawful, and that the conductor failed to exercise the highest degree of care to protect plaintiff from such arrest, if any, you will find for plaintiff.<sup>3</sup>

**§ 1546. Liability for acts of police officer in connection with making arrest**

You are instructed that if the plaintiff violated the law on defendant's train, so as to justify his arrest by the conductor, and he was taken into custody by regular officers of ——— county, the conductor, under the law, was not required to anticipate that the officers would mistreat the plaintiff; therefore you are charged that if plaintiff was properly arrested and turned over to proper legal officers of ——— county, and that he was not subject to any improper indignities or suffering in the presence of the conductor, and a reasonably prudent man in the position of the conductor would not have anticipated any such mistreatment, then you would answer the first issue, "No."<sup>4</sup>

**§ 1547. Duty to protect from injury by fellow passengers**

See, also, post, § 1607.

**§ 1547(1). Kentucky**

You are instructed that if the jury believe, from the evidence, that the conduct of the negroes, by whom plaintiff claims to have been insulted and assaulted on the occasion in the evidence referred to, was such on defendant's car, and prior to the happening of the alleged assault, as would induce a reasonably vigilant and prudent conductor to have anticipated that such assault might be made, then it became the duty of such defendant's conductor, in the exercise of the utmost vigilance, to use all reasonable means to protect the plaintiff from indignity and assault from said negroes, and if you shall believe from the evidence that the defendant's conductor under such circumstances failed to use all reasonable means to prevent such indignity to or assault upon the plaintiff, and that by reason of such failure on the part of defendant's conductor the plaintiff sustained insult, assault, or injury from said negroes on the occasion in the evidence referred to, the law is for the plaintiff, and the jury should so find.<sup>5</sup>

<sup>3</sup> *Louisville & N. R. Co. v. Byrley*, 153 S. W. 36, 152 Ky. 35, Ann. Cas. 1915B, 240.

<sup>4</sup> *Carver v. Carolina, O. & O. Ry. Co.*, 85 S. E. 293, 169 N. C. 204.

<sup>5</sup> *Louisville Ry. Co. v. Wellington*, 126 S. W. 370, 137 Ky. 719.

## § 1547(2). Maryland

The court instructs the jury that, if they shall find from the evidence that on the \_\_\_\_\_ day of \_\_\_\_\_, the plaintiff was a passenger on the defendant's railway round trip excursion train from \_\_\_\_\_ to \_\_\_\_\_, and return, and that on said train while running from \_\_\_\_\_ to \_\_\_\_\_, and also when returning from \_\_\_\_\_, for a period of from \_\_\_\_\_ to \_\_\_\_\_ minutes just after leaving \_\_\_\_\_, persons had congregated and were engaged in drinking beer and were acting in a disorderly manner and throwing empty beer bottles from the train, and that the defendant's agents and servants in charge of said train knew, or by the exercise of ordinary care should have known, of the said disturbances and of the throwing of said bottles, and that the said train, returning, left \_\_\_\_\_ about \_\_\_\_\_ o'clock on the evening of the said \_\_\_\_\_ day of \_\_\_\_\_, and that from the time that said train left \_\_\_\_\_, and for a period of from \_\_\_\_\_ to \_\_\_\_\_ minutes thereafter, several of the same persons who had engaged in said acts of disorder on the downward trip, if the jury find such acts, in the car in which the plaintiff was seated, were drinking, carousing, and acting in a disorderly manner to the disturbance of the passengers on said car, and at frequent intervals were throwing empty beer bottles from said car toward the east-bound track of the defendant's railway, and shall further find that the agents and servants in charge of the said defendant's train knew that trains were passing or likely to pass on said east-bound track, and shall further find that the throwing of said bottles toward said east-bound track occurred with such frequency and at such intervals before the plaintiff was injured, that the said agents and servants in charge of said train knew, or by the exercise of ordinary care could have known, of the throwing of said bottles, and that the persons throwing the same were drinking, carousing, and acting in a disorderly manner, and shall further find that the said agents and servants of the defendant knew of said drinking, carousing, bottle throwing, and disturbances, or by the exercise of ordinary care and caution could have known of said drinking, carousing, bottle throwing, and disturbances, for a sufficient time before the accident to have prevented the throwing of the bottles which caused the accident, if the jury find it was so caused, and that on said return trip, when said train was from \_\_\_\_\_ to \_\_\_\_\_ minutes west of \_\_\_\_\_, and while said train was proceeding on the west-bound track, and when the plaintiff was seated in the coach wherein said drinking, carousing, and throwing of bottles occurred, and while he was exercising due care and caution on his part, one of said bottles was thrown from said car toward said east-bound track, and that the same struck a train

passing on said track, broke, and that a piece of the same rebounded into the car where the plaintiff was seated and struck him in the eye and injured him, the plaintiff is entitled to recover, unless the jury shall further find that the defendant company, its agents and servants in charge of said train, did not know of the throwing of said bottles, or by the exercise of ordinary care could not have known in time to have prevented the throwing of the bottle which injured the plaintiff in time to have avoided the injury.<sup>6</sup>

The court instructs the jury that, even if they find that the injury to plaintiff's eye was caused by its being pierced or cut by a particle of glass from a bottle thrown by a passenger on defendant's train through an open window of a car thereof, and that said bottle was thrown through said open window by a passenger who with others had been drinking beer in said car and throwing some of the empty beer bottles through the open window of said car, and who had with others been talking loud and using profane language and was of a party that had been tussling with each other and doing other acts more or less rough in said car, before the injury to the plaintiff, if they shall find any such acts, yet the plaintiff cannot recover in this case, unless the jury further believes from a preponderance of the evidence that before the throwing through the open window of the bottle, a particle of the glass of which after being broken flew or was projected into another window of a car in the train of the defendant and into the eye of the plaintiff, the conductor, brakeman, or other servant of the defendant anticipated, or by proper care and caution could have anticipated, that the drinking, profanity, tussling, and previous throwing of bottles through the window, if they shall find any of said acts, would probably result in the throwing through said open window of the bottle, whose particle penetrated plaintiff's eye, long enough before said bottle was thrown through said window to have enabled said conductor, brakeman, or other servant of the defendant to prevent the throwing of said bottle, which caused the injury to plaintiff's eye.<sup>7</sup>

§ 1547(3). Texas

The court instructs the jury that if you believe, from the evidence in this case, that under all the circumstances defendant's conductor, at and before the time plaintiff was assaulted as testified to by him, ought to have remained with plaintiff for his care and protection, yet if you believe from the evidence that the attack made upon plaintiff was so sudden and of such a character that the con-

<sup>6</sup> Baltimore & O. R. Co. v. Rudy, 84 A. 241, 118 Md. 42.

<sup>7</sup> Baltimore & O. R. Co. v. Rudy, 84 A. 241, 118 Md. 42.

ductor, it present, could not reasonably have prevented same, then you are instructed that you cannot find a verdict for the plaintiff on account of the fact that said conductor was not present and personally looking after plaintiff's protection at the time he was assaulted.<sup>8</sup>

**§ 1548. Failure to enforce separate coach law as proximate cause of assault on passenger**

You are instructed that the law requires that all railway companies carrying passengers in this state shall provide separate accommodations for the white and African races by providing two or more passenger coaches for each passenger train or by carrying one partition car, one end of which may be used by white passengers, and the other end by passengers of the African race, and that the officers of such passenger trains are required to assign each passenger or person to the coach or compartment used for the race to which such passenger belongs. And if you find from the evidence in this case that plaintiff became a passenger upon one of the defendant's trains about the date mentioned in the complaint, and was assigned to or was riding in the coach or compartment provided for white passengers upon said train, and that defendant's officers in charge of said train knowingly permitted a negro passenger to enter said compartment and ride therein, or by the exercise of ordinary care and diligence could have known that said negro passenger was riding in said compartment among white passengers, and made no effort to expel him therefrom, and that said negro passenger while riding therein made an assault upon plaintiff and thereby injured him, then you will find for plaintiff, unless you further find that plaintiff, by his own wrongful act, provoked the assault, and but for such act or conduct on his part he would not have been assaulted.<sup>9</sup>

**7. Care Required as to Safety of Premises**

**§ 1549. Defects in platforms and approaches to station**

**§ 1549(1). Arkansas**

You are instructed that it is the duty of railroad companies to exercise ordinary care to keep in reasonably safe condition all portions of their platforms and approaches thereto to which persons purchasing tickets with the view of becoming passengers upon trains would naturally or ordinarily be likely to go.<sup>10</sup>

<sup>8</sup> Ft. Worth & R. G. Ry. Co. v. Stewart, 182 S. W. 893, 107 Tex. 594.

<sup>9</sup> Hines v. Meador (Ark.) 224 S. W. 742.

<sup>10</sup> St. Louis & S. F. R. Co. v. Grider, 161 S. W. 1032, 110 Ark. 437.

You are instructed that if you find, from a preponderance of the evidence, that on the date of the alleged injury the defendant was negligent in failing to exercise ordinary care to keep in a reasonably safe condition the approach to, or portion of its platform at ——— station, and further find from such evidence that such approach to or portion of its platform was located where persons purchasing tickets with a view of taking passage on defendant's trains would naturally or ordinarily be likely to resort, and you should further find from such proof that plaintiff on said date had purchased a ticket with the intention of taking passage on defendant's train, and that he, while awaiting such train, and in the exercise of care for his own safety, was injured by stepping upon and having his ankle sprained in such defective platform or approach, you should find for the plaintiff.<sup>11</sup>

§ 1549(2). Missouri

The court instructs the jury' that if you find and believe from the evidence in this case that on or about the ——— day of ———, the plaintiff, intending to become a passenger on one of defendants' passenger trains, purchased of defendants' agent a ticket at ———, in the state of ———, one of the stations on the defendant's railroad, to ———, another station on said line of railroad, and that plaintiff, intending to board one of said passenger trains as a passenger, went upon the approach to the platform of said railroad at said station of ———, and if you further find and believe from the evidence in this cause that defendants had negligently permitted and suffered the approach to said platform to be and remain out of repair, so that the same was dangerous and unsafe for their passengers to go upon and over, and had negligently suffered and permitted a large hole in said approach to said platform to be and remain open for a long time prior to said ——— day of ———, if you find and believe from the evidence such action of the defendants in permitting said hole to be and remain in said approach to said station platform was negligence, and if you believe from the evidence that the defendants and their agents and servants knew, or by the exercise of ordinary care on their part could have known, of said hole and the dangerous and unsafe condition of said approach to said platform, if you believe said condition of said approach to said platform was dangerous, and if you further believe and find from the evidence herein that plaintiff, while walking on said approach to said platform for the purpose of boarding one of defendants' passenger trains, and without knowing of the existence of said hole in said approach to said platform, and without any neg-

<sup>11</sup> St. Louis & S. F. R. Co. v. Grider, 161 S. W. 1032, 110 Ark. 437.



ligence on his part, and being unable to see said hole, stepped with his left foot in said hole and fell into the same, and then fell backwards on said approach, and that plaintiff was then and thereby and in the manner aforesaid hurt and injured, then your verdict will be for the plaintiff. The term "negligence," as used in these instructions, means the want of ordinary care, and the term "ordinary care" means such care as a person of ordinary prudence would have exercised under the same or similar circumstances to those constituting the facts of this case.<sup>12</sup>

You are further instructed that, although you may find and believe from the evidence that passengers or intended passengers on defendants' trains had been known to use the incline or wagon approach to the crossing over defendants' tracks in going to and from defendants' depot and station platform, yet if they went there by the mere passive acquiescence of the defendants, and without a direct or implied invitation or inducement to do so, then the defendants were under no duty or obligation to keep said incline or wagon approach in a reasonably safe condition as to such passengers or intended passengers; and if you find and believe that the plaintiff, in going to defendants' depot and station platform, voluntarily and without a direct or implied invitation so to do, walked up said incline or wagon approach, and while doing so stepped into a hole therein and was injured, then as to the plaintiff the defendants were not negligent in failing to maintain said incline or wagon approach in a reasonably safe condition, and the plaintiff cannot recover in this action.<sup>13</sup>

The court instructs the jury that there is no evidence in this case that the defect, if any, in the wagon approach in which plaintiff stepped was caused by the defendants or their agents or servants. Therefore, before plaintiff can recover in this case, he must prove that the defendants knew, or by the exercise of ordinary care might have known, of said defect, if any, in time to have reasonable opportunity to repair the same.<sup>14</sup>

**§ 1549(3). West Virginia**

The court instructs the jury that if they believe from the evidence that the plaintiff went to the defendant's depot in the town of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ with the intention and for the purpose of becoming a passenger on one of the defendant's passenger trains; and if they further believe from the evidence that the said plaintiff, after reaching the platform of the said depot, and while on the said platform, still intending so to become a passen-

<sup>12</sup> Gurtman v. Lusk, 208 S. W. 61.

<sup>13</sup> Gurtman v. Lusk, 208 S. W. 61.

<sup>14</sup> Gurtman v. Lusk, 208 S. W. 61.



ger, not being at the time guilty of contributory negligence on her part, fell into a hole in the said platform, whereby she was injured, as in her declaration is alleged; and if they further believe from the evidence that the hole in the said platform was there in consequence of the negligence of the defendant,—then the jury should find for the plaintiff, and assess her damages at such an amount as the jury, under all the evidence in the case, believe her entitled to recover, not exceeding, however, the sum of \$———. <sup>15</sup>

### § 1550. Duty to provide lights and railings

Safety of place for alighting passenger, see post, §§ 1633(2), 1645(2, 6, 9, 10).

#### § 1550(1). Kentucky

You are instructed that it was the duty of the defendant company, in the maintenance of the platform in question, to make the same reasonably safe to prevent injury to its passengers getting on and off at said station; and, if the jury believe from the evidence that to make same reasonably safe it was necessary to erect and maintain a railing on said platform at the place plaintiff was injured, if he was injured, or to have maintained a light at the said station, at the time he was injured, if he was injured, and further believe from the evidence that the defendant negligently failed to erect and maintain such railing or light, and that as a direct result of such failure, if any there was, plaintiff, while exercising ordinary care for his own safety, was thereby injured, they will find for the plaintiff; and, unless they so believe, they will find for the defendant. <sup>16</sup>

#### § 1550(2). Missouri

You are further instructed that the defendants were under no duty to provide lights for the incline or wagon approach on which the plaintiff was injured, if you find he was injured, and that their failure to do so was not negligence. <sup>17</sup>

You are further instructed that it was the duty of the defendant railway company to exercise ordinary care and prudence in constructing and maintaining reasonably sufficient and proper railings and guards at the ends of its station platforms for the reasonable safety of persons using its platforms and cars, and, if you believe from the evidence that it failed to exercise such ordinary care and prudence in constructing and maintaining the railings or guards at its ——— street station, then it was guilty of negligence in that regard. <sup>18</sup>

<sup>15</sup> *Barker v. Ohio River R. Co.*, 41 S. E. 148, 51 W. Va. 423, 90 Am. St. Rep. 808.

<sup>16</sup> *Chesapeake & O. Ry. v. Honley*, 159 S. W. 1147, 155 Ky. 447.

<sup>17</sup> *Gurtman v. Lusk*, 208 S. W. 61.

<sup>18</sup> *Barth v. Kansas City El. Ry. Co.*, 44 S. W. 778, 142 Mo. 535.

You are instructed that, if you find that the injuries resulting in the death of the plaintiff's husband were caused by the negligence of the servants or employes of defendant in charge of the car, in suddenly starting the car while said husband was in the act of stepping up upon the platform of said car, combined with the negligence of defendant in so constructing the railing at the west end of the platform as to leave the open space at the end of the platform described in evidence, if you find that such construction was negligent, then you will find for the plaintiff.<sup>19</sup>

§ 1550(3). Virginia

The jury are instructed that they should find for the defendant, unless they believe from all the evidence that the accommodations provided by the defendants for passengers arriving at ———, of ordinary intelligence and prudence, were unsafe, or that, on the night of the accident to the plaintiff, the defendant's agents were negligent in properly lighting the premises; and shall further believe that the plaintiff did not contribute to the accident by her own negligence, or want of such care and caution as a reasonably prudent person should have exercised for his own protection.<sup>20</sup>

§ 1550(4). Wisconsin

You are instructed that it is claimed upon the part of the plaintiffs that the defendant was negligent in not having a reasonably safe platform, in not having the platform sufficiently lighted, and in not having some person stationed at the point where this accident occurred, to warn persons, and prevent their walking off the platform. It will be the duty of the jury to determine, from all the testimony in the case, whether the defendant was negligent in these respects or either of them. It was the duty of the defendant to have its platform reasonably sufficient and safe in all respects, to be used by such persons as may have lawful occasion to use it. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable. But it must be reasonably safe and sufficient to all persons using it, who are themselves in the exercise of ordinary and reasonable care.<sup>21</sup>

You are instructed that, if a barrier or guard is reasonably necessary to prevent persons who are themselves in the exercise of ordinary and reasonable care from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it

<sup>19</sup> Barth v. Kansas City El. Ry. Co., 44 S. W. 778, 142 Mo. 535.

<sup>20</sup> Reed v. Richmond & A. R. Co., 4 S. E. 587, 84 Va. 231.

<sup>21</sup> Quaife v. Chicago & N. W. Ry. Co., 4 N. W. 658, 48 Wis. 513, 33 Am. Rep. 821.

to the cars reasonably safe, should be upon the platform at the time of the arrival of trains and during the time the train remains at the station.<sup>22</sup>

**§ 1551. Care required in operation of trains or cars at station or place of boarding or alighting**

See, also, post, §§ 1656, 1657.

**§ 1551(1). Iowa.**

The court instructs the jury that it is claimed by the plaintiff that the train which struck ——— approached the crossing where the accident occurred at an unlawful, dangerous, and negligent rate of speed. In the operation of said train, the defendant is charged with knowledge that the passengers for such train were required to cross its tracks to the south platform before said train arrived at the station, and it was the duty of the defendant to so run its train in approaching the station and crosswalk between the two platforms, as not carelessly or needlessly to expose its passengers, crossing to the south platform, to needless and excessive danger.<sup>23</sup>

The court instructs the jury that the law does not fix or designate any particular rate of speed at which trains may be run or operated. And whether defendant was negligent in running its train at the rate of speed, which the evidence shows the train in question was running when the deceased was struck, is a question of fact for the jury to determine from all the facts and circumstances given in evidence before you. In determining that question, the jury may consider the kind of train it was; the manner of its equipment and operation, the condition of its braking appliances; whether the engine and cars were under the control of the engineer in charge of the same; the fact that the train stopped at ——— for water; the manner it approached the station, and the speed it was running as it neared the cross-over in question, and from these, and all the facts and circumstances in evidence before you, you will determine whether said train was run at such high, excessive, and improper rate of speed as to amount to negligence on the part of the defendant.<sup>24</sup>

The court instructs the jury that if you find, from the evidence, that the speed of the train on approaching the crosswalk and in striking plaintiff's intestate was excessive and negligent as already defined, then the fact, if it be a fact, that it had been usual and customary to run said train past said depot and over said crosswalk at the same rate of speed, would not justify or excuse

<sup>22</sup> *Qualfe v. Chicago & N. W. Ry. Co.*, 4 N. W. 658, 48 Wis. 513, 33 Am. Rep. 821.

<sup>23</sup> *Dieckmann v. Chicago & N. W. Ry. Co.*, 144 N. W. 587, 163 Iowa, 13.

<sup>24</sup> *Dieckmann v. Chicago & N. W. Ry. Co.*, 144 N. W. 587, 163 Iowa, 13.

defendant for running its train at an excessive and negligent rate of speed at the time of the accident, if it did so run said train.<sup>25</sup>

The court instructs the jury that, if you find that said train was run at an excessive and negligent rate of speed at the time it struck the deceased, and that such excessive and negligent rate of speed was the direct and proximate cause of decedent's injuries, then your verdict will be for the plaintiff, unless you further find that decedent was guilty of contributory negligence, as explained in these instructions, and, if he was so guilty, then your verdict will be for the defendant, notwithstanding the negligence of defendant.<sup>26</sup>

§ 1551(2). **Kentucky**

The court instructs the jury that the law is for the plaintiff, and they should so find, unless they shall believe from the evidence that, before the defendant moved its trains, or either of them, which were standing on the passing switch at ———, at the time mentioned in the petition to close the passageway across the said switch between the ends of its two freight trains then standing on said switch track, the employes of the defendant in charge of the train by which plaintiff was injured exercised ordinary care to give timely and reasonably sufficient notice that the train was about to be moved to close the said passageway, and exercised ordinary care to prevent injury to the plaintiff from the moving train, or unless they shall further believe from the evidence that the plaintiff himself was negligent, and thereby helped to cause or bring about his injuries; that but for his own negligence, if any there was, he would not have been injured.<sup>27</sup>

You are instructed that, if the defendant did give timely and reasonable notice, as mentioned in instruction No. ———, that the passway between the said trains was about to be closed by backing one or both of said trains, and did exercise ordinary care to prevent injury to the plaintiff from the moving train, the law is for the defendant, and so you should find.<sup>28</sup>

The jury are instructed that if they believe, from the evidence, that the defendant's car which struck the plaintiff was at the time running fast, or without sounding a gong or bell, they will find for the plaintiff, unless they also believe from the evidence that the plaintiff, in attempting to cross ——— street, did not use the care that an ordinarily prudent person under the same or like circum-

<sup>25</sup> Dieckmann v. Chicago & N. W. Ry. Co., 144 N. W. 587, 163 Iowa, 13.

<sup>26</sup> Dieckmann v. Chicago & N. W. Ry. Co., 144 N. W. 587, 163 Iowa, 13.

<sup>27</sup> Louisville & N. R. Co. v. Smith,

122 S. W. 806, 135 Ky. 462. In this case plaintiff went to the station to meet an incoming passenger.

<sup>28</sup> Louisville & N. R. Co. v. Smith, 122 S. W. 806, 135 Ky. 462.

stances would have used, and which, if used, would have avoided the accident, in which event they will find for the defendant.<sup>29</sup>

§ 1551(3). *Michigan*

The jury are instructed that, when a railroad company stops a passenger train where other tracks are between it and the depot platform, the rights of the people having business with such train and the duty of the company towards them are the same as if all of the intervening space between the depot and the train constitute the platform, and it is negligence on its part to allow another train to run between the passenger and the station at which the passengers are being taken on or discharged, and this rule applies to street car companies having regular stations, at which the cars are in the habit of stopping for persons to get on or off.<sup>30</sup>

§ 1551(4). *Missouri*

The jury are instructed that if you believe, from the evidence, that it was the direct and usual way, in getting on or off of defendant's trains on the south track, for passengers to cross over defendant's north track in going to or from the junction sidewalk on the north, and that defendant invited and allowed passengers to so cross over its north track in getting on or off its trains on the south track, then the plaintiff's rights as a passenger entitled him to demand from defendant the same degree of extraordinary vigilance and care for his safety while he was so passing from his train over defendant's north track to the junction sidewalk on the north as while being transferred over defendant's line.<sup>31</sup>

8. *Care Required with Regard to Safety of Roadbed and Equipment*

§ 1552. Degree of care required and duty of inspection in general

§ 1552(1). *Delaware*

You are instructed that the law exacts great care, diligence, and skill from those to whose charge as common carriers passengers are committed. Common carriers of passengers are responsible for any negligence, resulting in injury to them, and are required, in the preparation, conduct and management of their means of conveyance, to exercise every degree of care, diligence and skill which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract, to carry safely, as far as human care and forethought will reasonably admit.<sup>32</sup>

<sup>29</sup> *South Covington & C. St. Ry. Co. v. Beatty*, 50 S. W. 239.

<sup>30</sup> *Terrill v. Michigan United Traction Co.*, 183 N. W. 46, 214 Mich. 478.

<sup>31</sup> *Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669.

<sup>32</sup> *Wood v. Philadelphia, B. & W. R. Co.*, 76 A. 613, 1 Boyce, 336.

## § 1552(2). Iowa

The jury is instructed that common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers. Therefore you are instructed in this case that when the defendant received the plaintiff upon his car as a passenger for hire upon the \_\_\_\_\_ of \_\_\_\_\_, that the defendant was bound to make up its train, couple its cars, and manage and control the same, in such a careful, skillful, and prudent manner as to carry the plaintiff with reasonable safety as such passenger. You are therefore instructed that if you find the plaintiff was injured by reason of the negligent acts of the defendant's agents or servants, whereby they used a defective link or pin to couple said cars, and that human care, vigilance, and foresight could have reasonably discovered such defect, and you further find that the plaintiff did not contribute to such injury, and was using all reasonable care and caution to avoid said injury, then your verdict would be for the plaintiff.<sup>33</sup>

On the other hand, you are instructed that the defendant is not required to use the utmost degree of care which the human mind is capable of inventing, but is only required to use the highest degree of care and diligence which is reasonably practicable under the circumstances of the case in question. The defendant was not an insurer against accidents, nor is the defendant compelled to insure the absolute safety of its passengers. What the defendant was required to do was to do all that human care, vigilance, and foresight could reasonably do, consistent with the practical operation of the road, in order to prevent injury to the plaintiff, its passenger.<sup>34</sup>

You are instructed that the high degree of care hereinbefore referred to, and required of defendant, embraces its roadway, track, bridges, and rolling stock, and the selection of its employés, servants, and agents. In supplying materials for and in constructing its roadway, track, bridges, and rolling stock, it was required to exercise that high degree of care to see that materials used were amply sufficient, and of such quality, size, and pattern, as were accepted by and in general use and found to be sufficient, and approved by the best and most skillfully managed railroads of the country, doing a like business with defendant. In the selection

<sup>33</sup> Larkin v. Chicago & G. W. Ry. Co., 92 N. W. 891, 118 Iowa, 652. Plaintiff was accompanying stock.

<sup>34</sup> Larkin v. Chicago & G. W. Ry. Co., 92 N. W. 891, 118 Iowa, 652.



of trainmen, and in the management of its train, it was bound to exercise that high degree of care, and to provide men of sufficient experience, skill, and prudence to run such train safely, as far as was practicable; and it was bound also, in like manner, to see that, in the actual management of the train at the time of the accident, the trainmen exercised a like degree of care and skill in managing and running the train safely in all respects, so as to avoid injury to the passengers. If defendant failed in any of these respects, and such failure was the cause of the injury complained of, it was negligent, and is liable.<sup>35</sup>

§ 1552(3). **Kentucky**

You are instructed that the defendant is not an insurer of the safety of its passengers, but that the law made it the duty of the defendant and of its agents and servants to exercise the highest degree of care for the safety of the passengers it undertook to carry, in the management and operation of its cars, in the care and inspection of its track and switches, and in the care and inspection of the running gear of its cars; and if the jury shall believe from the evidence that the plaintiff sustained the injuries by her alleged by reason or because of the derailment of the car, then the law is for the plaintiff, and the jury should so find, unless the jury shall believe from the evidence that the derailment of the car was brought about by some cause which the highest degree of care upon the part of the defendant's agents and servants could not have prevented or guarded against, in which latter event the law is for the defendant, and the jury should so find.<sup>36</sup>

You are instructed that by the term "highest degree of care," as used in the foregoing instruction, is meant the degree of care which prudent persons engaged in business of carrying passengers in cars propelled by electric power usually exercise under similar circumstances.<sup>37</sup>

§ 1552(4). **Maryland**

The court instructs the jury that, if you shall find that the injuries complained of were caused by the act of the said ——— in jumping from said car, and that said ——— was induced to so jump from fear or apprehension of danger, and that said fear or apprehension was aroused by the act or conduct of some person or persons in said car, counseling or directing him to jump from said car, if the jury shall so find, and shall further find from the evidence that such real and imminent danger existed as would jus-

<sup>35</sup> *Pershing v. Chicago, B. & Q. R. Co.*, 32 N. W. 488, 71 Iowa, 561.

<sup>36</sup> *Louisville St. Ry. Co. v. Brownfield*, 96 S. W. 912.

<sup>37</sup> *Louisville St. Ry. Co. v. Brownfield*, 96 S. W. 912.



tify an ordinarily prudent and cautious person in jumping from said car and in counseling and directing others to so jump, and shall further find that such danger arose from the breaking of an axle under a loaded freight car, one of the cars of the said train, and that said loaded freight car belonged to the ——— Railroad Company, and was received by the defendant from the ——— Railroad Company at ———, to be forwarded over its lines, and that the defendant maintained and employed at ——— a force of competent and skillful inspectors, and that after said loaded freight car was received by the defendant it was examined and inspected by its said agents in as careful and thorough a manner as the necessary exigencies of the traffic at said point permitted, and that no defect was found in said car, and that the defendant forwarded said car on its line, and that the defendant, its servants and agents, exercised due care in the operation, running, and management of the train of which said car was a part, then the defendant was not guilty of negligence, and the verdict must be for the defendant, even though the jury shall further find that the person or persons so counseling or directing the said ——— to jump were servants or employés of the defendant.<sup>38</sup>

§ 1552(5). Michigan

In this case you are instructed that it was the duty of the defendant to exercise that high degree of care and caution consistent with the practical operation of its road to provide for the safety and security of plaintiff while transporting him from ——— to ———, which the most prudent, careful, and cautious person engaged in the same business exercises under the same or similar circumstances, in using and maintaining its roadbed with ties that were suitable and proper as to soundness, so that they would be reasonably safe and fit for passenger trains to pass over them in reasonable safety. The failure to perform that duty would constitute negligence on the part of defendant.<sup>39</sup>

You are instructed that the degree of care which is required by the defendant and by all street car companies in inspecting the various appliances of its car must be a reasonable degree of care and caution. By this I mean, the degree of care to be used in the inspection of its car must conform to the nature of the appliance in the car it is intended and expected to use, and the actual use to which it is customarily put by the passengers in the car. In the case at bar it is undisputed that the object of the handhold is to steady, aid, and to help passengers in getting off and on cars, and it must be expected that said appliance will be subjected to more

<sup>38</sup> Western Maryland R. Co. v. State, 53 A. 969, 95 Md. 637.

<sup>39</sup> Marshall v. Wabash R. Co., 151 N. W. 696, 184 Mich. 593.

or less strain, and that, as a consequence of this, it is the duty of the defendant not to make a perfunctory or careless inspection of it, but to make such an inspection of the handhold as is reasonable under the circumstances, and as will satisfy them that the handhold will answer the requirements naturally intended by it, and for which it is placed upon the car.<sup>40</sup>

You are instructed that, with respect to the duty of inspection, all the law required of the defendant was that it should provide such necessary means as, in the judgment of those who understand the subject and such as experience has shown, would be sufficient to secure the safety of its passengers, and to apprise itself of defects, deterioration, and want of repair, and, if such means are provided and proper use made thereof, it has discharged its duty in this behalf, and no negligence can be claimed on this head.<sup>41</sup>

§ 1552(6). Missouri

You are instructed that, if you believe from the evidence that defendant's cars were equipped with automatic couplers and such were in good order, and that the train was equipped with air brakes and they were in good order, and that no defects could be discovered in either the brakes or the couplers by careful examination, and that cars of that kind do become uncoupled when handled in the manner that the cars in question were, and that these cars became uncoupled without apparent cause or discoverable defect, then the defendant is not liable, etc.<sup>42</sup>

§ 1552(7). Texas

You are instructed that, if you find from the evidence that the wreck in which plaintiff claims to have been injured was caused by a broken flange on one of the car wheels, and that alone, and you further find that the broken flange was caused by a latent defect in said wheel, and that said wheel was sound when it left ———, or, if it was defective and insufficient, that such defect and insufficiency were unknown by the defendant, and could not have been discovered by the use of due diligence, and the application of the ordinary and proper tests at that time, then you will find for the defendant.<sup>43</sup>

§ 1552(8). Virginia

You are instructed that it was the duty of the defendant company in carrying the plaintiff upon its said train to use the highest degree of care for his safety known to human prudence and foresight, and it is liable for the slightest negligence against which hu-

<sup>40</sup> Gerlach v. Detroit United Ry., 137 N. W. 256, 171 Mich. 474.

<sup>41</sup> Gerlach v. Detroit United Ry., 137 N. W. 256, 171 Mich. 474.

<sup>42</sup> Holland v. St. Louis & S. F. R. Co., 79 S. W. 508, 105 Mo. App. 117.

<sup>43</sup> Houston, E. & W. T. Ry. Co. v. Summers (Civ. App.) 49 S. W. 1106.

man care and foresight might have guarded. This degree of care is required, and applies, not only to the manner in which the train was being run by the engineer, but also to the running gear and equipment of the engine, tender, and cars, and to the way in which its roadbed was constructed and its ties and rails laid and maintained; and, if you believe from the evidence that the defendant failed to exercise such care in any of these particulars, and that such failure caused the derailment resulting in injuries to the plaintiff your verdict must be for the plaintiff.<sup>44</sup>

**§ 1553. Latent defects**

See, also, ante, § 1552(7).

**§ 1553(1). California**

The jury are instructed that, if the accident in question was caused by a defect or flaw in one of the piston rods of the elevator apparatus, which defect or flaw was not discoverable on a reasonable and careful examination, according to the best-known tests reasonably practicable, then your verdict should be for the defendants.<sup>45</sup>

**§ 1553(2). Maryland**

The jury are instructed that, if the jury should find that the accident to the plaintiff was caused solely by a hidden or latent defect, not apparent to the eye, in the trolley wire, and which the defendant could not have discovered or detected by any reasonable examination, and that if the company employed proper and suitable contractors to erect the wire and overhead construction at the place of the accident, and if the contractors used suitable and proper material and a proper and skillful method of overhead construction, then the defendant has performed its duty to the passenger in this regard, and the verdict must be for the defendant, even though the jury further find that the plaintiff, without fault on his part, did receive injuries by reason of the breaking and falling of said trolley wire.<sup>46</sup>

**§ 1554. Duty with respect to roadbed and track**

See, also, post, § 1560.

**§ 1554(1). Kentucky**

The court instructs the jury that the defendant A. Railway Company, in undertaking to carry the plaintiff as a passenger on its train, did not insure her absolute safety, but it was its duty, and the duty of its servants and employes in charge of the engine and train

<sup>44</sup> Norfolk-Southern R. Co. v. Tomlinson, 81 S. E. 89, 116 Va. 153.

<sup>45</sup> Treadwell v. Whittier, 22 P. 266, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175.

<sup>46</sup> Baltimore City Pass Ry. Co. v. Nugent, 38 A. 779, 86 Md. 349, 39 L. R. A. 161.

on which she was a passenger at the time in question, and also the duties of the defendants, the B. Railway Company and the A. Railway Company, their servants and employes in charge of the construction, maintenance, and repair of the roadbed and track on or over which said engine and train of cars were propelled or operated at the time and place in question, to exercise the highest degree of practicable care and diligence consistent with the prudent operation of said train to safely convey the plaintiff to her destination. And, if the jury shall believe from the evidence that the defendants negligently suffered or permitted the roadbed or track of the said B. Railway Company to become out of repair, or negligently suffered or permitted the rail or rails of its said track to become loose, or insecurely fastened, or too close together at the end of the rails, and shall further believe from the evidence that by reason of such negligence, or want of care, if any, the coach in which plaintiff was riding as a passenger was on or about the \_\_\_\_\_ of \_\_\_\_\_, derailed, thrown from the track, and wrecked, and that she, while a passenger thereon, was thereby drawn down in said car, and thereby two of her ribs broken, or her shoulder fractured or dislocated, or badly cut or otherwise hurt, or her spine and back twisted or injured or her nervous system shocked and injured, then they will find for her, and fix her damages as indicated in instruction No. \_\_\_\_\_.<sup>47</sup>

**§ 1554(2). Oklahoma**

The court instructs the jury that it is the duty of a railroad company, in the construction of its railway and in keeping it in proper condition for the safe transportation of passengers or those occupying that relation, to exercise the highest degree of care and skill practicable under the circumstances and then known to persons skilled in such work; but when such care and skill have been exercised its duty to the public has been sufficiently discharged in this respect.<sup>48</sup>

The court instructs the jury that if you find from the evidence, under these instructions, that \_\_\_\_\_ was the husband of the plaintiff herein at the time of his death, and was killed, and such death was caused by reason of the road or roadbed of the defendant being in an unsafe condition on account of one or more of the causes so alleged in plaintiff's petition, which might have been remedied or guarded against and averted by the exercise by defendant's employes of the highest degree of skill then practicable and then known to servants having charge of said work, then and in that

<sup>47</sup> Chesapeake & O. Ry. Co. v. Burke, 145 S. W. 370, 147 Ky. 694, Ann. Cas. 1913D, 208.

<sup>48</sup> St. Louis & S. F. R. Co. v. Posten, 124 P. 2, 31 Okl. 821.

event the plaintiff would in such case be entitled to recover. But if the cause of the accident was one which the highest degree of practicable skill, care, and caution consistent with operating the road could not have been provided against, then you should find for the defendant.<sup>49</sup>

You are further instructed that, if you find from the evidence that the bridge or trestle at the place of the wreck was constructed of material which was not of the best practicable quality under the circumstances and then known to persons skilled in such work, or the material in said trestle had been allowed to materially deteriorate, or if you find that said trestle was not constructed in the manner the highest degree of human sagacity and care would suggest practicable under the circumstances and then known to persons skilled in such work, and that said accident could and would have been prevented by the use of proper materials and by the construction of the trestle in the proper manner, then your verdict should be for the plaintiff.<sup>50</sup>

**§ 1555. Duty with respect to keeping ties in sound condition**

You are instructed, as to the alleged negligence of defendant in failing to keep its track in proper repair, that it is claimed on the part of the plaintiff that the track was out of repair in consequence of defendant's neglect to remove decayed and unsound ties, and supply them with sound ones. It was the duty of the defendant to take due care to see that the ties in use are not permitted to decay to such an extent as to endanger the safety of its passengers, and an omission of this duty is a negligent failure to keep the road in proper repair. It is for you to say, in the light of the evidence, whether or not the defendant was guilty of negligence in regard to the ties at the place of the accident in question.<sup>51</sup>

**§ 1556. Duty with respect to rails**

You are instructed that, if you find that the rails which were broken were made by a manufacturer of good repute, were made upon the approved method of manufacturing rails, were properly tested by the proper known and usually applied tests then in practical use, and had been on the track for several years, and had successfully stood the strain of numerous passing trains without in any manner affecting their quality or strength, so far as could be seen by proper examination, carefully and skillfully made; if, at the time of the accident, they were placed and lying securely on

<sup>49</sup> St. Louis & S. F. R. Co. v. Posten, 124 P. 2, 31 Okl. 821.

<sup>50</sup> St. Louis & S. F. R. Co. v. Posten, 124 P. 2, 31 Okl. 821.

<sup>51</sup> Andrews v. Chicago, M. & St. P. R. Co., 53 N. W. 399, 86 Iowa, 677.

sound ties, with good anglebars or splices at the ends, with sufficient ballast under the ties, with all their connections and support well adjusted; if they had been subjected to a daily inspection in the most approved and customary way of inspecting such appliances, by the most careful and best managed railroads in the country, by some servant of competent skill and experience in such matters, and said rails appeared then sound, and all these connections and supports sound and secure; and if there were no flaws or defects visible, or that could have been discovered by such approved and customary inspection, made in the manner hereinbefore explained—then the defendant was not negligent with reference to said rails.<sup>52</sup>

### § 1557. Defective trestle

See, also, ante, § 1554(2).

You are instructed that it is the duty of the defendant to keep its road, its roadbed, and trestle in a safe and sound condition for the passage of its train of cars, and if the jury find from the testimony that the trestle was not sound and well built, and not of sufficient strength to stand the strain of an engine and cars such as was being used on that occasion, and should further find that the defective trestle caused said wreck which resulted in the death of ———, then the jury must find a verdict in favor of the plaintiff.<sup>53</sup>

### § 1558. Duty to guard against obstruction of track

You are instructed that it is the duty of a common carrier to provide safe cars, machinery, tracks and roadways for the safety of its passengers, and in the movement of its trains to use wise precaution and to exert high skill in protecting them from the results of obstructions upon its tracks. If a common carrier is negligent in any of these respects and injury thereby results to a passenger lawfully upon its train, then, unless it appears that the passenger in some way contributed to his injury, the common carrier is liable.<sup>54</sup>

### § 1559. Injury of passenger by objects near track

See, also, post, § 1618.

The court instructs the jury that if they believe from the evidence that the plaintiff was injured by being struck by a stone standing in dangerous proximity to the defendant's railroad track, and that the position of said stone was known to the defendant or

<sup>52</sup> Pershing v. Chicago, B. & Q. R. Co., 32 N. W. 488, 71 Iowa, 561.

<sup>53</sup> Nickles v. Seaboard Air Line Ry., 54 S. E. 255, 74 S. C. 102. This

is proper with an instruction that the carrier is not an insurer.

<sup>54</sup> Wood v. Philadelphia, B. & W. R. Co., 76 A. 613, 1 Boyce, 336.



the agent of said defendant, or might have been known to them by the use of ordinary care and diligence, and there was such negligence of said agents of said defendant in failing to remove such stone, or in failing to use care and diligence in ascertaining whether said stone was in dangerous proximity, such negligence of said agents was the negligence of the defendant.<sup>55</sup>

**§ 1560. Care required in construction of cars**

You are instructed that a railway company is required to so construct its roadbed and track as to avoid such dangers as could be reasonably foreseen by competent and skillful engineers as likely to be incident to that particular section of country through which it passes, and thereafter to keep the roadbed and track in the required condition; and the same degree of care is required in the selection and construction of its cars as is required in the construction of its roadbed.<sup>56</sup>

**§ 1561. Defective brakes**

The court instructs the jury that defendant was bound to use the utmost practicable care and diligence with reference to its cars, including its brakes and grip irons, for the safety of its passengers; and if you believe from the evidence that the plaintiff, on or about ———, entered the cars of defendant for the purpose of being conveyed from one point to another as a passenger thereon, and you further find from the evidence that when said cars were nearing the top of the incline on ——— street, between ——— avenue and ——— street, in ———, the grip iron, by reason of its being so insufficient in structure, or so weak or worn, as to render it unsafe for holding said cars to the cable rope, broke by reason thereof, and that the brakes were so weak or so constructed as to be insufficient for the purpose of holding said cars on said incline; and that the same was known to the defendant, or by the exercise of reasonable care and diligence might have been known by it, at any time before starting such cars up said incline, and you further find from the evidence that the plaintiff received the injuries complained of by reason of such defective grip or brakes without fault on his part directly contributing thereto, then he is entitled to recover in this action.<sup>57</sup>

**§ 1562. Defects in heating apparatus**

You are instructed that if you should believe, from a preponderance of the evidence, that the plaintiff, on or about the ———

<sup>55</sup> Carrico v. West Virginia Cent. & P. Ry. Co., 14 S. E. 12, 35 W. Va. 389.

Summers (Tex. Civ. App.) 49 S. W. 1106.

<sup>56</sup> Houston, E. & W. T. Ry. Co. v.

<sup>57</sup> Sharp v. Kansas City Cable Ry. Co., 20 S. W. 93, 114 Mo. 94.



day of ———, and while a passenger, as alleged, on one of defendant's trains, received injuries substantially as by him alleged, and that said injuries were caused by the bursting of the drum connected with the heating apparatus in said car, and that said heating apparatus was then and there under the management and control of the defendant company, and its agents and servants, and was in an unsafe and defective condition, or badly and unskillfully handled and managed by the defendant's servants in charge of the train, and that in the ordinary course of things such drum would not have burst if the defendant company and its agents and servants in charge thereof and having the management thereof had used proper care with respect to the condition of said heating apparatus, or the handling and management thereof, and if you further find and believe from the evidence that the alleged bursting of the drum was directly caused and occasioned by such alleged unsafe or defective condition of the heating apparatus or alleged unskillful handling thereof by the defendant's said servants, and you further believe that such alleged unsafe or defective condition of the heating apparatus, or such alleged unskillful handling of the heating apparatus, constituted negligence on the part of the defendant company, or its said agents or servants (as the term negligence has heretofore herein been defined), and you further believe from the evidence that as the direct and proximate result of such negligence, if any, plaintiff received injuries substantially as by him alleged, then find for the plaintiff and assess his damages as hereinafter instructed in the ——— paragraph hereof.<sup>58</sup>

**§ 1563. Care required as to steps, running board, etc.**

**§ 1563(1). Delaware**

You are instructed that the platforms and steps or running boards of a railway car are the proper and usual means by which passengers are expected to enter and depart from the car, and a passenger has a right to assume that such means are reasonably safe for the purposes for which they are used, provided he does not know, or by the exercise of ordinary care could not have known, they were not.<sup>59</sup>

You are instructed that, if you are satisfied from the weight of the evidence in this case that the step of the car from which the plaintiff fell, or was thrown, was in an unsafe and insecure condition, as averred by the plaintiff, and that her injuries were caused thereby, and shall also believe that the plaintiff had no knowledge of the unsafe condition of the step, or any information or warning

<sup>58</sup> *Houston, E. & W. T. Ry. Co. v. Roach*, 114 S. W. 418, 52 Tex. Civ. App. 95.

<sup>59</sup> *Smithers v. Wilmington City Ry. Co.*, 67 A. 167, 6 Pennewill, 422.

from which she should have known it, she would be entitled to recover, provided she was exercising reasonable care and caution at the time she was injured.<sup>60</sup>

§ 1563(2). Texas

The court instructs the jury that it was the duty of the defendant's agents, servants, and employes to use that high degree of care to keep the steps provided for passengers to alight from its coaches in a reasonably safe condition to so alight as would be exercised by very prudent persons under the same circumstances, and a failure to use such care would be negligence.<sup>61</sup>

The court instructs the jury that it is the duty of an interurban car conductor to be prudent and skillful and cautious to see that his passengers are not injured while alighting from his car and in case the passenger on the car is injured, while alighting, by the negligence of the conductor if any—that is, his failure to exercise the greatest degree of care as defined in the above paragraph, for the safety of the passenger—such failure, if any, constitutes negligence on the part of the railway company. It is the duty of the railway company, by which is meant the defendant company herein, to exercise the greatest degree of care, as defined above in this charge to select for its use cars with steps so constructed as not to expose to danger passengers alighting therefrom, but to maintain and keep all steps in such condition while using the car.<sup>62</sup>

§ 1564. Same—Grease or other slippery material

§ 1564(1). Missouri

You are instructed that it was the duty of the defendant to exercise ordinary care to keep the platforms mentioned in the evidence in a condition sufficiently free of grease or other slippery material to be reasonably safe for use by a person in stepping thereon from a train in motion on track ——— in said station while exercising ordinary care in so doing, and if the defendant failed to do so, and suffered grease or other slippery material to remain on the platform after lapse of a reasonable time to remove the same, so as to render it dangerous to a person stepping from a moving train while exercising ordinary care, and that while using ordinary care in attempting to alight from the moving train plaintiff stepped and fell in consequence of the greasy condition of the platform, then the defendant was negligent, providing the train was not moving at such a rate of speed as would have deterred an ordinarily pru-

<sup>60</sup> *Smithers v. Wilmington City Ry. Co.*, 67 A. 167, 6 Pennewill, 422.

<sup>61</sup> *St. Louis Southwestern Ry. Co. of Texas v. Gresham* (Civ. App.) 140 S. W. 483.

<sup>62</sup> *Northern Texas Traction Co. v. Danforth*, 116 S. W. 147, 53 Tex. Civ. App. 419.

dent and careful person from so attempting to alight from said train.<sup>63</sup>

**§ 1564(2). Texas**

The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff, while alighting from defendant's train, and while in the exercise of ordinary care for her own safety, slipped and fell upon the steps provided for passengers to alight from defendant's coach, and was injured as alleged in plaintiff's petition, and that the defendants, its agents, servants, or employes had permitted said steps to become slippery and muddy, and that the said defendant, its agents, servants, or employes were guilty of negligence, as the term "negligence" is hereinbefore defined to you, in allowing said steps to become slippery and muddy, if they did do so, or if the defendant, its agents, servants, or employes failed to have said steps equipped in such manner as would be reasonably safe for passengers in alighting from said train while said steps were wet and muddy, and you further believe from a preponderance of the evidence that such failure, if any, was negligence, as the term "negligence" is hereinbefore defined, and that such negligence, if any, was the direct and proximate cause of the plaintiff's injury, if she was injured, you will find for the plaintiff.<sup>64</sup>

**§ 1565. Snow and ice on steps or platform**

**§ 1565(1). Kentucky**

The court instructs the jury that it was the duty of the servants of defendant in charge of the car in question to exercise the utmost degree of care and skill which prudent persons engaged in that or the same business usually exercise to carry its passengers safely to their destination, and to provide for a reasonably safe means of alighting from the car, and, if the jury believe from the evidence that snow and ice had accumulated upon the step of said car so as to render it dangerous in alighting from said car, and that the same was so suffered to remain and exist for such period of time that the servants aforesaid, by the exercise of the care aforesaid, should have known of its existence, and that they had the time and opportunity to remove it before the accident in question, and failed to do so, and if, in addition, by reason of same, the plaintiff, using himself due care and caution, nevertheless slipped and fell, and so received the injuries complained of, the jury will find for plaintiff. Unless the jury so believe, they will find for the defendant.<sup>65</sup>

<sup>63</sup> *Newcomb v. New York Cent. & H. R. R. Co.*, 81 S. W. 1069, 182 Mo. 687.

of *Texas v. Gresham* (Civ. App.) 140 S. W. 483.

<sup>65</sup> *South Covington & C. St. Ry. Co.*

*v. Markel*, 182 S. W. 850, 168 Ky. 625.

The court instructs the jury that if the jury believe, from the evidence, that the step from which plaintiff fell, if he did so, was in a reasonably safe condition for use, and that the defendant and its servants in charge of said car used the degree of care which prudent persons in the same business usually observe to keep it in a safe condition from snow and ice, under the circumstances, then the law is for the defendant; or, if they shall believe from the evidence that the said step was in a reasonably safe condition for use, and that the snow and ice thereon, if any, was only such as would ordinarily gather there, the weather considered, while the car was in transit on one of its trips to the point where plaintiff fell, they should find for the defendant.<sup>66</sup>

§ 1565(2). Utah

You are instructed that before the plaintiff can recover in this action, it is incumbent upon her to show that there was ice on the threshold or sill of the car in question which was apparently dangerous, and that it must have remained there an unreasonable length of time, and that defendant's employes must have had a reasonable opportunity to remove the accumulation, if there was any, before the time of the accident.<sup>67</sup>

You are instructed that if you find from the evidence that there was a thin coat of ice on the doorsill, and that the coat of ice was transparent and could not be seen by an ordinarily reasonable inspection, and that the defendants had no actual knowledge of the presence of the ice, and in the exercise of reasonable care could not have acquired such knowledge, then you will find the issues in favor of the defendants.<sup>68</sup>

You are instructed that the defendants were required to exercise only such care in maintaining the entrance and thresholds of its cars in a condition free from ice as ordinarily prudent persons would use. Such care varies according to the peculiar facts and conditions of each instance.<sup>69</sup>

§ 1566. Safety of aisles and passageways of cars

You are instructed that a carrier of passengers, having impliedly invited the public to enter its cars, is required to exercise a high degree of care in protecting the passengers while entering the car and going through the aisles and passageways to seats. And it is the duty of the carrier to exercise care in seeing that the threshold

<sup>66</sup> South Covington & C. St. Ry. Co. v. Markel, 182 S. W. 850, 168 Ky. 625.

<sup>67</sup> Connell v. Oregon Short Line R. Co., 168 P. 337, 51 Utah, 26.

<sup>68</sup> Connell v. Oregon Short Line R. Co., 168 P. 337, 51 Utah, 26.

<sup>69</sup> Connell v. Oregon Short Line R. Co., 168 P. 337, 51 Utah, 26.

of the cars and carpets in the aisles of the cars are in a reasonably safe condition so that passengers will not be injured.<sup>70</sup>

You are instructed that it is the duty of a carrier of passengers for hire to provide reasonably safe means for passengers going in and out of its passenger cars, and these means include reasonably safe steps, aisles, and passageways in the cars, and the failure to use due care to keep and maintain these means of egress and ingress in a reasonably safe condition and repair is negligence on the carrier's part.<sup>71</sup>

**§ 1567. Same—Banana peeling**

You are instructed that if you believe, from the evidence, that the defendant was guilty of "negligence," as that term is herein defined, in the operation of its train or its failure to have sufficient light in the passenger coach or (in) leaving or permitting a banana peeling, causing the plaintiff to slip upon said banana peeling, whereby he was thrown against said car and down upon said floor, and that said negligence did approximately and directly cause injuries to the plaintiff, as he has described in his petition, and to which you will refer for more particular description as to said injury, if any, then you will find for plaintiff, unless you find that the plaintiff himself was guilty of negligence in not discovering and avoiding said obstructions which contributed to said injuries.<sup>72</sup>

**§ 1568. Duty as to furnishing safe seats**

You are instructed that it is the duty of a railroad company to exercise a very high degree of care for the safe transportation of its passengers, and to provide safe seats for their transportation; and a failure on the part of the railroad company to exercise a high degree of care in the transportation of passengers, and to provide reasonably safe seats for them, would be negligence on the part of the railroad company; and, if injury is occasioned to one of its passengers by such negligence, then the railroad company would be liable for such injuries as resulted proximately from such negligence, provided such passenger was not guilty of contributory negligence (as that term is above defined) contributory to such injury.<sup>73</sup>

You are instructed that it is the duty of a railroad company to exercise a very high degree of care to provide safe seats for its passengers, and a passenger has a right to presume any seat, apparently in good condition, will safely accommodate her; and a

<sup>70</sup> *Indian v. Delaware, L. & W. R. Co.*, 104 A. 871, 262 Pa. 117.

<sup>71</sup> *Indian v. Delaware, L. & W. R. Co.*, 104 A. 871, 262 Pa. 117.

<sup>72</sup> *Missouri, K. & T. Ry. Co. of Texas v. Swift* (Tex. Civ. App.) 128 S. W. 450.

<sup>73</sup> *Boyles v. Texas & P. Ry. Co.* (Tex. Civ. App.) 86 S. W. 936.

failure to exercise a high degree of care to provide such seats, or to warn passengers of any such seats as might be defective, would be negligence on the part of the railroad company, which would render it liable for all such damages as directly and approximately result therefrom.<sup>74</sup>

**§ 1569. Duty as to car belonging to another company**

The court charges the jury that the defendant has offered in your presence to prove that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation. But I instruct, as a part of the law of this case, that if the car composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable.<sup>75</sup>

**§ 1570. Duty as to equipment of elevators**

**§ 1570(1). California**

The jury are instructed that the defendants owed it as a duty to the persons using the elevator in their store, either as customers or by their invitation or request, to use all reasonable means and efforts to furnish good and well-constructed machinery adapted to the purposes of its use, of good material, and of the kind which is found to be safest when applied to use; and, while they were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greater safety with practical use.<sup>76</sup>

**§ 1570(2). Missouri**

The court instructs the jury that if you find and believe from the evidence in this case that on or about the ——— day of ———, the elevator in question was in the possession of and operated by defendant, and situated in said defendant's building, and that plaintiff was employed by a tenant in the building and went to the elevator for the purpose of being carried thereby from the ——— floor of said building to the ground floor thereof, and if you further find and believe from the evidence that as the plaintiff approached said elevator the door or gate was open, and that there was no operator upon said elevator, and that plaintiff believed and in the exercise of reasonable care had a right to believe the elevator was

<sup>74</sup> *International & G. N. R. Co. v. Anthony*, 57 S. W. 897, 24 Tex. Civ. App. 9.

<sup>75</sup> *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141.

<sup>76</sup> *Treadwell v. Whittier*, 22 P. 266, 80 Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175.



in service, and that after plaintiff had entered said elevator it suddenly started downward, and that thereupon plaintiff attempted to leave said elevator, and in attempting to do so, was caught between the elevator and the shaft and sustained injuries; and if the jury further find and believe from the evidence that the plaintiff at the time of approaching said elevator shaft and of entering therein, and while thereon, and in attempting to leave said elevator, was in the exercise of ordinary care for her own safety, and if the jury further find and believe from the evidence that the hydraulic machine operating said elevator was defective in condition and out of order and was so known to the defendant, or by the exercise of ordinary care might have been so known, and if the jury further find and believe from the evidence that the descent of said elevator was directly caused by the hydraulic machine being defective in condition and out of order, and that plaintiff attempted to leave the elevator in the circumstances referred to in plaintiff's instruction No. ———, then the court instructs the jury that your verdict must be for the plaintiff.<sup>77</sup>

**§ 1571. Same—Equipment of elevator shaft**

The court charges the jury that, even though the defendant had the gating over the elevator shaft on each floor constructed with an open space at the top in this case, such construction would not constitute actionable negligence, and the plaintiff would not be entitled to recover therefor.<sup>78</sup>

**§ 1572. Same—Violation of statute**

I charge you, gentlemen, that the plaintiff had a right to assume that the provisions of the law had been complied with, and that that car could not start up or down so long as the doors remained open. If you find that the statute was not complied with, and that that was the conducting cause of this accident, that of itself would be some negligence—sufficient negligence, perhaps; and it is for you to determine the weight which you will attach to that and all parts of the evidence.<sup>79</sup>

**§ 1573. Obstructions placed on track by persons not connected with carrier**

The court instructs the jury that if you believe, from a preponderance of the evidence, that the wreck in question was caused by some obstruction on the track, and that such obstruction was deliberately placed there without any fault or negligence on the part

<sup>77</sup> Cooper v. Century Realty Co., 123 S. W. 848, 224 Mo. 709.

<sup>78</sup> O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.

<sup>79</sup> Bullock v. Butler Exchange Co., 52 A. 122, 24 R. I. 50.



of the defendant, its agents or servants, then you will find for the defendant, provided you further find that the derailment of the train could not have been prevented by the exercise of the highest degree of human care and foresight, notwithstanding the obstruction, and in this connection you will take into consideration the evidence as to the lookout maintained by the engineer and fireman, what, if anything, was done to stop the train after its derailment or the discovery of danger, and the condition of the defendant's track, road-bed, and bridge; but if you believe from the evidence that the wreck could have been avoided by the exercise of the highest degree of care and foresight practicable to the operation of defendant's railroad in these particulars, and under these circumstances, then your verdict should be for the plaintiff.<sup>80</sup>

**§ 1574. Liability for acts of independent contractor**

You are instructed that if the jury believe, from the evidence, that the defendant company, while using its track for the carriage of passengers, engaged in a work to be done on its road, and in the immediate proximity to the track, negligence in the performance of which would, in the estimation and opinion of a reasonably cautious person, involve the hazard of obstructions to the passage of the cars, and an accident to a passenger is caused by an obstruction arising from negligence in the performance of the work, it is no defense to show merely that they had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of his employés.<sup>81</sup>

**9. Taking on Passengers**

**§ 1575. Duty of carrier in general**

You are instructed that if you find, from the evidence, that at the time of plaintiff's alleged injury the car on which he had entered was operated with the care defined in instruction No. ——— on the part of defendant's employés, in view of the actual position of its tracks at the place of said alleged injury, and in view of all the facts and circumstances in evidence, then your verdict should be for defendant.<sup>82</sup>

**§ 1576. Duty of carrier where passengers required to go between tracks to enter cars**

You are instructed that, when a railroad company receives its passengers from a space between parallel tracks, it is bound to

<sup>80</sup> St. Louis & S. F. R. Co. v. Posten, 124 P. 2, 31 Okl. 821.

<sup>81</sup> Carrico v. West Virginia Cent. & P. Ry. Co., 14 S. E. 12, 35 W. Va. 389.

<sup>82</sup> O'Connell v. St. Louis Cable & W. Ry. Co., 17 S. W. 494, 106 Mo. 482.

provide such safeguards as will protect passengers in the exercise of ordinary care from injury from a passing train; and if it fail to do this, whether its negligence consists in its failure to provide a proper platform, or failure to notify passengers who have gone between its tracks to enter its cars, of the approach of a train on a track, parallel to that on which its passenger train is standing, and an injury result from said failure to one of its passengers who is about to enter its car, without contributory negligence on the part of said passenger, the company is liable therefor.<sup>83</sup>

**§ 1577. Duty to give passenger time to procure ticket**

You are instructed that if you find, from the evidence, that the plaintiff went into the defendant's office at ——— within thirty minutes before the departure of said train for the purpose of purchasing a ticket with intent to take passage on defendant's train, and that the agent was not present in said office, and for that reason plaintiff did not purchase a ticket, and if he then went to the train and offered to board it, and if the conductor of said train directed or requested plaintiff to return to the office and procure a ticket, then it became the duty of said conductor to allow plaintiff a reasonable time in which to procure a ticket and return to said train before starting it; and if you find that the conductor started said train before plaintiff had time, by the exercise of reasonable diligence, to procure a ticket and return to and board said train, this would constitute negligence on the part of the defendant.<sup>84</sup>

You are instructed that if you find, from the evidence, that the failure of the plaintiff to get aboard said train before it started was caused by the negligence of the defendant, and if the plaintiff attempted to board said train while it was in motion, and if in so doing he fell or was thrown down as alleged in the petition, and injured, and if his injury was caused by the negligence of the defendant, and if he did not contribute to the bringing about of his injury by his own fault or negligence, you will find for the plaintiff.<sup>85</sup>

**§ 1578. Duty of conductor, when starting car, to know that no one is seeking to enter**

**§ 1578(1). Massachusetts**

You are instructed that, when a car stops on the street to receive passengers, it invites persons to enter the car and become

<sup>83</sup> Union Pac. Ry. Co. v. Sue, 41 N. W. 801, 25 Neb. 772.

<sup>84</sup> Missouri, K. & T. Ry. Co. of Texas v. Gist, 73 S. W. 857, 31 Tex. Civ. App. 662.

<sup>85</sup> Missouri, K. & T. Ry. Co. of Texas v. Gist, 73 S. W. 857, 31 Tex. Civ. App. 662.

passengers. Until that invitation is recalled, any person actually taking hold of the car and beginning to enter it is a passenger, and entitled to the protection of the principle that I have stated. It is true that the invitation may be recalled before the car starts. There may be circumstances under which the principle itself would require the recalling of the invitation. There may be such a pressure to enter the car that a load which it would be unsafe to move is accumulating, and it would be the duty of those in charge of the car to see that no more passengers should be received. The conductor does recall the invitation when he gives the signal for the car to move on, and he should not do that until he has reason to believe that all who have applied have reached the car in such a way that it is safe for the car to move. Nothing else appearing, no reason being shown why the conductor cannot know whether any person is attempting to board the car, it can be said that it is his duty to know. I cannot say that there are no circumstances that would, as a matter of law, justify him in starting, though, as a matter of fact, some one was at the time attempting to board the car. If he had stopped the car on a dark night, and all the passengers known by him to be seeking to enter had entered, and he took pains to examine on the outside to see if any others were seeking to enter, and, using all the means at his disposal to learn, he learned of none, he would be entirely justified in giving the signal to start, though it might happen that in the darkness of the night some one was seeking to enter. So I do not state to you, as a matter of law, that he must on all occasions and on every occasion know that no one is seeking to enter when he gives the signal to start; but when nothing is shown, more than the fact that the car had stopped to receive passengers, and that persons were seeking to enter, it is his duty to know whether any are entering at the time he gives the signal for starting. Now, unless there was some negligence on the part of the defendant—and I mean, by negligence of the defendant, negligence of any of its agents who are engaged in the management of the car—unless it is proved to your satisfaction that there was some negligence on their part, there can be no recovery by this plaintiff.<sup>86</sup>

§ 1578(2). *Minnesota*

The jury are instructed that if they believe, from the evidence, that the plaintiff came up to the car from the rear, and was not upon the car, but was in a position where the conductor, in the exercise of ordinary care in looking for intending passengers at the rear step of his car, would not ordinarily see plaintiff and the

<sup>86</sup> *Davey v. Greenfield & T. F. St. Ry. Co.*, 58 N. E. 172, 177 *Mass.* 106.

conductor, in the exercise of ordinary care in looking for intending passengers at the rear step, did look there, and in so looking saw no intending passenger, and at once gave the signal to go ahead, and the car thereupon started, then there could be no recovery in this case, and your verdict will be for the defendant.<sup>87</sup>

### § 1579. Duty to afford reasonable opportunity to board car

#### § 1579(1). Arkansas

The court instructs the jury that it is also the duty of the defendant company to stop its train at the station long enough to allow passengers to board and enter the car of the train, and it is the duty of the passenger to board and enter said train with reasonable dispatch, and it is negligence for the defendant company to start the train after it stops before the passenger has had a reasonable time to board and enter the train.<sup>88</sup>

#### § 1579(2). Kentucky

You are instructed that if you believe, from the evidence, that on the occasion in question plaintiff was at the station when the train stopped for the purpose of taking passage thereon, and attempted to board the train at a place where it was usual and customary for passengers to board defendant's trains, and the defendant failed to give plaintiff a reasonable opportunity to board the train, or started the train with a sudden, unusual and unnecessary jerk and plaintiff was thereby injured, you will find for plaintiff.<sup>89</sup>

You are instructed that if you believe, from the evidence, that plaintiff was not at the station when the train stopped for the purpose of taking passage thereon, or attempted to board the train at a place where it was not usual and customary for passengers to board defendant's trains, or that he was given a reasonable opportunity to board the train, and the train was not started with a sudden, unusual, and unnecessary jerk, then in either of these events you will find for the defendant.<sup>90</sup>

You are instructed that it was the duty of the defendant to stop its train at ——— a reasonable time for passengers demanding passage to have a reasonable opportunity to get on, and, if it failed to do so and by reason of this plaintiff was left at ———, the jury should find for her the damages she thereby sustained.<sup>91</sup>

<sup>87</sup> *Gaffney v. St. Paul City Ry. Co.*, 84 N. W. 304, 81 Minn. 459.

<sup>88</sup> *St. Louis, I. M. & S. Ry. Co. v. Williams*, 175 S. W. 411, 117 Ark. 329. This instruction has no reference to reaching a seat.

<sup>89</sup> *Louisville & N. R. Co. v. Quinn*, 219 S. W. 789, 187 Ky. 607.

<sup>90</sup> *Louisville & N. R. Co. v. Quinn*,

219 S. W. 789, 187 Ky. 607. In this case neither the conductor nor the brakeman saw plaintiff, who had flagged the engineer at a flag station and was getting on from the side opposite to the platform.

<sup>91</sup> *Chesapeake & Ohio Ry. Co. v. Austin*, 126 S. W. 144, 137 Ky. 611, 136 Am. St. Rep. 307.

## § 1579(3). Michigan

I further charge you in this case that if you should find upon the night in question that the plaintiff signaled for the car to stop, and that the motorman answered such signal with the usual answer of two short blasts of the whistle, then I charge you it was the duty of the defendant to have slowed down the car and brought it to a stop at the platform of the station so that plaintiff could have safely had access thereto; and if you should find that defendant did not do this, then it would be guilty of negligence, and plaintiff would be entitled to recover, if you should further find that defendant's failure to slow down the car was the proximate cause of the accident, and that plaintiff himself was free from any negligence that contributed to the injury. <sup>92</sup>

## § 1579(4). Missouri

The court instructs the jury that if you find and believe from the evidence that the car upon which the plaintiff boarded, or attempted to board, stopped at the usual stopping place, where plaintiff claims to have been injured, a reasonable length of time to enable plaintiff to board the same in safety by the exercise of ordinary care on his part, and if you believe that the signal to start was given prior to the attempt of plaintiff to enter the car, and that plaintiff understood such signal, then you will find your verdict for the defendant. <sup>93</sup>

The court instructs the jury that if they find from the evidence in this case that on ———, the defendant was operating the car mentioned in the evidence for the purpose of carrying passengers for hire; and if the jury further find from the evidence that on said day the plaintiff, at the crossing of ——— street and ——— avenue, in the city of ———, signaled the motorman of said car of his intention to become a passenger on said car at said place; and if the jury further find from the evidence that said place was where the defendant received passengers on its east-bound car; and if the jury further believe from the evidence that defendant's said motorman on said car, in obedience to said signal, slowed said car down, approaching and at said place, to enable the plaintiff to get upon said car as a passenger, and that the plaintiff, whilst said car was so slowed down for said purpose, attempted to get upon said car as a passenger—then it was the duty of defendant's motorman in charge of said car to use a high degree of care, such as would be exercised by a skillful and careful motorman under like circumstances, to so control and manage said car as to enable the plain-

<sup>92</sup> Rice v. Michigan Ry. Co., 175 N. W. 454, 208 Mich. 123.

<sup>93</sup> Quinn v. Metropolitan St. Ry. Co., 118 S. W. 46, 218 Mo. 545.

tiff to safely get upon said car, and reach a place of safety as a passenger.<sup>94</sup>

The jury are instructed that if you find, from the evidence, that the servants of the defendant stopped the car at the ——— street station for the purpose of receiving and letting off passengers, but did not stop the same a reasonably sufficient length of time to enable the plaintiff's husband, by the use of reasonable expedition and care, to get safely upon the car before it again started, and it was so started by the agents and servants of the defendant, while they saw that plaintiff's husband was in the act of climbing the steps of the platform for the purpose of getting upon the car as a passenger, whereby he was thrown down and killed without any fault or negligence on his part, then your verdict must be for the plaintiff.<sup>95</sup>

§ 1579(5). Texas

The court instructs the jury that, after the defendant's car stopped on this occasion at the corner of ——— and ——— streets, it was its duty to exercise the highest degree of care—that is, such care as a very cautious and prudent person would exercise under the same or similar circumstances—to allow said car to remain standing a reasonable length of time, and only a reasonable length of time, for all parties who were there intending to board said car to get thereon before starting the same, and a failure, if any, by the defendant, to exercise such care to keep said car standing after it stopped such reasonable length of time, would be negligence upon its part, and if plaintiff's said wife was prevented from boarding said car and received the injuries complained of as a direct and proximate result of such negligence, if any, it would be liable therefor, unless the plaintiff's said wife was guilty of negligence in not exercising ordinary care to board said car while it was standing.<sup>96</sup>

§ 1580. Suddenly starting car while passenger getting on

§ 1580(1). California

The court instructs the jury that, when a man signals a street car, at a place where such cars stop with or without signal to take on passengers, for the purpose of stopping it so he can board it and become a passenger, and the car stops or slows up as if intending to stop at that point in answer to the signal, and the man steps forward to the car, in plain view of those in charge of the operation of the car for the purpose of boarding the car, it then

<sup>94</sup> *Elkenberry v. St. Louis Transit Co.*, 80 S. W. 360, 103 Mo. App. 442.

<sup>95</sup> *Barth v. Kansas City El. Ry. Co.*, 44 S. W. 778, 142 Mo. 535.

<sup>96</sup> *Citizens' Ry. Co. v. Farley* (Civ. App.) 136 S. W. 94.



becomes the duty of those in charge of the car to ascertain and know whether or not he has safely boarded the car, or is in the act of boarding it, and it is negligence for them to suddenly start the car forward without warning, while he is in the act of boarding the car. <sup>97</sup>

§ 1580(2). Colorado

You are instructed that if you find and believe, from a preponderance or greater weight of the evidence, that the defendant carelessly and negligently started the car which plaintiff was seeking to enter while it was standing still, and while the plaintiff had one foot upon the step, and while attempting to place her other foot upon the platform of the car, and that the same was started with a sudden and violent jerk, and that by reason of the same being so carelessly and negligently started the plaintiff was thrown therefrom and onto the ground, and by reason of which she sustained injuries, and that said careless and negligent act of the defendant was the proximate and direct cause of the injuries sustained by the plaintiff, if she sustained any, then under such circumstances she is entitled to recover at your hands, provided she was not herself guilty of contributory negligence, as you have heretofore been instructed. Of course, if you find and believe that the defendant was not guilty of the act of negligence complained of, your verdict should be in its favor. <sup>98</sup>

§ 1580(3). Delaware

You are instructed that, if you believe that the car which the plaintiff was boarding was started so quickly and suddenly as to throw him off and injure him, and shall also believe that the plaintiff was not guilty of any negligence upon his part which contributed to the injury, then your verdict should be for the plaintiff. <sup>99</sup>

§ 1580(4). Illinois

The jury are instructed that, if you believe from the evidence that at a signal from plaintiff the car of defendant was stopped for him to get aboard, and that while he was in the act of doing so in a reasonable and proper manner, and exercising due care and caution, the car was suddenly and negligently started, and by means thereof the plaintiff was thrown to the ground and injured, as charged in the declaration, then the jury should find for plaintiff. <sup>1</sup>

<sup>97</sup> Nilson v. Oakland Traction Co., 101 P. 413, 10 Cal. App. 103.

<sup>98</sup> Colorado Springs & Interurban Ry. Co. v. Allen, 135 P. 790, 55 Colo. 391.

<sup>99</sup> File v. Wilmington City Ry. Co., 80 A. 623, 7 Pennewill, 463.

<sup>1</sup> Tremblay v. Tri-City R. Co., 113 Ill. App. 56.



**§ 1580(5). Kentucky**

You are instructed that if you believe, from the evidence, that at the time mentioned in the petition the defendant's car stopped at the corner of ——— and ——— streets for the purpose of allowing persons who proposed to become passengers to board the car, and that the plaintiff in this case, when the car had stopped, attempted to board it for the purpose of becoming a passenger, and that while she was in the act of boarding it the car was suddenly started in such a manner as to give her a wernch or jerk, and because of the sudden starting of the car she received the injuries of which she complains, and that she would not have been injured but for the sudden starting of the car, then the law is for the plaintiff, and you should so find.<sup>2</sup>

**§ 1580(6). Michigan**

The court instructs the jury that if you find, from the proofs, that the boy was in fact boarding a standing car and in a dangerous position, and also find that the conductor failed to exercise reasonable care and prudence to discover the presence of boarding passengers at the time the car was started up and plaintiff injured, then your verdict should be for the plaintiff. If, on the other hand, the boy was in the act of boarding a standing car, as he claims, and you find from the proofs that because of the short space of time he remained at the point of boarding the car or for any other reason a reasonable, careful, and prudent inspection of the approach to the car would not have led to the discovery of his position in boarding it, then there was no breach of duty, no negligence on the part of the employes of the defendant company, and there can be no recovery by plaintiff. The reason for this must be plain to you, for, as I have explained, recovery must be based upon the breach of duty to make reasonable inspection for boarding passengers, and if for any reason that reasonable inspection, as I have explained it, would have failed to discover the impending danger, if there were any, then there has been no breach of duty, and consequently no liability on the part of the defendant company.<sup>3</sup>

**§ 1580(7). Missouri**

The jury are instructed that it was the duty of said railroad company by and through its said conductor and other agents, servants, and employes in charge of said train, to exercise the highest degree of care that very prudent persons would use or exercise under the same or similar circumstances, for the safety of plaintiff while she was in the act of and attempting to board said train for the

<sup>2</sup> Louisville Ry. Co. v. Pulliam, 101 S. W. 295.

<sup>3</sup> Keeley v. City Electric Ry. Co., 133 N. W. 1085, 168 Mich. 79.

becomes the duty of those in charge of the car to ascertain and know whether or not he has safely boarded the car, or is in the act of boarding it, and it is negligence for them to suddenly start the car forward without warning, while he is in the act of boarding the car. <sup>97</sup>

§ 1580(2). Colorado

You are instructed that if you find and believe, from a preponderance or greater weight of the evidence, that the defendant carelessly and negligently started the car which plaintiff was seeking to enter while it was standing still, and while the plaintiff had one foot upon the step, and while attempting to place her other foot upon the platform of the car, and that the same was started with a sudden and violent jerk, and that by reason of the same being so carelessly and negligently started the plaintiff was thrown therefrom and onto the ground, and by reason of which she sustained injuries, and that said careless and negligent act of the defendant was the proximate and direct cause of the injuries sustained by the plaintiff, if she sustained any, then under such circumstances she is entitled to recover at your hands, provided she was not herself guilty of contributory negligence, as you have heretofore been instructed. Of course, if you find and believe that the defendant was not guilty of the act of negligence complained of, your verdict should be in its favor. <sup>98</sup>

§ 1580(3). Delaware

You are instructed that, if you believe that the car which the plaintiff was boarding was started so quickly and suddenly as to throw him off and injure him, and shall also believe that the plaintiff was not guilty of any negligence upon his part which contributed to the injury, then your verdict should be for the plaintiff. <sup>99</sup>

§ 1580(4). Illinois

The jury are instructed that, if you believe from the evidence that at a signal from plaintiff the car of defendant was stopped for him to get aboard, and that while he was in the act of doing so in a reasonable and proper manner, and exercising due care and caution, the car was suddenly and negligently started, and by means thereof the plaintiff was thrown to the ground and injured, as charged in the declaration, then the jury should find for plaintiff. <sup>1</sup>

<sup>97</sup> Nilson v. Oakland Traction Co., 101 P. 413, 10 Cal. App. 103.

<sup>98</sup> Colorado Springs & Interurban Ry. Co. v. Allen, 135 P. 790, 55 Colo. 391.

<sup>99</sup> File v. Wilmington City Ry. Co., 80 A. 623, 7 Pennewill, 463.

<sup>1</sup> Tremblay v. Tri-City R. Co., 113 Ill. App. 56.

§ 1580(5). *Kentucky*

You are instructed that if you believe, from the evidence, that at the time mentioned in the petition the defendant's car stopped at the corner of ——— and ——— streets for the purpose of allowing persons who proposed to become passengers to board the car, and that the plaintiff in this case, when the car had stopped, attempted to board it for the purpose of becoming a passenger, and that while she was in the act of boarding it the car was suddenly started in such a manner as to give her a wrench or jerk, and because of the sudden starting of the car she received the injuries of which she complains, and that she would not have been injured but for the sudden starting of the car, then the law is for the plaintiff, and you should so find.<sup>2</sup>

§ 1580(6). *Michigan*

The court instructs the jury that if you find, from the proofs, that the boy was in fact boarding a standing car and in a dangerous position, and also find that the conductor failed to exercise reasonable care and prudence to discover the presence of boarding passengers at the time the car was started up and plaintiff injured, then your verdict should be for the plaintiff. If, on the other hand, the boy was in the act of boarding a standing car, as he claims, and you find from the proofs that because of the short space of time he remained at the point of boarding the car or for any other reason a reasonable, careful, and prudent inspection of the approach to the car would not have led to the discovery of his position in boarding it, then there was no breach of duty, no negligence on the part of the employés of the defendant company, and there can be no recovery by plaintiff. The reason for this must be plain to you, for, as I have explained, recovery must be based upon the breach of duty to make reasonable inspection for boarding passengers, and if for any reason that reasonable inspection, as I have explained it, would have failed to discover the impending danger, if there were any, then there has been no breach of duty, and consequently no liability on the part of the defendant company.<sup>3</sup>

§ 1580(7). *Missouri*

The jury are instructed that it was the duty of said railroad company by and through its said conductor and other agents, servants, and employés in charge of said train, to exercise the highest degree of care that very prudent persons would use or exercise under the same or similar circumstances, for the safety of plaintiff while she was in the act of and attempting to board said train for the

<sup>2</sup> *Louisville Ry. Co. v. Pulliam*, 101 S. W. 295.

<sup>3</sup> *Keeley v. City Electric Ry. Co.*, 133 N. W. 1085, 168 Mich. 79.

purpose of being transported thereon; and if you further believe and find from the evidence that while said train was standing at said station platform for the purpose of taking on passengers, if you so find, the plaintiff, in the exercise of reasonable diligence and ordinary care on her part, proceeded to board said train for the purpose of being transported as such passenger, and that at said time and place the defendant railroad company, and the defendant ———, in charge of said train as conductor of defendant railroad company, if you find from the evidence he was conductor in charge thereof, negligently caused or suffered said train to start while plaintiff was so in the act of boarding the same, without any warning to plaintiff, and that at the time of so negligently starting said train, if you find it was so negligently started, the defendant railroad company, and the defendant ———, so in charge of said train as conductor, if you so find, knew, or by the exercise of the highest degree of care that a very prudent person would exercise under the same or similar circumstances would have known, that plaintiff was in the act of boarding said train, and that the negligent starting of said train, if you so find, caused plaintiff to be jerked or thrown therefrom and injured, and that plaintiff at all such times was in the exercise of such care, caution, and diligence as an ordinarily careful and prudent person would exercise under the same or similar circumstances, then the plaintiff is entitled to recover in this action, and it is your duty as jurors to return a verdict in her favor. <sup>4</sup>

You are instructed that, if you find and believe from the evidence that on ———, the defendant ——— Railroad Company owned and operated for the purpose of carrying passengers for hire the train of cars consisting of a passenger motorcar and passenger trailer on which plaintiff claims to have attempted to take passage, and if you further find from the evidence that on said date the plaintiff was standing at or near the intersection of ——— street and ——— avenue in ———, and that said train approached said point where plaintiff was standing, if he was, and that when said train reached said point it stopped, and if you further find from the evidence that while said train was standing still, if it was, the plaintiff stepped upon the step of said passenger motorcar for the purpose of being transported on said train, and that while the plaintiff was so getting upon said car and was partially on said car, and before he had a reasonable time or opportunity to get altogether upon said car, the defendant's servant or servants in charge of said train negligently caused said train to start suddenly,

<sup>4</sup> May v. Chicago, B. & Q. R. Co., 225 S.W. 660.

and that thereby the plaintiff was thrown to the ground and between said motorcar and said trailer, and his feet over one of the rails on which said train was running, and his feet were run over by said trailer, and he sustained the injuries mentioned in the evidence, and if you believe that the place where plaintiff attempted to board the car was the usual and customary place for taking on and discharging passengers, or, if it was not the usual and customary stopping place, that those in charge of the train knew before starting the cars that plaintiff was boarding the train and had not reached a place of reasonable safety, and if you further find and believe from the evidence that the plaintiff was not guilty of negligence which produced or contributed to his injury, then your verdict should be for the plaintiff. <sup>5</sup>

The court instructs the jury that if you believe from the evidence that the defendant on ———, was operating the car mentioned in the evidence, for the purpose of carrying passengers for hire, and that on said day it stopped said car at or near the corner of ——— street and ——— avenue, in ———, for the purpose of taking on or discharging passengers, and that while said car was so stopped plaintiff was standing at such stopping point, and thereupon immediately exercised reasonable expedition to get upon said car, and that while she was in the act of getting upon said car it was started forward by defendant before plaintiff could, by the exercise of reasonable expedition and reasonable care on her part, have gotten safely upon said car, and that the conductor of said car saw, or by the exercise of the highest practicable degree of care ought to have seen, said plaintiff while she was attempting to get on said car (if she was); and if you further believe that by the starting of said car (if it was started) said plaintiff was thrown off her balance, and that defendant's conductor in charge of said car jerked plaintiff toward him on the car in attempting to keep her from falling to the ground (if she was), and that she was thereby caused to fall against parts of said car and to the ground; and if you further believe that prudent men engaged in the street railway business, in the exercise of the highest practicable degree of care, would not have started said car forward under such circumstances—then the defendant was guilty of negligence; and if you believe that said plaintiff was, as the direct result of such negligence (if any), thrown against parts of said car and to the ground, and was thereby injured, then your finding should be for the plaintiff, provided you further believe that plaintiff was in the exercise of reasonable care, at the time. <sup>6</sup>

<sup>5</sup> *Husbands v. St. Louis Electric Terminal Ry. Co.* (App.) 196 S. W. 78.

<sup>6</sup> *Wellman v. Metropolitan St. Ry. Co.*, 118 S. W. 31, 219 Mo. 126.

You are instructed that if you find, from the evidence, that on the ——— day of ———, the defendant was a carrier of passengers for hire by street railroad, and used the railway and car mentioned in the evidence for such purpose, and if you further find from the evidence that on said day the defendant's employés in charge thereof stopped the car mentioned in the evidence at the west crossing of ——— street on ——— street in the city of ——— for the purpose of receiving the plaintiff as a passenger upon said car, and that, while said car was so stopped, the plaintiff was in the act of stepping upon the steps of said car to become a passenger thereon, and defendant's employés in charge of and operating said car carelessly and negligently, and without warning, caused said car to be started forward before the plaintiff had a reasonable time to get upon said car and to a place of safety, and that thereby the plaintiff was thrown upon the street and injured, and if the jury further find from the evidence that defendant's servants in charge of said car, by the exercise of the highest degree of care which would have been used by careful and skillful street railroad employés under like circumstances, could have prevented such movement of said car at such time, and thereby have averted the injury to plaintiff, and failed to do so, and if the jury further find from the evidence that the plaintiff, while in his attempt to board said car, was exercising ordinary care for his safety in doing so under the circumstances shown in the evidence, then the plaintiff is entitled to recover.<sup>7</sup>

You are instructed that if the jury find, from the evidence in this case, that the defendant was, on ———, operating the railway and car mentioned in the evidence as a carrier of passengers for hire, and if the jury find from the evidence that on said day the defendant's servants in charge of the east-bound car on ——— boulevard stopped said car at the intersection of ——— boulevard and ——— avenue to receive the plaintiff as a passenger thereon at the signal of the plaintiff of his intention to become a passenger on said car, and if the jury find from the evidence that, whilst said car was so stopped to receive the plaintiff as such passenger, the plaintiff was proceeding to get upon said car as a passenger, and that whilst he was in the act of doing so, and that whilst he was stepping upon said car to become a passenger, and before he had a reasonable time or opportunity to do so, defendant's servants in charge of said car negligently caused or suffered said car to be started, and that thereby the plaintiff was caused to be thrown and to fall from said car, and to sustain injuries to his person thereby, and if the jury find from the evidence that the plain-

<sup>7</sup> Devoy v. St. Louis Transit Co., 91 S. W. 140, 192 Mo. 197.



tiff was exercising ordinary care at the time of his injuries, then he is entitled to recover.<sup>8</sup>

The jury are instructed that it was the duty of those in charge of the car operated by the defendant company to stop at the station a reasonably sufficient length of time to allow passengers to get off and on the cars in safety; and if the jury believe from the evidence that they did not do so, and that while they saw plaintiff's husband getting upon the car they negligently, carelessly, and suddenly started up the car while he was in the act of getting on the car, and that plaintiff's husband was thereby thrown from said car and killed, without any fault or negligence on his part, then your verdict should be for the plaintiff.<sup>9</sup>

§ 1580(8). Oregon

You are instructed that your inquiry will be first whether the company was negligent in the particulars alleged in the complaint, and if you are satisfied by a preponderance of the evidence that this car came to a full stop at the usual stopping place for receiving passengers, and that while it was so stopped the plaintiff attempted to board the car in the usual and reasonable way, and while so doing the defendant, without paying care or attention to her safety, started that car and she was thereby injured, then the company is guilty of negligence in this case, and your verdict will be for the plaintiff, unless she contributed in some way to that injury herself.<sup>10</sup>

§ 1580(9). Virginia

The court instructs the jury that if they believe from the evidence in this case that the defendant, through its servants and agents, stopped a certain one of its cars near the ——— depot for the purpose of inviting and receiving passengers on board its cars, and that, while said car was standing for that purpose, the plaintiff attempted to get on board of said car as a passenger and while the car was standing still, and when she had taken hold of the railing of the platform and was attempting to get on the car, and before she had time to get on, the car was suddenly and without any warning to her negligently started, and the plaintiff was thrown, knocked, and jerked down on the street and injured, then the jury ought to find a verdict for the plaintiff, if they believe from the evidence that the said negligent starting of said car was the proximate cause of the plaintiff's injury.<sup>11</sup>

<sup>8</sup> Schmitt v. St. Louis Transit Co., 90 S. W. 421, 115 Mo. App. 445.

<sup>9</sup> Barth v. Kansas City El. Ry. Co., 44 S. W. 778, 142 Mo. 535.

<sup>10</sup> Tompkins v. Portland Ry., etc., Co., 150 P. 758, 77 Or. 174.

<sup>11</sup> Blue Ridge Light & Power Co. v. Price, 62 S. E. 938, 108 Va. 652.



## § 1580(10). Wisconsin

The jury are instructed that, if the train in being brought up to the ——— station came to a stop in such a manner as to induce the belief on the part of the passengers in waiting on the platform that it had stopped for the reception of passengers, and then, when the passengers, acting on this belief, were going aboard, it started again without caution or signal given, this would constitute an act of negligence on the part of defendant, and it would make no difference whether, in so starting the train, it was intended to proceed to the next station, or merely to locate it more conveniently at the same station.<sup>12</sup>

## § 1581. Same—Negligence of motorman in starting car without signal

I should say a word upon the effect of the motorman's starting the car without having received a signal from the conductor. I do not say to you, as matter of law, that that would be negligence, but the starting of the car by the motorman without having received the signal from the conductor is to be treated just as if he had had the signal; that is, if it would have been negligence on the part of the conductor to have given the signal and to have had the car started at that moment, then it was negligence on the part of the motorman to start it at that moment. In other words, the corporation was negligent if that car was started when passengers were in the act of entering the car, and were in such a position that they were injured by its starting, whether its starting at the moment was due to the improper action of the conductor in giving the signal, or to the improper action of the motorman in starting without it.<sup>13</sup>

## § 1582. Same—Unauthorized signal to start train

You are instructed that if the jury believe, from the evidence, that some person not in the employment of the defendant company rung the bell which started the train at the time in question, still that fact will not exempt the defendant company from liability in this case, provided the jury believe from the evidence that the conductor could, by use of due care and diligence, have countermanded the unauthorized signal for starting the train in time to have prevented any injury to plaintiff, if he (the conductor) had exercised due care and diligence in the discharge of his duties, and provided the jury believe from the evidence the plaintiff, at the time in question, was in the exercise of reasonable care and diligence for his own safety.<sup>14</sup>

<sup>12</sup> Curtis v. Detroit, etc., R. Co., 27 Wis. 158.

<sup>13</sup> Davey v. Greenfield & T. F. St. Ry. Co., 58 N. E. 172, 177 Mass. 106.

<sup>14</sup> North Chicago St. R. Co. v. Cook, 33 N. E. 958, 145 Ill. 551.

**§ 1583. Duty to passenger incumbered with parcels**

Duty to assist passenger in alighting, see post, § 1653.

You are instructed that the trainmen were bound to allow plaintiff a reasonable time to get safely upon the car, and, the plaintiff having packages in his hands, they were bound to conduct themselves in starting the train in reference to that fact. These trains are not, of course, ordinarily expected to make long stops. But if anything is apparent in the condition of the passenger, so that he would be likely to be thrown or injured by a motion of the car, then proper regard for his safety might require a train to be held in position to avoid it. Care and negligence, in any case, depend upon the circumstances of the particular case. The care, both by the plaintiff and defendant, must depend largely upon the circumstances.<sup>15</sup>

**§ 1584. Duty as to passenger attempting to board moving car****§ 1584(1). Kentucky**

You are instructed that it was the duty of the defendant and its agents in charge of the car upon which the plaintiff was seeking to become a passenger, after they were notified and knew, if they did know, that plaintiff was seeking to become a passenger, to observe the highest degree of care which a prudent person would exercise under like or similar circumstances in the management and control of the car, to enable plaintiff to board it with reasonable safety, and if the jury believe from the evidence that the motorman in charge of defendant's car failed to exercise that degree of care after he knew plaintiff's intention to become a passenger, and failed to give the plaintiff a reasonable opportunity to board said car, after same had slowed down to an extent or degree which would reasonably warrant an ordinarily prudent person in assuming he could board same with reasonable safety to himself by the exercise of ordinary care, or if they believe from the evidence that the motorman started said car forward, after it had slowed down and plaintiff had attempted to board it, with an unnecessary, unusual jerk or lurch, and the plaintiff was thereby thrown under the car and injured the law is for him, and the jury should so find.<sup>16</sup>

The jury are instructed that, if the plaintiff attempted to get on the car while in motion, and the conductor had reasonable ground to believe she was in danger of falling from the car, it was his duty to take such steps for her protection as under the circumstances ordinary care required; and, if in holding or jerking her to prevent her from falling from the car he used no more force than

<sup>15</sup> Steeg v. St. Paul City Ry. Co., 52 N. W. 393, 50 Minn. 149, 16 L. R. A. 379.

<sup>16</sup> Kentucky Traction & Terminal Co. v. Waits, 180 S. W. 356, 167 Ky. 236.

reasonably appeared to be necessary under the circumstances for her protection, and she was thus accidentally hurt, the law is for the defendant and the jury should so find.<sup>17</sup>

§ 1584(2). Missouri

You are instructed that if the jury believe, from the evidence in this case, that on ——— the defendant was operating the car mentioned in the evidence for the purpose of carrying passengers for hire from one point to another in the city of ——— by street railway; and if the jury further find from the evidence in this case that on ———, the plaintiff was on the east crossing of ——— avenue and ——— street, in the city of ———, intending to become a passenger upon defendant's east-bound car at said place, and said place was where the defendant received passengers on its east-bound car; and if the jury further find from the evidence that whilst so at said crossing the plaintiff signaled defendant's motorman in charge of its east-bound car, approaching said point, of his intention to become a passenger upon said car at said place; and if the jury further find from the evidence that said motorman, in obedience to said signal, slowed said car down as it approached said crossing for the purpose of receiving the plaintiff as a passenger on said car while it was so slowed down and moving slowly at said crossing; and if you further find from the evidence in this case that, after said car was so slowed down, it was so moving slowly at said crossing, and while so moving slowly the plaintiff stepped upon the step of the rear platform of said car for the purpose of becoming a passenger on said car, and that whilst the plaintiff was so getting upon said car, and before he had a reasonable time or opportunity to get upon said car as a passenger, defendant's motorman in charge of said car caused or suffered said car to suddenly go forward with increased speed and shock, and that thereby the plaintiff was caused to be thrown and fall from said car and sustain injuries; and if the jury believe from the evidence that the defendant's motorman so in charge of said car, while plaintiff was in the act of getting on the car, failed to exercise such high degree of care as would be exercised by a skillful and careful motorman under the same or similar circumstances, and thereby directly caused said movement of said car, and plaintiff's injuries; and if the jury find from the evidence that the plaintiff was exercising ordinary care at the time in so getting upon said car, and whilst on said car—then the plaintiff is entitled to recover.<sup>18</sup>

<sup>17</sup> South Covington & C. Ry. Co. v. Raymer, 116 S. W. 281, 132 Ky. 187, 136 Am. St. Rep 177.

<sup>18</sup> Elkenberry v. St. Louis Transit Co., 80 S. W. 360, 103 Mo. App. 442.

You are instructed that if the jury find, from the evidence, that the car was slowed down while passing around the curve leading from ——— avenue to ——— street for the purpose of making it safe in getting around said curve, and that such slowing down was not done for the purpose of enabling the plaintiff to get upon the car, then such slowing down of the car was not an invitation to plaintiff to attempt to get upon the same, and if the motorman did not know, and had no reasonable cause to think, that the plaintiff was attempting to get on said car while it was in motion, then it was not negligent or improper in the motorman to accelerate the motion of said car when leaving said curve, and such facts, if you find them to be true from the evidence, do not authorize the plaintiff to recover.<sup>19</sup>

§ 1584(3). Oklahoma

You are instructed that if you believe, from the evidence in this case, that the passenger train testified about slowed down at the town of ———, and that the plaintiff took hold of the rods and pulled up, and thereby got upon the first step, and that the conductor saw him there and prevented him from getting on the car any further, and thereupon signaled the engineer to increase the speed, and the speed of the train was then increased suddenly, and the plaintiff was thereby thrown from the step where he was standing, and that no negligent act of his after he had gained the first step contributed to the fall, then the defendant would be liable for any injury that resulted from such fall.<sup>20</sup>

You are further instructed that if you find by a fair preponderance of the evidence that the defendant company followed the course of permitting passengers to and from ——— to board its train at said place, either while moving slowly or stopping the same, had collected fares from such passengers, that the plaintiff knew this at the time he went to the railroad at ———, that the plaintiff signaled the engineer upon the train at the said time, that the engineer saw the signal and the train slowed up, and the plaintiff, with the intent of becoming a passenger upon the said train, caught hold of the handholds on one of the coaches and was in the act of boarding said train, that the conductor and engineer saw the position and understood the purpose of the plaintiff, and at that time the conductor signaled the engineer to move forward with increased rate of speed, that the engineer obeyed the signal and jerked the train forward, and thereby violently threw the plaintiff loose from the train and down the embankment, and in that man-

<sup>19</sup> Eikenberry v. St. Louis Transit Co., 80 S. W. 360, 103 Mo. App. 442.

<sup>20</sup> Webb v. Missouri, O. & G. Ry. Co., 179 P. 17.

ner inflicted injuries complained of by the plaintiff, that in that event you should find in favor of the plaintiff.<sup>21</sup>

You are further instructed that if you find by a fair preponderance of the evidence that the defendant company had followed the course of permitting persons to become passengers from ——— to board its passenger trains at ——— while the same were moving slowly through the said town, collecting fares from such passengers so boarding said train, and that the plaintiff knew of the said practice, and the plaintiff went to the place on the defendant's railroad where persons had been in the habit of boarding the said train, and there signaled the passenger train in the usual manner, and the signal was seen by the engineer of the said train, and thereupon the train slowed down and the plaintiff caught the handholds of one of the coaches composing the said passenger train, and was in the act of boarding the same, and that the conductor and engineer saw and knew his position and understood his purpose, then in that event it was the duty of the said servants of the defendant company to maintain the said slow rate of speed until the plaintiff had a reasonable opportunity to safely board the train, and it was the duty of the said servants to refrain from suddenly increasing the speed of the said train while the plaintiff was in the act of boarding the same; if you find by a fair preponderance of the evidence the above facts to be true, and that by reason of the acts of the said conductor and engineer in increasing the said rate of speed the plaintiff was thrown violently to the ground and injured as alleged by the plaintiff, you should find for the plaintiff.<sup>22</sup>

§ 1584(4). Texas

You are instructed that if you find, from the evidence, that on or about the ——— day of ———, plaintiff was on ——— street in the city of ———, and that, as one of defendant's cars approached the point where plaintiff was, he signaled to an employé in charge of said car to stop same so that he (plaintiff) might take passage thereon, and you further find that, in obedience to said signal, if any, said car was reduced to a slow rate of speed, and that thereupon plaintiff stepped aboard the running board of said car, and you further find that as plaintiff stepped aboard said running board, if you find he did, defendant's employé operating said car caused said car to suddenly and violently start forward, and that plaintiff was thereby thrown against the side of said car, and by reason thereof sustained any of the injuries complained of in his petition, and you further find that in causing said car to suddenly and violently start forward, if you find he did, said defend-

<sup>21</sup> Webb v. Missouri, O. & G. Ry. Co., 179 P. 17.

<sup>22</sup> Webb v. Missouri, O. & G. Ry. Co., 179 P. 17.

ant was guilty of negligence, and that such negligence, if any, was the direct cause of plaintiff's injury, if any, and you further find that plaintiff was not guilty of any negligence that caused or contributed to his injury, if any, then you will find for plaintiff.<sup>23</sup>

**§ 1585. Misleading passenger into attempt to board moving car**

**§ 1585(1). Missouri**

The court instructs the jury that if you find and believe from the evidence that on or about the ——— day of ———, the defendant was operating certain lines of street railroads in the city of ———, and particularly a double-track line of railroad running east and west on ——— avenue, past the intersection of ——— and ——— avenues, in said city; and if you further find and believe from the evidence that the plaintiff attempted to board one of the defendant's east-bound cars on ——— avenue, at the intersection of said ——— and ——— avenues, and on the east side of said ——— avenue and south side of said ——— avenue, at a place where defendant's cars were in the habit of stopping to receive passengers, and that plaintiff, at said time and place, had reason to believe, and did believe, that said car was stopping for passengers to board said car at said place; and if you further believe and find from the evidence that the plaintiff took hold of the handrail of said car at the rear end thereof for the purpose of becoming a passenger on said car; and if you find from the evidence that the defendant's servants in charge of said car knew, or by the exercise of ordinary care should have known, that plaintiff was attempting to board said car as a passenger; and if you further believe from the evidence that after the plaintiff had so taken hold of the handrail of said car at the rear end thereof for such purpose the said servants in charge of said car suddenly started the same before the plaintiff had a reasonable time to get upon said car and to a place of safety therein, and that the injury complained of was caused by the failure to stop the car and by such sudden starting of the car under such circumstances; and if you further believe from the evidence that the plaintiff at the time exercised ordinary care in attempting to board the car in the manner shown by the evidence—then your verdict should be for the plaintiff.<sup>24</sup>

**§ 1585(2). Wisconsin**

The jury are instructed that, if you believe from the evidence that the train had not come to a full stop, but that the stop, during which the plaintiff attempted to go on board, was one which resulted from checking the speed of the train in bringing it up to the

<sup>23</sup> Gildemeister v. San Antonio Traction Co. (Civ. App.) 135 S. W. 1097.      <sup>24</sup> Maguire v. St. Louis Transit Co., 78 S. W. 838. 103 Mo. App. 459.



station, yet if the passengers were directed to go on board by the men in charge of the train, the plaintiff had a right to assume that the train was ready for his reception, and cannot be charged with negligence in following that direction, provided the train when he attempted to enter, was actually still at the time, and if the cars were not ready for the reception of passengers, it was a clear act of negligence in the defendant's servants to tell him to go on board.<sup>25</sup>

**§ 1586. Duty to prevent getting on while train in motion**

The court instructs the jury that ———, the plaintiff, had no right to board, or attempt to board, a moving train, and took upon himself the risk and hazards incident to his getting on, or attempting to get on, a moving train; and the employes of the defendant in charge of the train were under no duty to keep a lookout for persons, or for him, in attempting to board the train as plaintiff claims he did, but yet, should the jury believe and find from the evidence that plaintiff did board, and was on the steps of, the car of said train while the car was in motion, and that the defendants' flagman, an agent and servant, willfully and with much force, jumped against the plaintiff while the plaintiff had hold of the grabirons, if they believe he did have hold of them, and knocked plaintiff loose therefrom, and caused him to fall from the train to the ground, if they believe he did fall therefrom, and to be run over and injured by the train, they will find for the plaintiff.<sup>26</sup>

**§ 1587. Requirements of ordinance as to time and place of stopping cars**

The court instructs the jury that at the time said ——— was injured the city ordinance introduced in evidence imposed upon the servants, agents, and employes of the defendant, while running, conducting, or managing the street car in question, the following duties: That they should stop cars going eastward on ——— avenue on the east side of ——— avenue for taking on passengers: that they should bring cars going eastward to a full stop on the east side of ——— avenue at the intersection of ——— avenue and ——— avenue whenever requested, signaled, or motioned by any person standing at the southeast corner of the intersection of said ——— and ——— avenues desiring to board such cars, and in every instance to keep such cars stationary for a reasonable length of time to enable such persons desiring to board such cars safely to board such cars. And if the jury believe from the evidence that the agents, servants, and employes of the defendant, while run-

<sup>25</sup> *Curtis v. Detroit, etc., R. Co.*, 27 Wis. 158.

<sup>26</sup> *Louisville & N. Ry. Co. v. Copley*, 197 S. W. 648, 177 Ky. 171.



ning, conducting, or managing said street car upon the occasion referred to, failed to perform any one or more of the duties specified in this instruction, such failure was negligence. And if you believe from the evidence that in consequence of such negligence in any one or more of the particulars hereinabove mentioned the said ——— received the injuries which are complained of in his petition herein, your finding should be for the plaintiff, unless you further believe from the evidence that the said ——— was guilty of negligence which contributed to the injury; and the burden of proving contributory negligence on the part of said ——— rests on the defendant, and, unless the defendant has proven such contributory negligence by a preponderance of the evidence, you cannot find for the defendant on that ground.<sup>27</sup>

**§ 1588. Closing door on passenger's foot**

The court instructs the jury that if you find and believe from the evidence that on the ——— day of ———, the ——— Company owned the car mentioned in the evidence, and that defendants were operating the same for the carriage of passengers for hire, and that defendants' servants were in charge thereof, and that said car was a car of the P. Line and was west-bound and stopped at a point at or near the intersection of ——— and ——— streets, in ———, for the purpose of receiving passengers, and that said point was a usual and customary stopping place for cars on that line to take on or discharge passengers, that within a reasonable time after said car stopped plaintiff attempted to board said car at the rear end thereof, while the same was standing, for the purpose of transportation, and with the intention of paying her fare thereon, and had one foot upon the platform of said car and was in a position of peril, and that defendants' servants in charge thereof knew or by the exercise of the highest practicable degree of care that careful, experienced, and skillful street car operatives would exercise under the same or similar circumstances could have known of plaintiff's perilous position on said car, and if you further find from the evidence that while plaintiff was so on said car, if she was, and that before she had a reasonably sufficient time to reach a place of safety on said car, defendants' servants in charge thereof negligently caused, suffered, or permitted the step or door of said car to close on or against plaintiff's right foot or body, and thereby directly caused her to fall on the platform of said car and the street and sustain injuries, and if the jury further find and believe from the evidence that defendants' servants in charge of said car, while plaintiff was so on said car (if she was), failed in the fore-

<sup>27</sup> Maguire v. St. Louis Transit Co., 78 S. W. 838, 103 Mo. App. 459.

going respects to exercise such a high and practicable degree of care, and thereby directly caused, suffered, or permitted such closing of said step and door of said car, and in consequence thereof plaintiff was injured, and if the jury further find and believe from the evidence that plaintiff, while attempting to board said car, was exercising such care as a reasonably prudent and careful woman would exercise for her own safety under like circumstances, then your verdict should be for the plaintiff.<sup>28</sup>

**§ 1589. Duty to give passenger opportunity to reach place of safety on car**

**§ 1589(1). Michigan**

Your first inquiry here, gentlemen of the jury, should be: What actually happened after the plaintiff attempted to or did succeed in boarding this car? It seems to be conceded that the car was brought to a full stop. Thereupon it was the duty of defendant to give the plaintiff a reasonable opportunity to board it, and to come to a position of safety upon the car. If they did that, then the defendant did its full duty and is not liable.<sup>29</sup>

**§ 1589(2). Missouri**

The court instructs the jury that if they find from the evidence that the defendant, on ———, was operating the car mentioned in the evidence for the purpose of carrying passengers for hire by street railway, and if the jury find from the evidence in this case that defendant's motorman, at a signal given by the plaintiff, stopped said car to allow plaintiff to get on said car as a passenger, then it was the duty of the defendant, by its servants in charge of said car, to hold said car still until the plaintiff had a reasonable time and opportunity to get upon said car, and in a position of reasonable security on said car.<sup>30</sup>

You are instructed that if you find from the evidence that the plaintiff, on or about ———, got upon the rear platform of one of the cars that was then being operated by defendant as a carrier of passengers, and that thereafter he was thrown from said platform and injured by reason of the omission of such care on the part of the operatives or employes of defendant in operating or moving said car (at the time and place of the injury) as is particularly defined in instruction No. ———; and if you further find from the evidence that by reason of such want of care the car on which plaintiff was riding at the time was started by defendant's employes rapidly around a certain curve at the junction of ———

<sup>28</sup> Sparks v. Harvey (Mo. App.) 214 S. W. 249.

<sup>29</sup> Formiller v. Detroit United Ry., 130 N. W. 347, 164 Mich. 658.

<sup>30</sup> Schmitt v. St. Louis Transit Co., 90 S. W. 421, 115 Mo. App. 445.

and ——— streets before plaintiff had a reasonable time to reach a position of reasonable safety on said car, and that plaintiff thereafter paid his fare as a passenger on said car—then your verdict should be for plaintiff.<sup>31</sup>

The court instructs the jurors that defendant was not bound to carry plaintiff safely, absolutely, and at all events, but was only bound to operate its train of cars under all of the circumstances with the highest degree of care of a very prudent person, and if the jurors are satisfied from all the evidence in the case that defendant's servants, operating the coach from which plaintiff says he was thrown, gave plaintiff reasonable opportunity to get in a place of safety before the car was started, then the verdict will be for defendant.<sup>32</sup>

### § 1590. Care required while passenger going to seat

#### § 1590(1). Kentucky

You are instructed that if you believe, from the evidence, that plaintiff, while entering defendant's car, was injured by being thrown against one of the seats thereof, and that such injury was caused by the negligence of defendant's agents or employes in charge of said car in starting said car by a reckless or unnecessary and unusual jerk or lurch, you will find for plaintiff.<sup>33</sup>

You are instructed that it was not the duty of the agent and servant of the defendant in charge of the car to have the car remain standing until the plaintiff was seated in said car; and unless you believe from the evidence that the said agent or servant in charge of the car failed to exercise that degree of care with which he was charged, as set out in instruction No. ———, and by a reckless or unnecessary jerk or lurch of said car started the same, and the plaintiff was injured thereby, the law is for the defendant, and you should so find.<sup>34</sup>

#### § 1590(2). Washington

You are instructed that, if you find from a preponderance of the evidence that the said ——— got upon the rear platform of said car, and thereafter, while endeavoring to secure a place of safety and a seat in said car, she exercised reasonable and ordinary care for her own safety under all the circumstances, and proceeded as expeditiously as she could under all the circumstances toward a seat in said car, and if before she became seated the defendant's

<sup>31</sup> O'Connell v. St. Louis Cable & W. Ry. Co., 17 S. W. 494, 106 Mo. 482.

<sup>32</sup> O'Connell v. St. Louis Cable & W. Ry. Co., 17 S. W. 494, 106 Mo. 482.

<sup>33</sup> Lexington Ry. Co. v. Britton, 114 S. W. 295, 130 Ky. 676.

<sup>34</sup> Howard v. Louisville Ry. Co., 105 S. W. 932; Bennett v. Louisville Ry. Co., 90 S. W. 1052, 122 Ky. 59, 4 L. R. A. (N. S.) 558, 121 Am. St. Rep. 453.

servants and employes started said car without exercising the highest degree of care reasonably practicable under the circumstances and conditions existing at the time and place in question, and by reason thereof the said ——— was injured as is alleged in the complaint, such acts of the defendant's servants and employes would constitute negligence, and the defendant would be liable to the plaintiffs for damages sustained by the said ——— as a result of being thrown against the handles of the doors of said car, and against the sill thereof, and then thrown upon the floor of said car, provided you further find that she was without negligence on her part.<sup>35</sup>

**§ 1591. Injuries caused in attempting to regulate time or method of entering train**

You are instructed that the plaintiff had the right in law to board said train and to make all reasonable effort to do so, so long as he was not at the time doing violence to, or hurt to, some other passenger's right to enter the train who at the time was also attempting to get aboard said train. If therefore you believe, from the evidence that at the time plaintiff attempted to board said train, the stool and steps leading up to the car were unoccupied, and that he was making an effort to ascend the steps and get aboard the train, then you are instructed he had the right to do this, and the brakeman had no right to undertake to prevent him from doing so. And if you further believe that, in the attempt of said brakeman to prevent him from going upon said train, he was knocked or pushed down and over against the steps of the car, or other part of the train, and sustained injuries, then and in such event, your verdict should be for the plaintiff.<sup>36</sup>

**§ 1592. Injuries caused in attempting to exclude intoxicated passenger**

You are instructed that if the plaintiff, when he offered to get on the car, was so far intoxicated as to affect his conduct, or if the conductor believed, and under all the circumstances had reasonable grounds to believe, that if admitted to the car he would be boisterous or disorderly, or if on previous occasions, when intoxicated, he had been guilty of vulgar or offensive conduct on the cars of defendant, and was at the time in a similar state of intoxication, then in any of these states of case the conductor had a right to refuse to receive him on the car, and the jury should find for the defendant,

<sup>35</sup> Behling v. Seattle Electric Co., 96 P. 954, 50 Wash. 150.

<sup>36</sup> St. Louis Southwestern Ry. Co. of Texas v. Hassell (Tex. Civ. App.) 177 S. W. 518.

unless the conductor pushed him from the car as set out in No. \_\_\_\_\_.<sup>37</sup>

You are instructed that if, while the plaintiff was on the steps of the car, and while the car was in motion, the conductor willfully and with force pushed him from the car, causing him to fall to the ground and to be injured, you should find for the plaintiff.<sup>38</sup>

**§ 1593. Duty to persons accompanying passengers for purpose of assistance**

The jury are instructed that if they believe from the evidence that one of the employés of the defendant in charge of said train took his position at the steps of the coach for the purpose of assisting passengers off and on said train, and that plaintiff informed said employé of his intention to attend his wife, seat her, and then leave the train, and said employé assented thereto, then it was the duty of defendant to stop its train a reasonably sufficient time to allow the plaintiff to assist his wife thereon and to attend her and to seat her and then alight therefrom in safety; and if you further believe from the evidence that the defendant did not so stop its train a reasonably sufficient time as above charged, and that it thereby caused the plaintiff to fall from said train and to be injured, then you will find for the plaintiff, unless you find against the plaintiff on the ground that he was guilty of contributory negligence under subsequent paragraphs of this charge.<sup>39</sup>

**10. Care Required in Management and Operation to Prevent Injuries in Transit**

**§ 1594. Degree of care required in general**

See, also, ante, § 1552(2).

**§ 1594(1). Alabama**

The court charges the jury that, if they are reasonably satisfied from the evidence in this case that the plaintiff was a passenger upon the street car of the defendant at the time of his injuries, then it was the duty of the employés of the defendant, then in control of said car, to exercise the highest degree of care, skill, and diligence known to very careful, skillful, and diligent persons engaged in like business, to avoid injury to plaintiff; and it is for the jury to determine, under the evidence, whether or not such care, skill, and diligence was exercised by the employés then in control of the said car.<sup>40</sup>

<sup>37</sup> Louisville & E. R. Co. v. McNally (Ky.) 105 S. W. 124.

<sup>38</sup> Louisville & E. R. Co. v. McNally (Ky.) 105 S. W. 124.

<sup>39</sup> St. Louis Southwestern Ry. Co. v. Cunningham, 106 S. W. 407, 48 Tex. Civ. App. 1.

<sup>40</sup> Mobile Light & R. Co. v. Hughes, 67 So. 278, 190 Ala. 216.

**§ 1594(2). Arkansas**

You are instructed that if you should find that there was an injury received by the plaintiff, and that the same was caused by the negligence, carelessness, or improper management of the defendant, you will find for the plaintiff, unless you find also that the plaintiff by his negligence contributed to such injury. In case you should find that the plaintiff's negligence occasioned or contributed to such injury, if any, you will find for the defendant.<sup>41</sup>

**§ 1594(3). Indiana**

You are instructed that, where a collision between two passenger cars on the railroad of a common carrier is caused by the negligence of such carrier's servants in charge of said cars, while operating the same, it will not be permitted to say, in defense to an action for damages brought by one of its passengers who may have been injured in such collision, that it could not anticipate that its servants would be negligent. Under such circumstances, the negligence of the carrier's servants is the negligence of the carrier itself, and it must respond in damages to any of its passengers who, without fault, are injured thereby.<sup>42</sup>

**§ 1594(4). Missouri**

The jury are instructed that if you believe and find from the evidence that the defendant, at the time of the occurrence in question, received and accepted the plaintiff's said husband, deceased, as a passenger upon a car which it was then operating, then the degree of care which defendant and its employes were bound to exercise towards plaintiff's said husband while he was so being carried upon said cars was this: Defendant was bound to run and operate its cars with the highest practical degree of care of a very prudent person engaged in like business, in view of all the facts and circumstances, as shown in evidence, at the time of the alleged killing of plaintiff's said husband; and defendant is liable in this case if its agents, servants, and employes in charge of said cars were guilty of even slight negligence in the management and operation thereof, if the jury further find and believe from the evidence that the death of plaintiff's said husband was the result of such negligence, and that plaintiff's said husband was, at the time of the happening of the occurrence in question, exercising ordinary care himself.<sup>43</sup>

**§ 1594(5). Nebraska**

The jury are instructed that, if you find from a preponderance of the evidence that the defendant failed to exercise that high de-

<sup>41</sup> St. Louis & S. F. Ry. Co. v. Murray, 18 S. W. 50, 55 Ark. 248, 16 L. R. A. 787, 20 Am. St. Rep. 32.

<sup>42</sup> Louisville & S. I. Traction Co. v. Lloyd, 105 N. E. 519, 58 Ind. App. 39.

<sup>43</sup> Sweeney v. Kansas City Cable Ry. Co., 51 S. W. 682, 150 Mo. 385.



gree of care and caution required of them while carrying said ———, and the defendant negligently permitted said ——— to become injured on account of a failure on its part to properly care for said ——— while a passenger, and you further find that the injuries of said ——— were the direct result of such negligence on the part of said defendant, then you are instructed that your verdict should be for the plaintiff.<sup>44</sup>

**§ 1594(6). Washington**

You are instructed that the defendant is not an insurer of the safety of its passengers in any and at all events. If its motormen exercised the highest degree of care to avoid the accident which is reasonably practicable under the circumstances and conditions existing at the time and place in question, the demands of the law are satisfied. By the term "highest degree of care," used in these instructions, is meant that degree of care which would be exercised under like circumstances by very careful, prudent, and experienced conductors and motormen generally.<sup>45</sup>

**§ 1595. Liability for unauthorized acts of strangers**

Starting signal given by outsider, see post, § 1637.

**§ 1595(1). United States**

The jury are instructed that, if a trespasser boarded and ran the car, the defendants are not liable, provided the motorman who started the car from the wharf, and who was admittedly a servant of the defendant when he left the car to go forward, as he says he did, to help another car which had been stalled, took reasonably proper and effective means to guard his car from being started by a trespasser during his absence.<sup>46</sup>

**§ 1595(2). Virginia**

The court instructs the jury that, even if the jury believed from the evidence that the plaintiff was injured while a passenger upon the elevator of the defendant, and that such injury was caused by the negligence of the person operating it, if they also believe that such person was directed to operate it by ——— without the knowledge or means of knowledge or consent, or authority of the defendant, they will find for the defendant.<sup>47</sup>

<sup>44</sup> *Quimby v. Bee Bldg. Co.*, 127 N. W. 118, 87 Neb. 193, 138 Am. St. Rep. 477.

<sup>45</sup> *Connell v. Seattle, R. & S. Ry. Co.*, 92 P. 377, 47 Wash. 510. The allegations of negligence were in very general terms, simply saying that there was a head on collision, which

could have been prevented by the exercise of proper care.

<sup>46</sup> *Thompson v. Green* (O. C. A. N. J.) 174 F. 404, 98 C. C. A. 621.

<sup>47</sup> *Board of Trade Bldg. Corporation v. Cralle*, 63 S. E. 995, 100 Va. 246, 22 L. R. A. (N. S.) 297, 132 Am. St. Rep. 917.



**§ 1596. Duty to avoid alarming passenger**

You are instructed that the mere fact that the plaintiff, through fear and apprehension of danger, did an act which was the immediate cause of injury to himself, is not of itself sufficient to authorize a finding for him; but to authorize such finding you must also find that the defendant was guilty of some act of negligence, carelessness, or improper management in running his train in close proximity to plaintiff, which was sufficient to create in the mind of a reasonable and prudent person such fear and apprehension.<sup>48</sup>

**§ 1597. Duty to avoid collision with other vehicles**

Presumption from fact of collision, see post, § 1717.

**§ 1597(1). California**

I instruct you that, if you find from the evidence that the car of the ——— Railroads of ——— moving south along ——— street came to a stop at the corner of ——— and ——— streets, that the motorman looked and saw the ——— street car approaching, but a sufficient distance away to allow him to pass in safety over the track, and that he did attempt so to pass, but before he had completely passed over the track certain women getting on the car track forced him to stop his car, and that the gripman of the ——— street car, without any negligence on his part, or any defect in the equipment of his car, attempted to stop his car, but was unable to do so before it crashed into the ——— street car, causing the accident which resulted in the death of ———, then I instruct you that no negligence has been shown on the part of the defendant, and your verdict must be in favor of the ——— Railroads of ———.<sup>49</sup>

**§ 1597(2). Missouri**

The jury are instructed that, if the jury find the agents, servants, and employes of the defendant in control of the car on which plaintiff was a passenger, or of the track on which said car was running, or the switch at the place where the derailment occurred, could have prevented said derailment and collision by the exercise of the very high degree of care and foresight of skillful, careful, and practical railroad operatives under the same or similar circumstances, then the plaintiff was entitled to recover.<sup>50</sup>

You are instructed that, if the jury find from the evidence in this case that the defendant, on the ——— was operating the cars mentioned in the evidence for the purpose of carrying passengers for hire as a street railway; and if the jury further find from the

<sup>48</sup> St. Louis & S. F. Ry. Co. v. Murray, 18 S. W. 50, 55 Ark. 248, 16 L. R. A. 787, 29 Am. St. Rep. 32.

<sup>49</sup> Bond v. United Railroads of San

Francisco, 140 P. 982, 24 Cal. App. 157.

<sup>50</sup> Heyde v. St. Louis Transit Co., 77 S. W. 127, 102 Mo. App. 537.

evidence that the defendant, by its servant in charge of one of said cars, received plaintiff as a passenger thereon at or near ——— Station, to be carried as such passenger upon said car to a point on defendant's railroad at or near ——— race track in ———, and that the plaintiff paid his fare as such passenger; and if the jury further find from the evidence in this case that whilst the plaintiff was such a passenger on said car, being so carried to his point of destination aforesaid, and before he reached his said point of destination, the car in which he was such passenger was collided with by another of defendant's cars going the opposite direction on the same track, and that thereby plaintiff was injured—then the defendant is liable in this case, if the defendant's servants in charge of its said car could have prevented said collision by the exercise of a high degree of care, such as would have been exercised by careful, skillful railroad employes under the same and similar circumstances.<sup>51</sup>

The jury are instructed that if they believe and find from the evidence that defendant was, on the ——— day of ———, operating a railway upon and over certain streets and highways in ———, and upon and over ——— street, between ——— and ——— streets, in said city, and was at said time engaged in the business of transporting passengers for hire over said last-named line of railway; that plaintiff was, on said ——— day of ———, and prior thereto, the wife of ———, deceased; that this suit was brought within ——— months next succeeding the death of her said husband, deceased; that on said ——— day of ———, her said husband took passage upon one of the cars of defendant's railway as a passenger; that said defendant railway company received and accepted her said husband as a passenger upon its said cars; that said defendant, by its agents, servants, and employes in charge of the cars upon which plaintiff's said husband was riding as aforesaid, so negligently, carelessly, and unskillfully managed, operated, and conducted said cars at a point on ——— street, between ——— and ——— streets, in said city, as to cause said cars and the person of plaintiff's said husband to be brought into violent contact with a broken-down wagon and obstruction which was at said time upon and in close proximity to the tracks of the defendant at said point, injuring plaintiff's said husband, and causing his death; that the agents, servants and employes of the defendant in charge of the said cable cars upon which plaintiff's said husband, deceased, was then riding, saw, or would by the exercise of the care required of them, as set out in instruction No. ———, have seen, the broken-down wagon or obstruction upon

<sup>51</sup> Robinson v. St. Louis & S. Ry. Co., 77 S. W. 493, 103 Mo. App. 110.

and in close proximity to said track in time to have stopped said cars, and have avoided the injury to plaintiff's said husband, but negligently and carelessly failed to stop said cars and prevent said injury and killing; and that plaintiff's said husband was himself, at the time of the happening of the injury in question, in the exercise of ordinary care,—then your verdict must be for the plaintiff.<sup>52</sup>

**§ 1597(3). Texas**

The jury are instructed that, if you believe from the evidence that the collision of defendant's passenger train with its engine, at the time and place mentioned in plaintiff's petition, was caused by the failure of defendant to exercise that high degree of foresight as to possible dangers to its passengers, and that high degree of prudence in guarding against them, if you find there was such failure, as would be used by very cautious, prudent, and competent persons under similar circumstances, and that said failure, if any, was the proximate cause of plaintiff's injuries, if any, then you will find for the plaintiff; unless you so find, you will find for the defendant.<sup>53</sup>

You are instructed that if you believe, from the evidence, that a collision occurred between the car on which plaintiff was riding and another car, and that plaintiff by said collision had his wrist sprained or dislocated, and that said collision and injury would not have occurred if the motorman of defendant company had been in the exercise of the care and skill hereinbefore defined, and that the collision was the result of the motorman's negligence, if he was guilty of negligence, your verdict will be for plaintiff.<sup>54</sup>

**§ 1598. Same—Collision with steam roller**

The court instructs the jury that if you believe from the evidence that plaintiff was a passenger upon the car mentioned in the evidence at the time she claims to have been injured, and that defendant by its agents, servants, and employes in charge of said car upon which plaintiff was a passenger (if you find she was a passenger) so negligently, carelessly, and unskillfully managed, operated, and ran said car at a point on the ——— boulevard near the intersection of ——— street and said ——— boulevard in ———, as to cause said car to be brought into violent contact with the steam roller mentioned in the evidence which was at said time upon said track at said point (if you find such to be the fact),

<sup>52</sup> Sweeney v. Kansas City Cable Ry. Co., 51 S. W. 682, 150 Mo. 385.

<sup>53</sup> Missouri, K. & T. Ry. Co. of Texas v. Dalton, 120 S. W. 240, 56 Tex. Civ. App. 82.

<sup>54</sup> Galveston City Ry. Co. v. Chapman, 80 S. W. 856, 35 Tex. Civ. App. 551.

and that plaintiff was injured thereby, and that the agents, servants, and employes of defendant in charge of said car upon which plaintiff was riding saw, or by the exercise of the care required of them as set out in instruction No. ——— could have seen, said steam roller upon said track in time to have stopped said car and have avoided the injury to plaintiff, but negligently and carelessly failed to stop said car and prevent said injury (if you find plaintiff was injured), then your verdict must be for the plaintiff.<sup>55</sup>

**§ 1599. Care required from street car company on crossing tracks of another company**

You are further instructed that the statutes of this state provide that it shall be the duty of every street railway company or corporation, operating a street railway across the tracks of a railroad company, to bring its cars to a full stop at least ——— and not more than ——— feet before reaching the tracks of the railroad company, unless a flagman is kept at such crossing. It is conceded in this case that a flagman was not maintained at the crossing where the collision occurred, and if you find from the evidence that the employes in charge of the street car failed and neglected to stop the same not less than ——— or more than ——— feet from the railroad crossing before attempting to cross the same, and that such failure and neglect directly or proximately contributed to the injury complained of, in no event can such street railway company, defendant, be relieved from the consequences of such failure or neglect.<sup>56</sup>

The jury are instructed that the ——— Railway Company, in the operation of its trains along, over, and across said ——— avenue, was only required to exercise reasonable and ordinary care to avoid injury to others, and it had a right in the operation of its said train, to rely upon the assumption that said street car company, in the operation of its cars over such crossing, for the protection of its passengers, would exercise the highest degree of care, and to that end would obey and observe not only the statutory rules and requirements for the protection of its passengers, but would exercise the highest degree of care.<sup>57</sup>

**§ 1600. Speed as negligence**

Speed of trains at station, see ante, § 1551(1).

**§ 1600(1). Indiana**

You are instructed that a railroad company has a right to propel its trains over its road at a reasonable rate of speed, and when

<sup>55</sup> *Stauffer v. Metropolitan St. Ry. Co.*, 147 S. W. 1032, 243 Mo. 305.

<sup>56</sup> *McCullough v. Missouri Pac. Ry. Co.*, 146 P. 1005, 94 Kan. 349.

<sup>57</sup> *McCullough v. Missouri Pac. Ry. Co.*, 146 P. 1005, 94 Kan. 349.

its track is in good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects, which, by the highest degree of skill and care, could not be discovered, it would not be negligence per se to run the train at a rate of speed of ——— miles an hour, provided that, under all the circumstances of a given case, such rate of speed was reasonable and a safe one.<sup>58</sup>

§ 1600(2). Iowa

You are instructed that a high rate of speed of a railway train will not of itself establish or prove negligence of the railway company. Railway companies may run their cars at such speed as, under all the circumstances, shall comport with the rule of law which requires them to exercise the utmost care and foresight for the safety of their passengers, as explained in paragraph ——— hereof. And whether a given rate of speed comports with the rule depends on the circumstances, such as the condition and curvature of the track, the danger, if any, to passengers occupying any and all seats where passengers are accustomed and permitted to ride of being thrown from the car by the movement thereof, and all the facts and circumstances surrounding the particular time and place in question, as you find same to be shown by the evidence introduced upon the trial.<sup>59</sup>

§ 1600(3). South Carolina

You are instructed that a railroad company is liable for damages for injury to a passenger, caused by the willfully moving its trains at such a great rate of speed as to make it leave the track.<sup>60</sup>

§ 1600(4). Texas

The jury are instructed that it was the duty of defendant while transporting plaintiff in its said car to exercise for plaintiff's safety the degree of care that a very cautious and prudent person would have exercised under the same circumstances; so, therefore, if you believe from the evidence that on said occasion defendant, its servants, and employes in charge of said car, in operating its said car and in transporting plaintiff failed to exercise such degree of care, and that by reason of such failure, if any, said car was derailed and plaintiff thereby injured as a proximate result of said derailment; or, if you believe from the evidence that at the time of the derailment of said car it was being operated at a greater rate of speed than ——— miles per hour; and if you further believe from the evidence that said car was caused to be derailed by reason of its being operated at said rate of speed greater than ——— miles

<sup>58</sup> Pennsylvania Co. v. Newmeyer, 28 N. E. 860, 129 Ind. 401.

<sup>59</sup> Fitch v. Mason City & C. L. Trac-

tion Co., 100 N. W. 618, 124 Iowa, 685.

<sup>60</sup> Stenbridge v. Southern Ry., 43 S. E. 968, 65 S. C. 440.

per hour, if you should believe from the evidence that plaintiff was injured by reason of said derailment, then in either of these events you will find for plaintiff and assess his damages as hereinafter directed unless you should find for defendant under other instructions given you.<sup>61</sup>

**§ 1601. Duty to avoid sudden jerks and jars**

See, also, post, § 1608(1).

Presumption from sudden stop or jerks or jolts, see post, § 1721.

**§ 1601(1). Kentucky**

The court instructs the jury that it was the duty of the defendant, ———, when it undertook to transport the plaintiff as a passenger, to exercise the highest degree of care to carry the plaintiff safely to his destination; and if you shall believe from the evidence in this case that on the occasion referred to the agents of the defendant company controlling and operating its train failed to exercise that degree of care, and by reason of such failure upon their part, or upon the part of any one or more of them, they or either of them caused the train upon which the plaintiff was riding as a passenger to stop with an unusual and unnecessary jerk in the movement of the train, of sufficient violence to indicate a want of the highest degree of care in the operation of said train, and that by reason of such negligence, if they or either of them were so negligent, the plaintiff was caused to be thrown against the glass of the vestibule door and he was thereby injured, the law is for the plaintiff and you should so find. But, unless you shall so believe from the evidence, the law is for the defendant and the jury should so find.<sup>62</sup>

You are instructed that, if you believe, from the evidence that, while the plaintiff, in the exercise of ordinary care for his own safety, was standing on the platform of the car, he was caused to fall from it by an unusual and unnecessary jerk in the movement of the car of sufficient violence to indicate a want of the required care in the operation of the car as defined in instruction No. ———, you should find for the plaintiff; but, on the other hand, if you believe from the evidence that the plaintiff was not caused to fall from the car by an unusual and unnecessary movement of the car of sufficient violence to indicate a want of the required care in the operation of the car as defined in instruction No. ———, but that he fell on account of some careless act of his own, you should find for the defendant.<sup>63</sup>

<sup>61</sup> Texas Traction Co. v. Hanson (Civ. App.) 143 S. W. 214.

<sup>62</sup> McDermott v. Louisville & N. R. Co., 206 S. W. 6, 182 Ky. 22.

<sup>63</sup> Louisville Ry. Co. v. Osborne, 163 S. W. 189, 157 Ky. 341.



The court instructs the jury that, although the jury may believe from the evidence that, at the time the plaintiff got aboard of the train of defendant those in charge of said train held said train still a sufficient length of time for plaintiff to find a seat, yet if the agents or servants of defendant caused said train to start with a violent and unusual jerk, and the plaintiff was thereby caused to be injured, the law is for the plaintiff, and you should so find.<sup>64</sup>

§ 1601(2). *Missouri*

The court instructs the jury that if they believe from the evidence in this case that Jennie ——— is a minor about the age of ——— years, and that John H. ——— was appointed as her next friend to institute and prosecute this suit by the clerk of this court in vacation, at or before the time the suit was instituted, and that the defendant owns, operates, and controls, and did, at the time herein afterwards mentioned, own, operate, and control, street car lines in the city of ———, and that one of said lines extended along ——— street and to ———, and that on or about ———, plaintiff became a passenger on one of defendant's cars, propelled by electricity, and that while she was such passenger, and that while said car was being run north on ——— street not far from the viaduct, the defendant and servants in charge of said car carelessly and negligently, suddenly, and with great and unusual force, stopped said car and thereby threw the plaintiff out of said car onto the ground, whereby her arm was injured and broken at or near the elbow joint, then the jury will find for the plaintiff.<sup>65</sup>

The court instructs the jury that if they believe, from the evidence, that the plaintiff was, at the time of the occurrence in question, a passenger on one of the cars of the defendant's street railroad, exercising reasonable care and diligence, and that the car started before plaintiff took his seat, with a sudden and violent jerk, that by reason thereof the plaintiff lost his balance, and his hand was thrown against and through one of the windows of the car, cutting and injuring it, then and in that case the defendant is liable to the plaintiff for the damage caused by and resulting from said injury to the plaintiff, unless the jury further believes from the evidence that the defendant, its agents, servants, and employes managing said car, were not guilty of any negligence or want of care in the management of said car causing the injury, and the burden of showing such care and want of negligence is upon the defendant to prove to the satisfaction of the jury.<sup>66</sup>

<sup>64</sup> *Louisville & N. R. Co. v. Gaines*, 153 S. W. 216, 152 Ky. 255.

<sup>65</sup> *Willis v. St. Joseph Ry., Light*,

*Heat & Power Co.*, 86 S. W. 567, 111 Mo. App. 580.

<sup>66</sup> *Dougherty v. Missouri R. Co.*, 8 S. W. 900, 97 Mo. 647.



**§ 1601(3). Texas**

You are instructed that, if you believe from the evidence that the plaintiff has failed to show, by a fair preponderance of the evidence, that the train in question was checked, jarred, or shaken by an unusual jar or stop, or if you find there was such unusual jar or stop, that plaintiff has not shown by a fair preponderance of the evidence that such unusual jerk or jar was the result of a failure on the part of defendant to use that degree of care that the court has charged you it was the duty of defendant to use, you will find for the defendant.<sup>67</sup>

**§ 1602. Same—Jar or jerk resulting from coupling car with another car**

You are instructed that, if you believe from the evidence that the coupling was made gently, or was made in the usual and customary way, and with no greater violence than is usual and customary under the same circumstances, then you will find for the defendant.<sup>68</sup>

You are further instructed that in taking passage in said car, to be transported therein, the plaintiff assumed the risks and danger incident to whatever jerking and pushing of said car against other cars was necessary and proper to be done in the handling and transportation of said car; so, if you should believe from the evidence that plaintiff was injured, but you further believe from the evidence that such injuries resulted from such jerking or pushing said car against other cars as was necessary and proper in order to couple same onto other cars when making up the train with which said car was to be transported, then you will find for the defendant.<sup>69</sup>

**§ 1603. Same—Freight train**

You are instructed that a passenger upon a freight train is presumed to assume the risks of jolts and jars not caused by the negligence of the railroad employes, and in this case, if you find that it was such a jolt or jar which threw the plaintiff from his seat, he cannot recover in this action.<sup>70</sup>

**§ 1604. Same—Mixed trains**

You are told that, while the plaintiff in taking passage upon a mixed train assumed the risk of necessary and usual jolts and jars, this did not relieve the railroad company from exercising the same high degree of care in the handling of its train as if he

<sup>67</sup> Ebert v. Gulf, C. & S. F. Ry. Co. (Civ. App.) 49 S. W. 1105.

<sup>68</sup> Texas & P. Ry. Co. v. Boleman (Tex. Civ. App.) 112 S. W. 805.

<sup>69</sup> Texas & P. Ry. Co. v. Adams, 72 S. W. 81, 32 Tex. Civ. App. 112.

<sup>70</sup> Steele v. Southern Ry. Co., 33 S. E. 509, 55 S. C. 389, 74 Am. St. Rep. 756.

was riding on a regular passenger train to avoid injuring him. The risk of usual jolts and jars assumed by plaintiff is the risk incident to the mode of conveyance, and does not relax the rule as to the high degree of care to be exercised by the servants of the defendant to avoid injuring passengers; so, in this case, if you believe that the plaintiff was without fault and would not have been injured if the defendant's servants had exercised such high degree of care, your verdict would be for the plaintiff.<sup>71</sup>

**§ 1605. Duty on down grade**

You are instructed that the term "ordinary care," when applied to the management of a railway, imports all the care which the peculiar circumstances of the place or occasion reasonably require; and this will be increased or diminished according as the ordinary liability to danger or accident, and injury to others, is increased or diminished in the movement and management of the cars. In the management of trolley cars, and especially in going downgrade, it is the duty of the motorman, if he is able to do so, to make the descent at such reasonable speed as not to allow the car to get beyond his control; and, as the danger of a collision with another car increases, it is his duty to use all means in his power to check or stop the car. This does not impose upon the motorman, however, an impossibility. If he in fact did all he could to control the speed of the car, under the circumstances, the company would not be liable, provided the car was properly equipped with brakes and other devices reasonably necessary and adequate to control its speed, and the company exercised reasonable care in other respects.<sup>72</sup>

**§ 1606. Open switch**

The jury are instructed that this is a suit by the plaintiff against the \_\_\_\_\_ Railroad Company for damages alleged to have been sustained by plaintiff by reason of the infliction of injuries to plaintiff's wife, \_\_\_\_\_, while plaintiff and his said wife were traveling on one of defendant company's passenger trains between the city of \_\_\_\_\_, and the city of \_\_\_\_\_, on or about \_\_\_\_\_; plaintiff alleging that he and his said wife had purchased tickets reading over the line of railroad of defendant company, between said points, by which they were entitled to a first-class passage to the city of \_\_\_\_\_, and that in consideration of the purchase of said tickets the defendant company undertook to safely transport them to their said destination. Plaintiff further alleges that while on said train,

<sup>71</sup> St. Louis Southwestern Ry. Co. v. Wyman, 178 S. W. 423, 119 Ark. 530.

<sup>72</sup> Eaton v. Wilmington City Ry. Co. (Del.) 75 A. 369, 1 Boyce, 435.

at a point at or near the town of ———, the said train was wrecked; that at the time of said wreck the said train was negligently operated, in that it was run at a high and dangerous rate of speed; that defendant company, its servants, agents, and employes, were negligent in running said train across a switch at said point at a high and dangerous rate of speed, and were negligent in then and there permitting and allowing their road and track to become and remain in bad repair, and in then and there permitting the switch at said point to be and remain in bad condition and defective in its construction; and that, in addition to all of said defects and causes contributing to the wrecking of said train, the defendant, its servants, agents, and employes, negligently and carelessly allowed said switch to remain open at the time of the passing of said train, so as to allow the said train to enter said switch and side track with unusual force and speed, resulting in the wrecking of said train. Plaintiff further alleges that his said wife sustained serious and permanent injuries in said wreck, which injuries are fully set out in plaintiff's second amended original petition herein; that his said wife suffered great physical and mental pain, and was compelled to engage the services of physicians, surgeons, and nurses, and purchase medicines and medical supplies in order to properly care for said injuries, to plaintiff's further damage, as alleged in his said petition; and that all of said damages are the proximate result of the negligence of the defendant company, its servants, agents, and employes, in the manner and things alleged in said petition. In answer to these allegations, the defendant company has pleaded a general denial, and the effect of this plea is to cast upon the plaintiff the burden of proof to establish the material allegations in his petition, and, amongst other things, that his said wife was injured as alleged, and that such injuries, if any, were the proximate result of the negligence of the defendant company, its servants, agents, and employes, in one or more of the things charged against it. Now, gentlemen of the jury, bearing in mind the foregoing instructions and definitions, if you find, from a preponderance of the evidence before you, that the plaintiff and his said wife were passengers for hire, as alleged by them, and at the time and place alleged, and that plaintiff's wife was then and there injured, as alleged, that the defendant company, acting by and through its servants, agents, and employes, were then and there in charge and control of said train, and that said train was then and there run into and across an open switch upon a siding, at an unusual rate of speed; and you further find from a preponderance of the evidence before you that in so doing the said defendant, its servants, agents, and employes, were guilty of negligence, as that term has been herein defined to

you, and that such negligence was the proximate cause of plaintiff's wife's injuries, then, if you so find, you will find for the plaintiff, etc. Or, if you should find, from a preponderance of the evidence, that, at the time and place alleged, the defendant company, its servants, agents, and employes, failed to exercise due care and foresight, as has been herein explained, in regard to the condition of the switch, and that such act, if any, constituted negligence, as the term has been defined, and that such negligence, if any, was the proximate cause of said injuries, then you will find for the plaintiff.<sup>73</sup>

**§ 1607. Duty to make provision for the accommodation and control of periodical large crowds**

The jury are instructed that when a common carrier, its agents and servants, have knowledge, or from circumstances ought to know, that on certain days of the week large crowds of passengers board its train of cars at certain regular stations in a populous vicinity along its line of railroad, it is the carrier's duty, under such circumstances, to provide sufficient accommodations as required by law, so as to safely transport its passengers without subjecting them to unnecessary risk and danger from lack of accommodations to handle such large crowds of passengers, and, if the carrier knew or had reasonable grounds under the circumstances to anticipate danger from the handling of such large crowds, it is also held to the highest degree of care, on such occasions, to provide a sufficient force of employes and servants to control the large crowds of passengers, though this may require the employment of an extra force of help, so as to protect innocent passengers from assaults or other injuries at the hands of fellow passengers, and should the carrier fail to perform either of these duties, in consequence of which a passenger sustains an injury from another passenger, without fault on his part, it is liable in damages.<sup>74</sup>

**§ 1608. Duty to passengers on crowded train or car**

**§ 1608(1). United States**

You are instructed that the railroad company, in pulling out a crowded train, assumed the duty of carrying passengers on that crowded train in such a way that danger should not come to any of those passengers from any act or omission reasonably within the control of the railroad company. Because the danger was greater, the care should have been greater. You are instructed that the railroad company assumed, when they pulled out a train upon

<sup>73</sup> Texas & N. O. R. Co. v. Clippen-  
ger, 106 S. W. 155, 47 Tex. Civ. App.  
510.

<sup>74</sup> Anderson v. South Carolina &  
G. R. Co., 61 S. E. 1096, 81 S. C. 1.

which there were passengers on the platforms and on the steps, to so conduct that train as to keep those people upon the steps and upon the platforms as safely as the reasonable management of the train under those circumstances would permit. It is charged then further by the plaintiff that the act of negligence in conjunction with the crowded condition of the train which occasioned the death of the plaintiff's decedent was that at a certain point a short distance east of ——— there was a sudden jerk or lurch imparted to the train sufficient to throw ——— from the train. That is a question of fact for you, gentlemen. You have heard the testimony: First, whether there was such a jerk or lurch to the train; next, what occasioned it; third, whether or not that jerk or lurch, by reasonable care exercised in the situation, could have been omitted by the engineer, or by whomsoever had charge of the conduct of the train. The question for you to determine primarily in this case is whether that was negligence, and a breach of duty towards ———.

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## § 1608(2). Texas

You are instructed that if you believe from the evidence that on or about the ——— day of ———, the plaintiff boarded one of the defendant's cars, known as an ——— car, at or near the intersection of ——— and ——— streets in the city of ———, to go to ——— on ——— street, and further believe that when she boarded said car it was filled with passengers and they were crowded, and that she was unable to get a seat, and she was compelled to stand, and passengers were standing on either side of her, so that she was unable to catch hold of either side of the car, or brace herself against anything, and further believe that the conductor of said car was in the vestibule of the rear end of the car, and further believe that the car door in the rear end of the body of the car was open, and that the exit door of the vestibule was open, and that the conductor knew both doors were open, or by the use of ordinary care would have known they were open, and further believe that, when the car was nearing the street or place at which plaintiff desired to get off, she could not reach the side of the car so as to ring the signal, because of many passengers standing in the car, and that she stepped back a short distance and told the conductor she desired to get off at the next stop, and just at that time, or a few seconds thereafter, the car turned on a curve, and that plaintiff was thereby thrown out of the car onto the ground, and thereby injured as alleged in plaintiff's petition, and further believe that the conductor was guilty of negligence in per-

<sup>75</sup> Pennsylvania Co. v. Paul (C. C. A. Ohio) 126 F. 157, 62 C. C. A. 135.

mitting the doors to be open under the circumstances, you should find for the plaintiff, unless you find for the defendant under some other instruction given you by the court.<sup>76</sup>

**§ 1609. Care required as to passengers standing on platform or steps**

**§ 1609(1). Alabama**

The court charges the jury that if they are reasonably satisfied from the evidence in this case that it was the defendant's general custom, at and before the time of plaintiff's injury, to permit passengers to ride on the steps of its street cars, and to collect fares from such passengers, at times when such cars and their platforms were so crowded with passengers as to make it impossible for any more passengers to ride inside of the cars or on the platform, and if the jury are further reasonably satisfied from the evidence that such custom was then known to the motorman and conductor who were engaged in the operation of the car from which plaintiff claims to have fallen, then it was the duty of the motorman and conductor to know whether or not their said car was so crowded as to require any passengers to ride on the steps of the car, and, if any passengers were riding on a step or steps because of the crowded condition of the car and platform, it was the duty of the motorman and conductor to exercise skill and care in operating the car to avoid injury to such passengers.<sup>77</sup>

**§ 1609(2). Florida**

You are further instructed that if, while the passenger cars were standing at ———, the plaintiff and her mother were, for convenience and comfort, standing upon the platform of the said cars, and that the defendant negligently and violently caused said train of cars upon which the plaintiff was a passenger to be struck by an engine with sufficient force to injure the plaintiff, and did so without notice or warning to the plaintiff, her mother, and the other passengers, then the defendant is responsible for all injuries resulting to the plaintiff therefrom.<sup>78</sup>

**§ 1609(3). Washington**

You are instructed that if you believe from a preponderance of the evidence that the deceased was permitted to ride by the defendant upon the platform of defendant's car; that the defendant carelessly and negligently failed and neglected to provide and have on said car a gate, railing, or other protection around the platform thereof, and that thereby said car was rendered an unsafe and dan-

<sup>76</sup> Dallas Consol. Electric St. Ry. Co. v. Stone (Civ. App.) 166 S. W. 708.

<sup>77</sup> Mobile Light & R. Co. v. Hughes, 67 So. 278, 190 Ala. 216.

<sup>78</sup> Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.



gerous conveyance, in that passengers on said platform were unprotected and liable to be thrown therefrom; and you further believe that defendant permitted said car to become overcrowded with passengers, and failed to provide said deceased with a seat on said car, but permitted him to be crowded and jostled by other passengers likewise upon said platform; and if you further believe that said car ran into said curve at a high rate of speed, without warning or notice to said deceased; that thereby said car was caused to lurch and jerk as it went around said curve, causing said deceased to be thrown therefrom, and to receive injuries of which he died—then your verdict will be for plaintiff, etc.<sup>79</sup>

**§ 1610. Same—Starting car suddenly from a standstill**

The court instructs the jury that, if they believe from the evidence that the defendant company, through their agents, employes, and servants, while the train of said company was at the depot in the act of discharging passengers, negligently and violently started its train from a standstill, without notice or warning to its passengers, the said company is responsible for all injury resulting to a passenger from their act.<sup>80</sup>

The jury are instructed that, if the jury believe, from the evidence, that the defendant company had stopped its train at the Union Station in ——— on the occasion of the accident complained of in the plaintiff's declaration, and that passengers were in the act of leaving said train, or were standing up in and upon the said train, it was negligence in the said company, its agents or employes, to start or run said train without giving fair and ample notice to said passengers of its intention so to do, and any passenger injured by the said act of said company is entitled to recover damages for such negligence, and if the jury believes from the evidence that the plaintiff was a passenger at the time, and not in fault, she is entitled to recover.<sup>81</sup>

**§ 1611. Duty towards passenger on running board of street car**

You are instructed that it is the plaintiff's claim that after this boy boarded the car in front of the ——— bust, and at the stop made at ——— street, others were permitted by the defendant company to board the car, particularly upon this running board upon which he stood, to such numbers that thereafter he was by other persons crowded out from the body of the car into a position which brought his body or some portion of it where an oncoming

<sup>79</sup> Halverson v. Seattle Electric Co., 77 P. 1058, 35 Wash. 600.

<sup>81</sup> Southern R. Co. v. Smith, 28 S. E. 173, 95 Va. 187.

<sup>80</sup> Southern R. Co. v. Smith, 28 S. E. 173, 95 Va. 187.



—— street car came and did strike him; and it is urged by the plaintiff that it was an act of negligence on the part of the defendant company, after the inside running board was so loaded with passengers, including the plaintiff's deceased, to permit others to get upon that running board and crowd the plaintiff's deceased out and into a place of danger. I charge you, gentlemen of the jury, if you find that to be a fact, it would be an act of negligence on the part of defendant company. While it is not negligence for them to permit people to stand upon the running boards of their cars, I charge you it would be a negligent act for them to permit the running board to be so crowded as to allow oncoming passengers to push those, who had a proper place upon the platform, into a place of danger; and that would be a question of fact for your determination.<sup>82</sup>

**§ 1612. Compelling passenger to ride in dangerous position because of overcrowding**

You are instructed that, before you can find for the plaintiff in this case, you must be reasonably satisfied from the evidence in this case that plaintiff was compelled, on account of the overcrowded condition of the car upon which he was riding, to ride upon the running board of the car.<sup>83</sup>

**§ 1613. Care required as to passenger riding on platform because of overcrowding or failure to furnish seats**

See, also, post, § 1615.

**§ 1613(1). Alabama**

You are instructed that plaintiff was under no duty to defendant to pay an additional fare and ride in the Pullman or sleeping car; and if you believe from the evidence that on reaching the day coach she found the said coach so crowded as that she could not enter by reasonable effort, and defendant's conductor or auditor failed to provide her a seat upon her request, then in law her being on the platform would be of necessity or by compulsion.<sup>84</sup>

You are instructed that if you believe, from the evidence, that plaintiff was a passenger on defendant's train, as alleged in the complaint, and by reason of the crowded condition of the train there was no unoccupied seat on defendant's cars, and she was of necessity, real or reasonably apparent, standing on the platform of one of defendant's cars, and while on said platform she

<sup>82</sup> *Kalls v. Detroit United Ry.*, 119 N. W. 906, 155 Mich. 485.

<sup>83</sup> *Birmingham Ry., Light & Power*

*Co. v. Hunnicutt*, 57 So. 262, 3 Ala. App. 448.

<sup>84</sup> *Southern Ry. Co. v. Hayes*, 69 So. 641, 194 Ala. 194.

prudently and reasonably guarded herself from being thrown or jerked down, and if you further believe that plaintiff's situation was known to defendant's employes, and they then ran said train at such a careless or negligent rate of speed as to cause plaintiff to fall or be injured, your verdict should be for plaintiff, under count \_\_\_\_\_ of the complaint.<sup>85</sup>

The court charges the jury that if they are reasonably satisfied from the evidence in this case that it was the defendant's general custom, at and before the time of plaintiff's injury, to permit passengers to ride on the steps of its street cars, and to collect fares from such passengers, at times when such cars and their platforms were so crowded with passengers as to make it impossible for any more passengers to ride inside of the cars or on the platform, and if the jury are further reasonably satisfied from the evidence that such custom was then known to the motorman and conductor who were engaged in the operation of the car from which plaintiff claims to have fallen, then it was the duty of the motorman and conductor to know whether or not their said car was so crowded as to require any passengers to ride on the steps of the car, and, if any passengers were riding on a step or steps because of the crowded condition of the car and platform, it was the duty of the motorman and conductor to exercise skill and care in operating the car to avoid injury to such passengers.<sup>86</sup>

§ 1613(2). Texas

You are instructed that if you find, from the evidence, that plaintiff was a passenger on defendant's passenger train; that defendant company had negligently failed to furnish sufficient cars to accommodate its negro passengers with a seat in a compartment or compartments required by law to be set apart for the use of negroes; that thereupon plaintiff went out, and stood upon the platform of one of defendant's coaches, and while so standing upon such platform he was, without negligence on his part, shoved or thrown therefrom by the motion of another or other passengers, and injured, as alleged; that defendant company's failure, if any, to furnish sufficient room, as above explained, was negligence; and that the accident and injury, if any, to plaintiff was the natural, direct, and proximate result of such negligence on the part of defendant, or of such negligence on the part of defendant, concurring with the acts of negligence of others than plaintiff in such way as that the injury would not have occurred

<sup>85</sup> Southern Ry. Co. v. Hayes, 69 So. 641, 194 Ala. 194.

<sup>86</sup> Mobile Light & R. Co. v. Hughes, 67 So. 278, 190 Ala. 216.

but for the negligence of defendant,—you will find for the plaintiff.<sup>87</sup>

**§ 1614. Duty to prevent passengers from riding on platform or steps**

You are charged as the law in this case that, if the plaintiff had intelligence enough to know and understand that it was more dangerous to ride on the platform or on the steps of the coach than it was to ride on the inside thereof, then you are instructed that no duty would devolve upon the defendant to prevent him from riding on the platform or steps of the coach.<sup>88</sup>

**§ 1615. Injuries occurring from failure of carrier to perform duty to provide separate coaches for white and negro passengers**

You are instructed that it was the duty of the railroad company to provide separate coaches for the accommodation of white and negro passengers. Conductors on passenger trains provided with separate coaches have authority to refuse white passengers seats in negro coaches, and to refuse negro passengers seats in coaches for white people, and it is the duty of the railroad company to remove all white passengers from negro coaches, and to remove all negro passengers from the coaches for the whites. Therefore, if you believe from the evidence that the plaintiff is a negro; that he entered the negro coach; that said negro coach would have had room for him if white people had not been in it; that white men went into said coach, occupied the seats and room, and thereby the said negro coach became so crowded that there was not room in it for the plaintiff; and that on this occasion the plaintiff was crowded out on the platform of said negro coach; and that he fell from said platform, or was pushed or thrown from said platform by other passengers being thrown against him from the swaying of the cars, and was injured without contributory negligence on his part—you will find a verdict in favor of the plaintiff and assess the damages as explained in other portions of this charge.<sup>89</sup>

**§ 1616. Injuries caused by catching arm in door jamb**

You are instructed that in this case the plaintiff sues the defendant for damages for an injury which plaintiff alleges he received on or about the ——— day of ———, on a street car belonging to and operated by the defendant. The plaintiff alleges

<sup>87</sup> International & G. N. R. Co. v. Williams, 50 S. W. 732, 20 Tex. Civ. App. 587.

<sup>88</sup> Walling v. Trinity & Brazos Val-

ley Ry. Co., 106 S. W. 417, 48 Tex. Civ. App. 35.

<sup>89</sup> Williams v. International & G. N. R. Co., 67 S. W. 1085, 28 Tex. Civ. App. 503.

that on account of the crowded condition of the car he stood on the front platform, and in order to steady himself took hold of the handle on the left door of the car as same was going from ——— toward ———; that the conductor in charge of the said car took hold of the handle on the inside of said door and in opening same pulled the door back before the plaintiff could remove his hand from the handle on the outside, and the plaintiff's right arm was caught between the handle and the left jamb of said door so that he could not disengage his hand from the handle or his elbow from the jamb, and although the plaintiff called to the conductor twice to stop, that he was breaking the plaintiff's arm, the conductor still pulled on said handle, attempting to open the door, and notwithstanding the conductor plainly and distinctly heard the plaintiff he paid no attention thereto, but in a violent and angry manner the conductor placed his foot against the right side of the door jamb and threw his whole weight and strength against the said door and violently forced the said door open, while the plaintiff's arm and hand were thus fastened, thereby breaking the wrist of the plaintiff's right arm to such an extent as to render it absolutely useless, and because of the maiming and breaking of said wrist the bone thereof has become rotten and the flesh and skin covering the bone periodically breaks out in sores, and on several occasions pieces of bone of said wrist came out through said sore; that plaintiff has been unable to perform any kind of work since the said ——— day of ———; that prior to the time of sustaining said injury the plaintiff was a strong, vigorous, and healthy man, a machinist and boilermaker by trade, and earning and capable of earning ——— cents per hour, or \$—— per day of eight hours, but since said injury plaintiff has been incapacitated from performing any kind of labor; that said injuries were caused by the gross and criminal negligence of the said conductor. Defendant denies each and every allegation contained in the petition.<sup>90</sup>

**§ 1617. Leaving trapdoor in vestibule open**

In this connection you are instructed that if you believe from the evidence in this case that the train on which the plaintiff was riding was a vestibule train, and that the trapdoor in the floor of the vestibule on the coach in which plaintiff was riding was permitted to be open while the train was in motion and by the use of the utmost diligence the defendant could have had such trapdoor closed, and that said plaintiff, in attempting to pass from one coach to another on said train, without negligence on his part, fell

<sup>90</sup> Shawnee-Tecumseh Traction Co. v. Newcome, 158 P. 1193, 59 Okl. 271.

through such open trapdoor, and thereby sustained the injuries complained of in his petition, and that the open trapdoor was the proximate cause of said injury, then a prima facie case has been made by plaintiff which raises a presumption of negligence on the part of the defendant company, which the defendant has the burden of overcoming to your satisfaction.<sup>91</sup>

**§ 1618. Duty to avoid exposing passenger to injury from objects near track**

Care in maintaining road, see ante, § 1468.

**§ 1618(1). Alabama**

The court charges the jury that, if they are reasonably satisfied from all the evidence in the case that the accident complained of happened by an iron rake or some other instrument or hard substance so negligently carried on defendant's train that it came in contact with the mail sack hanging on the crane near defendant's roadbed and dragged the same off, and either struck or caused the mail bag to strike plaintiff and inflict the injuries complained of, then the jury would be authorized in finding that the defendant was guilty of negligence.<sup>92</sup>

The court charges the jury that it would be negligence on the part of the defendant to so negligently carry on its train an iron rake, or other hard substance, as that it would come in contact with the mail sack hanging on the crane near defendant's roadbed, and drag the said mail sack off of said crane, and be dragged from said train by so coming in contact with said mail sack, and thereby either striking, or causing said mail sack to strike, plaintiff, and inflict the injuries complained of.<sup>93</sup>

**§ 1618(2). Illinois**

The jury are instructed that unless they find from the evidence that the company, by its servants in charge of the train, while there was yet time to stop the same before reaching the place at which the accident occurred, had notice or reason to suppose, or by the exercise of the highest degree of care, under the circumstances, in running its said train, consistent with the due operation of its road, would have known, that said derrick would be operated while said train was passing it, and that such operation would endanger the safety of the passengers in said train, they must find the said railroad company not guilty.<sup>94</sup>

<sup>91</sup> Chicago, R. I. & P. Ry. Co. v. Dizney, 160 P. 880, 61 Okl. 176.

<sup>92</sup> Louisville & N. R. Co. v. Glasgow, 60 So. 103, 179 Ala. 251.

<sup>93</sup> Louisville & N. R. Co. v. Glasgow, 60 So. 103, 179 Ala. 251.

<sup>94</sup> Chicago & A. R. Co. v. Murphy, 64 N. E. 1011, 198 Ill. 462.

**§ 1618(3). Missouri**

The court instructs you that if you find from the evidence that the plaintiff was a passenger on a car which was being operated by the defendant at the time and place referred to in other instructions, then it was the duty of the defendant to use and exercise that high degree of care, caution, and foresight for the safety of the plaintiff that a very careful and prudent person would use and exercise under like circumstances. And if you find from the evidence that at said time and place there was a post or pole standing at the west side of the track on which said car was running, and that there was a cross-beam bolted onto said pole in such a way that the east end of the same extended near enough to said track to endanger passengers on said car, and nearer to said track than a very careful and prudent person would have permitted under like circumstances, and that defendant knew of said condition of said cross-beam, or by the exercise of said high degree of care and caution might have known the same in time to have changed said cross-beam, and thereby prevented the injury to plaintiff, if any, then the defendant was negligent in said particular. Or, if you find from the evidence that at said time and place the window of said car at which the plaintiff claims to have been standing was not as well guarded or protected for the safety of passengers as a very careful and prudent person would have guarded or protected the same under like circumstances, and that defendant knew of such condition of said window, or by the exercise of said degree of care and caution might have known the same in time to have changed the same, and thereby prevented the injury to plaintiff, if any, then the defendant was negligent in said particular. Or if you find from the evidence that at said time and place the east rail of said track was higher than the west rail thereof and that said inequality of the rails caused the car to lean or pitch over toward the west as it was passing said point, and thereby endanger passengers on said car, and that such inequality was greater than a very careful person would have permitted under like circumstances, and that defendant knew of said condition, or could have known the same by the exercise of said degree of care in time to have repaired said track and prevented such injuries to plaintiff, if any, then defendant was negligent in said particular.<sup>95</sup>

**§ 1619. Duty to warn passengers concerning possible dangers**

The court instructs the jury that a corporation operating a line of interurban electric railroad, and carrying passengers for hire, extends to every person paying the stipulated fare an invitation

<sup>95</sup> *Gardner v. Metropolitan St. Ry. Co.*, 122 S. W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166.



to go upon its cars and be carried, and such company undertakes that its track, cars, and appurtenances are reasonably safe for the purpose of carrying passengers. If the car is run in an unusual manner, or cars are run in unusual proximity to each other, and a danger arises therefrom which does not ordinarily exist, it is the company's duty to warn passengers of such danger, in case time and opportunity exist to give such warning before an injury occurs. A passenger has the right to presume, in the absence of knowledge or warning to the contrary, that all necessary precautions have been and will be taken for his safe transportation. If a danger arises of which the passengers are ignorant, they should be notified, so they may take steps to avoid it, in case time and opportunity exist before the accident occurs.<sup>98</sup>

**§ 1620. Duty as to passengers leaving train en route for lunch or other business purposes**

**§ 1620(1). United States**

The jury are instructed that, when the company undertook to carry him on this freight car so long and while he was a passenger, the company owed to him the highest degree of care for his protection, for his safety, as it did to any other passenger; provided, of course, that a passenger who takes or undertakes to ride on a freight car understands there is a difference between that and a passenger car, that it is managed differently, that the appliances are different, that its conveniences are different; and, of course, it is only the exercise of that high degree of care that is required, such as it might practically exercise with a freight train as distinguished from a passenger train. The increased danger of riding on a freight train as compared with a passenger train the passenger undertook himself, and the company was required to exercise care of the highest character in the management of a freight train, but not of the same degree it would be bound to do in a passenger train. Now, when they reached ———, that not being the plaintiff's place of destination, if he alighted from the car intending to go direct to the depot for a particular business purpose, and with the intention of returning when that purpose was accomplished, he would, while going to and from the depot, exercising the proper diligence due from a passenger, remain a passenger, and would be entitled to the degree of care belonging to a passenger. Now, that rule applies until he had time to get off the car, going along exercising reasonable prudence to do so, attend to his business (if he had any), and return, and no longer. The liability of the company

<sup>98</sup> Indiana Union Traction Co. v. Maher, 95 N. E. 1012, 176 Ind. 289, Ann. Cas. 1914A, 994.



to him as a passenger lasted only so long as to give him a reasonable time in which to get to the depot and return, after transacting his business, and did not extend to him after the lapse of that time. After that they owed him no duty, except that which they owed to any stranger—not to wantonly or unnecessarily injure him. Now, then, coming back after the train stopped: If they stopped that train at the place where it was usual for passengers to get out and alight from a train whose point of destination was there, where it was usual for passengers to get out and go to the depot on proper business, and this man ——— got out and went along on his business, as an ordinarily prudent man would do, and was on his way to the depot, the company owed him that degree of care that it owes to its passengers not to hurt him, and so operate its trains as that during the time necessary for him to get out and back, that they would not strike him on his way, provided he was moving along the usual way of going to the depot; and if the company failed to exercise that degree of care, and he was struck and injured, it would be liable for the accident. Now, on the contrary, if, after they had got in the yard, he got out of the train, without having any business that required him to go to the depot, that not being his point of destination, or without having any particular business to go to the depot, and instead of going by the direct and usual route and within a reasonable time, such as any other man (a prudent man) would have required to go to the depot; and if, instead of that, he out of mere curiosity, got out to look through the yard and talk with the employes in the yard,—if he stopped in the yard, and began to talk and loiter about the yards there in conversation, or if he began to look at the overhead wires, as one of the witnesses indicates probably he did (at least, there is a little proof that tends to show that),—why, then, in each of these contingencies, he would cease to be a passenger, but would be there on the switch yard at his peril; and the only duty the defendant company would owe to him in such a situation as that would be the duty not to wantonly or unnecessarily injure him, and they would owe him no greater duty than they would owe to a stranger in the yard without any business.<sup>97</sup>

§ 1620(2). Texas

You are instructed that, if you believe and find from the evidence that while the plaintiff was a passenger from ———; to ———, said train stopped at ——— station, on its line of road, and that the plaintiff alighted from said train to procure a lunch at said

<sup>97</sup> Alabama G. S. Ry. Co. v. Coggins (C. C. A. Tenn.) 88 F. 455, 32 C. C. A. 1.

station, and that it was usual and customary for such trains to allow passengers to get lunch at said station, and if you further believe from the evidence that while plaintiff was eating his lunch the signal was given for passengers to board the said train, and thereafter a reasonably sufficient time was not given by the operatives of said train to enable plaintiff to get on before the same was put in motion, and that by reason thereof plaintiff was thrown down and injured as alleged in his petition, or in either of the ways therein alleged, and that such failure, if any, to give such time to plaintiff to board the train, was negligence, and but for such negligence, if any, plaintiff would not have been injured, or if you believe and find from the evidence that after said train was put in motion the plaintiff attempted to board the same, and while so doing the servants and employés of the defendant in charge of and operating said train caused the same to give a sudden jerk, thereby throwing plaintiff down and injuring him in the manner or in either of the ways alleged in his petition, and that the causing of said train to give such sudden jerk was negligence and that but for such negligence, if any, plaintiff would not have been injured. then, in either such case, if you so find, you will find for the plaintiff such sum as will actually compensate him for the damage, if any, sustained by reason of such injuries, unless you find for the defendant under the instruction hereinafter given you.<sup>98</sup>

**§ 1621. Duty to passenger going from one car to another to find a seat**

The jury are instructed that they must find for the defendant unless they shall believe from the evidence that the defendant was guilty of negligence. If they so believe, they must find for the plaintiff, unless they further believe from the evidence that the plaintiff was guilty of contributory negligence on his part; and, if they believe from the evidence that the plaintiff was guilty of contributory negligence, they must find for the defendant. The jury are instructed that if they believe from the evidence that the plaintiff, after getting on the car he first entered, was unable to find a seat therein, by reason of its crowded condition; that he was told by the conductor of the train that he might find a seat in the forward car; that he went forward after receiving such suggestion, and attempted to pass from that car to the next one; that, when he got out on the platform, he did not remain there, but attempted to pass into the next car, with reasonable promptness; that, while so passing, he exercised reasonable care and caution under the circumstances; that, while so passing, he was thrown from the car by reason of the defendant's train being run over the

<sup>98</sup> Texas & P. Ry. Co. v. Gray (Tex. Civ. App.) 71 S. W. 316.

switch and along the curve mentioned in the declaration at a dangerous rate of speed—they must find for the plaintiff. The burden of proving these facts is upon the plaintiff. But if the jury shall believe that he did not receive any such suggestion from the conductor, or that, if he received it, in passing from one car to the other, or in loitering upon the platform, or in the selection of the time when he undertook to so cross the platform, or in any other particular, he did not exercise such care and caution as a reasonably prudent man, under all the circumstances, should have exercised for his own protection, they should find for the defendant.<sup>99</sup>

**§ 1622. Duty to passenger in street car attempting to transfer to another car**

**§ 1622(1). Michigan**

Now, as to the duty of the company to passengers attempting to board the car: You are instructed that where any street car has stopped at a street crossing to allow one or more passengers to alight, in a populated community, it is the duty of those in charge of the car to be alert to ascertain whether there are also intending passengers attempting to board the same car or cars. If a car has either stopped to let off a passenger or for any other reason, an intending passenger at a street crossing would have a right to take advantage of that fact and board the car. In exactly the same manner, if you find from the proofs that the plaintiff was riding upon the front steps of the rear trailer, and the platform and steps were crowded with passengers, as he states, then he would have a right to step down upon the ground and step to and upon the steps of the platform of the next car while that car was standing still upon the track.<sup>1</sup>

You are further instructed that when he left the steps of the car, if he did so, and stepped down upon the ground to board the next car while it was standing still upon the track, then while he was upon the street he occupied the same position and was entitled to the same degree of caution on the part of the employes of the company as any other person who might have been attempting to board the car while it was standing still, and no further or different degree of care was due to him than to any other passenger attempting to board the same car under like circumstances. The reason for applying this rule is plain. As I have heretofore said, it is plaintiff's claim that he was upon the ground in a safe position just before he attempted to get on the car. There is nothing to show that he was not able to step up from the street upon the step and platform of the standing car as any older person in the

<sup>99</sup> Chesapeake & O. Ry. Co. v. Clowes, 24 S. E. 833, 93 Va. 189.

<sup>1</sup> Keeley v. City Electric Ry. Co., 133 N. W. 1085, 168 Mich. 79.

same position. There is no proof at all of his inability to do this, and you have no right to assume such inability on his part to do this. Therefore the same degree of care and watchfulness for boarding passengers applies in this case as it applies in the case of all passengers under like circumstances.<sup>2</sup>

**§ 1622(2). Missouri**

The court instructs the jury that, if you believe from the evidence that 'on the ——— day of ———, plaintiff became a passenger on one of defendant's cars east-bound on C. avenue, in the city of ———; that she paid her fare and asked for and received a transfer slip or ticket to the ——— line of said defendant company; that at the southwest corner of C. avenue and E. street she left the east-bound C. avenue car, on which she had been traveling, for the purpose of transferring to and entering one of defendant's ——— cars, south-bound on E. street, in order to continue her passage to her destination; that she walked across to the customary and usual stopping place for defendant's ——— cars south-bound on E. street, to take on and discharge passengers at said C. avenue and E. street; that when she reached there one of defendant's ——— cars, south-bound on E. street, had been brought to a stop at the northwest corner of E. street and C. avenue by defendant's agents and employes in charge of and operating said car, to allow passengers to board same; that plaintiff thereupon and without delay proceeded to board said car; that while plaintiff was upon the lower step of said car, and while she was in the act of stepping from the lower step onto the platform of said car for the purpose of entering said car, and before she had sufficient and reasonable time to step from the lower step onto the platform of said car and to secure a safe and firm footing on said car, defendant's agents and employes, in charge of and operating said car, carelessly and negligently caused said car to move forward with a sudden lurch or jerk; that by reason thereof plaintiff was thrown with great force and violence to the street below, and in consequence thereof sustained injuries to her person—then your verdict should be for the plaintiff, provided you further find from the evidence that plaintiff was then and there in the exercise of ordinary care for her own safety.<sup>3</sup>

**§ 1623. Duty to passenger who has taken wrong train through fault of carrier**

The court instructs the jury that if you believe, from the evidence, that the plaintiff was a through passenger from S. to N., in

<sup>2</sup> Keeley v. City Electric Ry. Co.,  
133 N. W. 1085, 168 Mich. 79.

<sup>3</sup> Lynch v. United Rys. Co. of St.  
Louis, 193 S. W. 890, 197 Mo. App.  
238.

the state of ———, by way of ———, in said state of ———, and that on ———, the through sleeping car from S. to N. on which plaintiff was being carried as such passenger reached the ——— station at ———, in the progress of said journey to the city of N., and that said station was then managed and controlled by defendant; and if you further believe from the evidence that said car arrived at said ——— station at 6:30 p. m. of said day on track No. ———, and was to leave said station on the way to N. at 6:50 p. m. over defendant's main line, the ——— Railroad, and that plaintiff during said interval of time between 6:30 and 6:50 p. m. visited the restaurant in said station to obtain refreshments, and upon his return to the train shed of said station, before 6:45 p. m. discovered that the said sleeping car on which he had been traveling as a passenger as aforesaid was no longer standing upon said track No. ———, on which plaintiff had left it, and that plaintiff did not know where said sleeping car was, and thereupon endeavored to find the said car, and in so doing observed a train headed towards the east upon track No. ——— in said station, and that said train contained several sleeping cars and had the general appearance of a through train, and that, on asking the porter on one of said sleeping cars of said train, plaintiff was told by him that said train was the train from N., and that plaintiff thereupon and in consequence of said statement of the porter got on said train, believing it to be the train of which said sleeping car on which he rode from S. was a part, and that afterwards plaintiff was informed by said porter that said train was the ——— train and that he then was directed by said porter to jump off, and that plaintiff then stepped to the platform adjacent to track No. ——— of said station from the step of said sleeping car of said ——— train while the latter was in motion, and in so doing plaintiff slipped upon said platform and fell underneath said train and was run over, whereby he received personal injury in the loss of part of his leg; and if you further find that said injury was so received by plaintiff as a direct consequence of negligence on the part of defendant as defined in other instructions, then your verdict should be for the plaintiff, unless you should further find from the evidence that in the particulars named above the plaintiff was also guilty of negligence which contributed to his injury.<sup>4</sup>

You are instructed that, if the jury should find that when the plaintiff returned to the train shed after leaving the restaurant he discovered that the car in which he had arrived was not on the track where he left it, and he did not know where it was, and defendant

<sup>4</sup> Newcomb v. New York Cent. & H. R. R. Co., 81 S. W. 1069, 182 Mo. 687.

had failed to make reasonable arrangements for directing him to his car, or use ordinary care to do so, and that as a direct result of that failure the plaintiff got on the wrong train, and on discovering that fact got off while the train was in motion, and while exercising ordinary care on his part slipped in doing so and was injured, then such omission or failure of defendant to exercise ordinary care as aforesaid was negligence on the part of defendant.<sup>5</sup>

You are instructed that if, after the plaintiff discovered that he was on the wrong train, the porter told him to jump off, and if the train was going at such a rate of speed that it was dangerous to do so, that plaintiff was unaware of the fact and under the circumstances could not by the exercise of ordinary care have discovered it, but that the porter by the exercise of ordinary care would have known of the danger, but nevertheless gave the plaintiff direction to get off, and the porter's direction influenced the plaintiff's action in getting off, and that in the aforesaid conduct of the porter he omitted to exercise ordinary care for the plaintiff's safety in the circumstances, then defendant was guilty of negligence.<sup>6</sup>

#### § 1624. Duty to persons accompanying stock

##### § 1624(1). United States

The jury are instructed that a person taking a cattle train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes.<sup>7</sup>

##### § 1624(2). Missouri

The court instructs the jury that, if they believe from the evidence that ——— is the mother of S., and that he was on the ——— day of ———, single and unmarried, had no children, and his father was dead, and that on or about the ——— day of ———, S. was, with the consent of defendant, on a freight train of defendant, acting as a caretaker of live stock being transported on said train, and while the caboose was attached to the train standing in the switchyards of defendant in ———, in a safe place and on level ground, he entered the caboose and remained there in the presence of the agent of defendant in charge of the operation thereof, and while so inside the caboose it and a portion of the train was switched and moved in the railroad yards of defendant at ———, by defendant by its agents and servants, and was by them left standing on a high and unprotected trestle or bridge, with no light thereon, and while it was dark and in the nighttime, and that S. was unaware that the caboose had been moved and left standing

<sup>5</sup> Newcomb v. New York Cent. & H. R. R. Co., 81 S. W. 1069, 182 Mo. 687.

<sup>6</sup> Newcomb v. New York Cent. & H. R. R. Co., 81 S. W. 1069, 182 Mo. 687.

<sup>7</sup> Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898.



on said trestle or bridge after he got into the same, and that defendant, its agents and servants, knew, or by the exercise of ordinary care could have known, that S. was in said caboose and was in charge of live stock on said train, and might reasonably leave the caboose to attend to and care for the live stock at any time, and that S. was unfamiliar and unacquainted with the surrounding conditions with reference to the location of said caboose on said trestle, and, on account of the darkness, did not discover or ascertain that the caboose was standing on said trestle or bridge, or that it was dangerous to alight therefrom, and that the agents and servants of defendant in charge of said caboose and train were present when said S. attempted to leave said caboose, and did not inform him that the caboose was standing on said trestle or bridge, and of the danger in attempting to alight therefrom, and he did not receive any warning or notice, and, under all the circumstances, you believe they were negligent in not so informing him, and that the said S., while attempting to leave or alight from the caboose by means of the steps made at the rear end of said caboose for the purpose of ingress and egress, to attend to his duties as a caretaker of said stock, stepped from the steps thereof, and that they extended over the ties and sides of said trestle or bridge, and that by reason thereof he fell a distance of about ——— feet, striking the water, ground, and rock under the trestle or bridge, from which he received injuries resulting in death in the course of a few hours, then you may find for the plaintiff, provided, however, you further find that the said S. at the time herein referred to, while leaving the caboose, was exercising ordinary care under all the circumstances for his own safety.<sup>8</sup>

§ 1624(3). Texas

The court instructs the jury that if you believe, from the evidence, that through the knowledge or acquiescence of the agents and employes of the defendant in charge of its freight and cattle trains, it had become and was, at the time plaintiff was injured, the common practice and custom of shippers of stock and men in charge of such shipments, after they had alighted from defendant's trains, and in leaving the yards of defendant at the place in question, to cross over defendant's train between the cars thereof, and if you believe that such practice and custom, if any there was, was known to defendant's employes who were, at the time in question, operating the defendant's train in question; or if you believe that such practice and custom, if any, was of such character and duration that said employes, as persons of ordinary prudence,

<sup>8</sup> Miller v. Southern Pac. Co., 178 S. W. 885, 266 Mo. 19.



ought to have known of same; and if you believe that such practice and custom, if any, was such as to require said employés, in the use of ordinary prudence, to look out for persons crossing its train; and if you further believe from the evidence that the plaintiff, after he had alighted from defendant's train, was leaving defendant's yards in the usual and customary way, and that, in the use of ordinary care and in pursuance of the said usual custom and practice, if there was such, he was crossing over between two of plaintiff's cars, and that while he was so crossing, the said train was suddenly and without warning started and moved backward, and that thereby plaintiff's foot was caught between said cars, and that he thereby received the injuries complained of; and if you believe that the defendant's employés in charge of said train knew of the presence of plaintiff between the cars, or that in the use of ordinary care and prudence they should have known of or discovered plaintiff's presence between said cars; and if you believe that said employés, in backing or moving said cars, in the manner in which they did back or move them, and under the circumstances, were guilty of negligence, and that such negligence was the proximate cause of plaintiff's injuries—you will find for the plaintiff, unless you find for defendant under other instructions. In this connection you are instructed that plaintiff cannot recover in any event under paragraph ——— of the charge, unless you believe from the preponderance of the evidence that it was customary for shippers of stock to cross defendant's train at the place and under the circumstances of this case, and that the employés of the defendant knew, or ought to have known, of such custom, by the exercise of ordinary care, and unless you further believe that said employés of defendant, in backing or moving its train on the occasion in question, were guilty of negligence that proximately caused plaintiff's injuries.<sup>9</sup>

The jury are instructed that if you believe, from the evidence in this case, that at the time alleged by the plaintiff he was in the car of cattle at ——— to care for his stock, and that the train was started while he was in the car, without notice to him, before he finished getting his cattle up, and that he continued to ride in said car and to work with his cattle from ——— to ———; and if you find that it was dangerous to attempt to get out of same while running, and that a person in the use of ordinary care, under the circumstances, would have remained in said car, and that the conductor in charge of said train knew that plaintiff went into and was riding in said car; and if you find that it was customary for

<sup>9</sup> Weatherford, M. W. & N. W. Ry. Co. v. Thomas (Civ. App.) 175 S. W. 822.

persons in charge of stock to ride in the car with them while moving when necessary, to get up and take care of the cattle; and if you further believe from the evidence that plaintiff was acting with ordinary care for his own safety, while in said car, and that while he was working with a calf in said car the agents or servants of the defendant in charge of said train suddenly and unexpectedly to plaintiff checked and jerked said train with unusual and unnecessary violence, and that by said check or jerk of the train (if there was such check or jerk) was negligence, and such negligence (if any) proximately caused plaintiff to be thrown down and backward against the end of the car, and the calf he was handling to be thrown against his abdomen, and he was thereby injured in any of the respects alleged by him—then you will find in favor of the plaintiff, unless you find for the defendant under other instructions herein given you.<sup>10</sup>

**§ 1625. Collision with frightened horse attached to vehicle**

You are instructed that it is the undisputed evidence in this case that plaintiff was a passenger on defendant's car at the time and place complained of by plaintiff; and the court now instructs you that it was the duty of the defendant's motorman, in charge of said car at the time and place complained of, to exercise the utmost care which ordinarily careful and prudent persons are accustomed to use or exercise in their own affairs, when engaged in a like business and under like or similar circumstances of this case, to safely carry her to her place of destination; and if you shall believe from the evidence in this case that defendant's motorman in charge of said car failed to use such care, and so negligently ran and managed said car that same was brought in contact and collision with a frightened horse attached to a vehicle, and by reason thereof, and as the direct and proximate cause thereof, plaintiff was caused to receive the injuries complained of, then the law is for the plaintiff.<sup>11</sup>

You are instructed that if you shall believe, from the evidence in this case, that said horse became frightened at defendant's street car while the same was being operated in a careful and prudent manner by the motorman in charge of same, and that said motorman in charge of said car could not by the exercise of the utmost care have prevented the collision and injury to plaintiff, if any, then the law in this case is for the defendant, and you will so find.<sup>12</sup>

<sup>10</sup> Gulf, C. & S. F. Ry. Co. v. Stewart (Civ. App.) 164 S. W. 1059.

<sup>12</sup> Wynn v. Paducah City Ry. (Ky.) 102 S. W. 824.

<sup>11</sup> Wynn v. Paducah City Ry. (Ky.) 102 S. W. 824.

**§ 1626. Duty to anticipate unusual occurrence—Acts in emergencies**

You are further instructed that if you believe from the evidence that the plaintiff's intestate was injured in the elevator, and that, at the time of the accident and when the operator was called upon to act, an emergency existed, and that the operator could have used either of two or more methods of stopping the elevator after the emergency arose, then the defendant company is not liable for the actions of the operator in exercising the right of selection between these methods, either of which was shown to be reasonably safe; and you are further instructed that if you believe from the evidence that the operator of the elevator was called on by an emergency created by the plaintiff's intestate, and was in fact attempting to prevent injury to the plaintiff's intestate, then you are instructed that the operator is not held to the same degree of care as he would have been under ordinary circumstances.<sup>13</sup>

You are further instructed that it is not negligence to fail to take precautionary measures to prevent an injury which if taken would have prevented it, when the injury could not have reasonably been anticipated, and would not have happened, but for the occurrence of exceptional circumstances.<sup>14</sup>

**11. *Setting Down Passengers*****§ 1627. Degree of care required in general****§ 1627(1). Colorado**

The court instructs the jury that it was the duty of defendant to exercise the highest degree of care, skill, and vigilance, reasonably practicable in the conduct of its business, to avoid injuring the plaintiff, and to afford her an opportunity to safely alight from the car on which she was riding.<sup>15</sup>

**§ 1627(2). Delaware**

You are instructed that a street railway company, in letting its passengers on and off its cars, is bound to stop its cars, and wait a reasonable time for the passengers to get on or off at its usual stopping places, and a failure to do so would be negligence on its part. It is also its duty to exercise all reasonable care to secure the safety of the passengers. What would be such reasonable time and care would depend, of course, upon the conditions and circumstances of the particular case. A common carrier, such as a railway company, is required to exercise the highest degree of care

<sup>13</sup> *Murphy's Hotel, Inc., v. Cuddy's Adm'r*, 97 S. E. 794, 124 Va. 207.

<sup>14</sup> *Murphy's Hotel, Inc., v. Cuddy's Adm'r*, 97 S. E. 794, 124 Va. 207.

<sup>15</sup> *Colorado Springs & I. Ry. Co. v. Marr*, 141 P. 142, 26 Colo. App. 48.

and diligence that is reasonably practicable in securing the safety of its passengers. But, while the common carrier is held to strict care and prudence in the safe transportation of its passengers, yet it must be borne in mind that it is by no means an insurer of their safety, but is only responsible for its own negligence in case of injury.<sup>16</sup>

§ 1627(3). *Florida*

The court instructs the jury that, if you find from the evidence that the viaduct station, where the train of the defendant is alleged to have stopped on the afternoon of the alleged injury to the plaintiff was a regular station of the defendant for the taking on or discharging of passengers by some of its trains, or on certain days, and if you further find from the evidence that the train on which the plaintiff was then a passenger actually did stop at the said station long enough and under such circumstances as to lead an ordinarily prudent person to believe that such stop was for the purpose of discharging passengers, then it became the duty of the defendant's agents and employes in charge of such train to use care and prudence in again starting the train to see that passengers alighting from said train would not be injured by such starting. If, under such circumstances, they failed to use such care and prudence, they were guilty of negligence, and, if such negligence contributed to the injury of the plaintiff, if you find that she was injured as alleged in the declaration, then you should find for the plaintiff and assess her damages according to the rule of damages already given you in charge by the court, making proper reduction in the amount on account of any contributory negligence on the part of the plaintiff, if you find she was guilty of such contributory negligence. But, if you find from the evidence that the plaintiff actually knew that such stop was not made for the purpose of permitting passengers to alight from said train, and that, notwithstanding such knowledge on her part, she nevertheless attempted to leave the train at that point, and alighted from it while it was in motion, and that she was injured solely as a result of so alighting, then you will find the defendant not guilty.<sup>17</sup>

§ 1627(4). *Indiana*

You are instructed that when a passenger enters the car of the railroad company for transportation over its road, he or she places his or her person in the custody of the railroad company, and has the right to rely upon the railroad company's discharging its duty to provide for his or her safety. This duty involves the providing

<sup>16</sup> *Benson v. Wilmington City Ry. Co.*, 75 A. 793, 1 Boyce, 202.

<sup>17</sup> *Florida East Coast Ry. Co. v. Carter*, 65 So. 254, 67 Fla. 835, Ann. Cas. 1916E, 1299.

by the company of such suitable and proper assistance from the trainmen and employés as may be necessary to enable the passenger to alight from the train, and the stopping of trains at its station in a proper place, and for a sufficient length of time to enable the passengers to alight from the train in safety; and if the company is negligent in failing to discharge all or any of the foregoing duties, and the passenger is injured by such failure, without fault or negligence on his or her part, the company is liable for the injury sustained.<sup>18</sup>

§ 1627(5). **Kentucky**

The jury are instructed that, when plaintiff became a passenger on the defendant's car, it did not insure his safety, but only undertook to observe the utmost degree of care and skill which prudent persons engaged in that or a similar business usually exercise to carry him safely to his destination, and provide him with a reasonably safe means of alighting from the car; and, unless the jury believe from the evidence that the defendant failed to use that degree of care and skill in providing that reasonably safe means of alighting from the car, and that plaintiff was injured by reason of such failure, then the law is for the defendant, and the jury should so find.<sup>19</sup>

§ 1627(6). **Michigan**

You are instructed that negligence is the basis of this action. The plaintiff sues this company because she claims that the company was negligent at the time of her alighting from that train and by reason of their negligence that she was injured and not because of any negligence on her own part. That is the basis of her case. If she fails to prove that she hasn't any case, or if she should prove that the company was negligent and fails to prove that she herself was in the exercise of due care, then she cannot recover. So that it is necessary for you to pay particular attention to what negligence is. It consists in the want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of an injury, and also of a failure to observe that degree of care which the law requires for the protection of interests likely to be injuriously affected by the want of it; a failure to observe, for the protection of another's interests, such care, precaution, and vigilance as the circumstances justly demand and the want of which causes injury. Now that negligence is what is charged here against the defendant. The plaintiff not only charges negligence upon the part of

<sup>18</sup> *Lake Erie & W. R. Co. v. Beals*, 98 N. E. 453, 50 Ind. App. 450.

<sup>19</sup> *South Covington & C. St. Ry. Co. v. Markel*, 182 S. W. 850, 168 Ky. 625.

the defendant, but affirmatively that she was herself in the exercise of due care. That is to say, that she had not contributed to the injury she sustained by reason of her own want of care or her own negligence, and, as applied to her, this definition means that it was her duty, at the time of alighting, to use such due care on the occasion as a prudent person would have done under the circumstances. Now the burden of proof is upon the plaintiff throughout this case upon these two important points; in fact, upon three points. There are three things you must find in this case in order that the plaintiff recover: First, that the defendant was negligent in the manner that is charged as negligence in the plaintiff's declaration, and that, by reason of that negligence, she was injured; and she must also show that her own negligence did not contribute to that injury. Then, if she has shown these two things, the burden of proof being upon her to show by a preponderance of the testimony in her favor, she must show she has been injured thereby and the extent of the injury.<sup>20</sup>

§ 1627(7). Missouri

You are instructed that a common carrier of passengers is charged by the law with the duty of using the utmost care, skill, and vigilance to safely transport those who become passengers on its cars, and the relation of passenger and carrier and the said duty of a carrier to its passenger continues, not only during the actual transportation of the passenger, but while such passenger is alighting from the car; and if in this case you find that plaintiff did become a passenger on one of defendant's passenger trains, and paid her fare as such, then she continued to be such passenger and entitled to said degree of care while alighting from the car at the point of her destination, and, in determining the question of whether defendant's servants exercised such care, you may take into consideration the apparent age and condition of plaintiff at the time, as you may find from the evidence same appeared to defendant's said servants, and the distance from the steps of the car to the ground, the character of the place where she was attempting to alight, as well as all other facts and circumstances shown by the evidence; and if from all the evidence you believe and find that defendant's said servants and agents were careless and negligent in assisting plaintiff to alight, if you find from the evidence they did attempt to assist her, as defined in other instructions, then your verdict should be for the plaintiff.<sup>21</sup>

You are instructed that the term "utmost care, skill, and vigi-

<sup>20</sup> *Chisholm v. Ann Arbor R. Co.*,  
153 N. W. 818, 187 Mich. 214.

<sup>21</sup> *Walker v. Quincy, O. & K. C. R. Co.*, 178 S. W. 108.



lance," as used in these instructions, means that degree of care and skill that very cautious men in the same vocation would use under similar circumstances. <sup>22</sup>

§ 1627(8). Texas

You are instructed that if the jury find, from the evidence, that the injuries sustained by plaintiff's wife were caused by the failure of the conductor to use such care in starting the car as a very competent and prudent man would have exercised under the same or similar circumstances, your verdict will be for plaintiff. <sup>23</sup>

You are instructed that if the jury find, from the evidence, that the conductor used such care in starting the car as a very competent and prudent man would have exercised under the same or similar circumstances, or if the jury find from the evidence that the woman caused or contributed to causing her fall by failure to use the care that a woman of ordinary prudence would have used under the same or similar circumstances, then your verdict will be for the defendant. <sup>24</sup>

You are instructed that the defendant company rested under the duty, in the matter of handling its train and allowing time for passengers to alight therefrom, to use that high degree of care which very prudent, cautious, and competent persons would use under the same or similar circumstances; and, if the defendant used that degree of care, it was not guilty of negligence; if it did not use that degree of care, it was guilty of negligence; and if by reason of and as a direct result of said negligence plaintiff's wife was injured, without contributory negligence on her part, defendant is liable for such damages, if any, as may have been occasioned by said injury. <sup>25</sup>

The jury are instructed that it was the duty of the railroad company to use that high degree of care to avoid injury to the plaintiff, when she was about to alight from its train at ——— on the occasion in question, which very prudent, cautious, and competent persons usually exercise under the same or similar circumstances as those then existing. It is a question of fact, for the jury to determine, whether the defendant's employes were guilty of the acts of which plaintiffs complain, and whether such acts show that said employes failed to use the degree of care above defined or not. <sup>26</sup>

<sup>22</sup> Walker v. Quincy, O. & K. C. R. Co., 178 S. W. 108.

<sup>23</sup> Galveston Electric Co. v. Hanson (Civ. App.) 187 S. W. 533.

<sup>24</sup> Galveston Electric Co. v. Hanson (Civ. App.) 187 S. W. 533.

<sup>25</sup> Galveston, H. & N. Ry. Co. v. Morrison, 102 S. W. 143, 46 Tex. Civ. App. 186.

<sup>26</sup> Houston & T. C. R. Co. v. Dotson, 38 S. W. 642, 15 Tex. Civ. App. 73.



**§ 1628. Duty to set down safely at point of destination****§ 1628(1). Indiana**

The jury are instructed that if you should find in this case, by the evidence, that the plaintiff was a passenger on one of defendant's cars on the night in question, returning from ———, bound for her home in ———, and in giving her ticket to the conductor, notified him that she wished to be put off at the regular stopping place in said city, known as ———, it was the duty of the defendant, the street car company, to carry the plaintiff safely to said stopping place, and its duty toward the plaintiff as a carrier of passengers was not discharged or ended until they had conveyed her to the point designated, and set her down as safely as the means of conveyance employed and the circumstances of the case would permit, she exercising at the time, due diligence and care, and not being guilty of contributory negligence.<sup>27</sup>

**§ 1628(2). Oregon**

You are instructed that, when a person purchases a ticket of a railroad company, and enters its cars, for the purpose of being conveyed from one point to another, the law raises an obligation on the part of the railroad company to carry the passenger safely to the point to which the ticket was purchased, and to stop its train at the point to which the ticket was purchased, at the station of the company or usual place of stoppage, for a sufficient length of time to enable the passenger to safely alight from the train.<sup>28</sup>

**§ 1629. Duty not to mislead passenger as to time and place of getting off****§ 1629(1). Arkansas**

You are instructed that if you find from the evidence, that the deceased was a passenger on the defendant's road from ——— to ———, and that when the train was approaching ——— the employé announced the name of the station in the customary manner, and after passing the city limits the train came to a stop before it came to the depot, and the deceased went from her seat to the platform and steps of the car under such circumstances as would lead a reasonably prudent person to believe that the train had stopped for passengers to ———, and that she acted as a reasonably prudent person, and that in attempting to get off, the train moved suddenly forward without sufficient time for her to alight, and that by reason thereof she was thrown from the steps of the car, then you may find for the plaintiff.<sup>29</sup>

<sup>27</sup> Wabash River Traction Co. v. Baker, 78 N. E. 196, 167 Ind. 262.

<sup>28</sup> Smitson v. Southern Pac. Co., 60 P. 907, 37 Or. 74.

<sup>29</sup> St. Louis, I. M. & S. Ry. Co. v. Rush, 123 S. W. 804, 93 Ark. 631.

The court instructs the jury that railway carriers of passengers must be extremely careful not to mislead their passengers into the belief that the halting of the train at a station is meant as an invitation to them to alight when it is not so intended; and, if the conduct of the servants engaged in the management of the train is such as may reasonably produce that impression, and the passenger so understands it, and in the attempt to leave the coach at a place where no facilities are provided for his doing so, and whilst in the exercise of due care and diligence in doing so, he is injured, the company will be liable.<sup>80</sup>

§ 1629(2). *Michigan*

You are instructed that railway companies are not insurers of the safety of their passengers. They are only liable when there has been actual negligence of themselves or their servants. The running of a railway train beyond the usual stopping place at the station before coming to a stand-still is not of itself negligence, or not negligence as a matter of law; nor is the pause after it is brought to a stop, for a period necessary to reverse the motion so as to back it to the usual stopping place, negligence, unless the stop is so made and for such a length of time as to indicate that it is an invitation to passengers to alight, and the movement backward is made without warning while they are alighting in response to such invitation.<sup>81</sup>

§ 1629(3). *Oregon*

You are instructed that if you should find, from the evidence introduced in this case, that the plaintiff left the car in which she was riding under the belief that the train had stopped, and went upon the platform of the car with her hand baggage, and attempted to alight, under the belief that she had reached the station, and at that time the train had stopped, or was moving so slowly as to lead the plaintiff, as a reasonably prudent person, to believe it was stationary, and was at the station of the defendant at ———, and you also find that the brakeman, the employé of the defendant, saw the plaintiff leave the car, and descend the steps of the platform, and he did not warn or inform her that the train had not yet reached the station, or that it was dangerous to alight at the point at which she was attempting to alight, then the defendant was guilty of negligence, and the plaintiff is entitled to a verdict at your hands.<sup>82</sup>

<sup>80</sup> *Kansas City Southern Ry. Co. v. Davis*, 103 S. W. 603, 83 Ark. 217.

<sup>81</sup> *Sherwood v. Chicago & W. M. Ry. Co.*, 46 N. W. 773, 82 Mich. 374.

<sup>82</sup> *Smitson v. Southern Pac. Co.*, 60 P. 907, 37 Or. 74.

**§ 1630. Inducing or misleading passenger to alight while car in motion**

**§ 1630(1). Delaware**

You are instructed that this is an action brought to recover damages for personal injuries which the plaintiff alleges she sustained on account of the negligence of the defendant company. It is admitted that the defendant company was operating the train of cars at the time of the accident. The plaintiff avers that, being a passenger on a train of the defendant on ———, traveling from ——— to ———, when the train had reached the northern part of the latter town, and a point at or near where ——— street intersects the railroad tracks, the conductor said, "All out for ———," and that she got up and followed him and he said, "Get off." The conductor denies that he told the plaintiff to get off or announced, "All out for ———." He insists that he has no recollection that the plaintiff was on the train on the night in question.<sup>33</sup>

You are instructed that whether the car on the morning of the accident did or did not stop at the usual stopping place at ——— and ——— streets, or whether the car so slowed up on the curve in going into ——— street as to invite the plaintiff to alight is peculiarly for your determination under the evidence in this case.<sup>34</sup>

**§ 1630(2). Kentucky**

You are instructed that, if you shall believe from the evidence in this case that on the occasion complained of by the plaintiff, and when she undertook to get off the defendant's street car on said occasion, and before same had been stopped, the conductor in charge of said street car knew that said car was still in motion, or by the exercise of ordinary care could have known it, and that plaintiff did not know that said car was in motion, but believed same had been stopped, and that said conductor saw plaintiff when she was making an effort to get off of said car in time to have warned her that said car had not stopped, or was still in motion, and thereby prevent her from stepping from said moving car, and failed to do so, then the defendant is chargeable with negligence, in this case, and the law is for the plaintiff, and you will so find.<sup>35</sup>

The court instructs the jury that it was the duty of defendant's servants in charge of the train upon which plaintiff was a passenger to exercise the highest degree of care, which prudent persons engaged in a like business usually exercise, to carry him safely as a passenger to ———, his destination, and to there allow him to

<sup>33</sup> Clayton v. Philadelphia, B. & W. R. Co. (Super.) 106 A. 577, 7 Boyce, 343.

<sup>34</sup> Glrardo v. Wilmington & Phila-

delphia Traction Co., 90 A. 476, 5 Boyce, 35.

<sup>35</sup> Paducah Traction Co. v. Tolar, 171 S. W. 1009, 162 Ky. 50.

alight from the train in safety; and the duty of plaintiff while upon the train and in leaving it to exercise ordinary care for his own safety. If you believe from the evidence that the train arrived at ——— in the darkness of the night, that its arrival was announced in the hearing of plaintiff by one of the train employes, and its speed lessened in approaching the station, and shall further believe from the evidence that the train porter, while it was still in motion, requested the plaintiff to get off and immediately stepped from the train himself, unprovided with a lantern, and that plaintiff was induced by such request and the act of the porter in stepping from the train, if either, to step from it himself, in the belief that it had stopped, and by reason thereof fell and was injured, you should find for the plaintiff, unless you believe from the evidence he knew, or by the exercise of ordinary care might have discovered, that the train was still in motion, and that it was not under the circumstances reasonably safe for him to attempt to alight from it, in which event you should find for the defendant. <sup>36</sup>

§ 1630(3). Missouri

You are instructed that, if the jury find from the evidence that on the ——— day of ———, the defendant was a carrier of passengers for hire by street railroad, and used the railway and cars mentioned in the evidence for said purpose; and if you further find from the evidence that on said day the defendant's employes in charge of its cars received the plaintiff as a passenger upon its cars; and if you find from the evidence that the plaintiff paid her fare as such passenger to defendant's employe authorized to receive same for the defendant; and if you further find from the evidence that the plaintiff requested defendant's conductor in charge of the car on which she was such passenger to allow her to leave said car at ——— avenue crossing; and if you believe from the evidence that upon said car approaching said crossing it did not stop or slacken up, and that thereupon the plaintiff gave a signal to said conductor to stop said car, to enable her to alight therefrom; and if you further find from the evidence that said conductor did, in obedience to such signal, cause said car to slacken up between ——— avenue and ——— street to enable the plaintiff to alight from said car as such passenger; and if you further find from the evidence that whilst said car was so slackened up, and whilst said car was moving slowly, the plaintiff was in the act of stepping from said car, and whilst doing so defendant's employes in charge of said cars either caused or suffered said cars to be started forward with increased speed, or with a jerk, and that thereby

<sup>36</sup> Louisville & N. R. Co. v. Moore, 150 S. W. 849, 150 Ky. 692.

the plaintiff was thrown upon the street, and injured; and, if the jury further find from the evidence that defendant's servants in charge of its car could, by the exercise of a very high degree of care, such as would have been used by careful and skillful men under like circumstances, have prevented such movement of said car at such time, and failed to do so; and if the jury further find from the evidence that the plaintiff, at the time she attempted to alight from the car, was exercising ordinary care for her own safety in doing so, under the circumstances shown in evidence—then plaintiff is entitled to recover.<sup>37</sup>

§ 1630(4). *Oklahoma*

You are instructed that, if you believe from the evidence in this case, by a preponderance thereof, that the plaintiff, while such passenger upon defendant's street car, gave notice of her intention and desire to alight from said car and walked to the rear platform of said car for that purpose, and after she reached the said rear platform, and while the car was in motion, the servant and employé of said defendant, to wit, the conductor of the said car, took hold of her arm and by force and pressure impelled her to step from said car, the said car having gone beyond the regular stopping place, and not having stopped and given plaintiff an opportunity to alight at said regular stopping place, then the defendant, under that state of facts, would have failed to perform its duty toward plaintiff; and if you further believe, by reason of such negligence on the part of the defendant, the plaintiff stepped off said car and was injured, and that plaintiff was exercising, at the time, due care for her own safety, then and in that event your verdict should be for the plaintiff.<sup>38</sup>

§ 1631. *Stopping car as an invitation to alight*

You are instructed that the stopping of a street car at or near a regular stopping place, operated by a carrier of passengers for hire, after a signal provided by such carrier to notify the agents in charge of such car that a passenger desires to alight at the next stop has been given or caused to be given by a passenger on such car, is an invitation to such passenger to alight, and such passenger has a right to alight the instant such car stops, and to rely on such car not being started until a reasonable time for such passenger to alight has been given.<sup>39</sup>

The jury are instructed that bringing the car to a full stop near the regular stopping place after having given the usual signal in-

<sup>37</sup> *Cobb v. Lindell Ry. Co.*, 50 S. W. 310, 149 Mo. 135.

<sup>38</sup> *Oklahoma Ry. Co. v. Christenson*, 148 P. 94, 47 Okl. 132.

<sup>39</sup> *Terre Haute, I. & E. Traction Co. v. York*, 110 N. E. 999, 60 Ind. App. 399.

dicating the arrival at the stopping place is an implied invitation to the passenger to alight. <sup>40</sup>

**§ 1632. Duty to give reasonable opportunity to get off**

**§ 1632(1). Arkansas**

The court charges the jury that the law does not require a railroad conductor, before starting his train, to find out that all passengers desirous of getting off have gotten off, but he is only required to stop his train a reasonable length of time to allow passengers to get off, and when that time has elapsed he has a perfect right to set his train again in motion. <sup>41</sup>

The court instructs the jury that a "reasonable time to alight," as used in the instructions, is such time as is usually required for passengers to get on and off trains at that station in safety. <sup>42</sup>

The jury are instructed that, if you find from the evidence in this cause that the defendant's train did not stop long enough at the platform to allow the plaintiff to leave the train while standing, and that she stepped therefrom while it was in such slow motion as not to indicate recklessness, imprudence, or negligence as hereinbefore defined, and that she received injuries by a fall from the motion of the train, she is entitled to recover. <sup>43</sup>

The jury are instructed that a reasonable time to get off, as mentioned in these instructions, is such time as it usually requires for passengers to get off and on the train at that station in safety. <sup>44</sup>

**§ 1632(2). Delaware**

You are instructed that a street railway company, in letting its passengers on and off its cars is bound to stop its cars and wait a reasonable time for the passengers to get on or off at its usual stopping places and a failure to do so would be negligence on its part. It is also the duty of the company to exercise all reasonable care to secure the safety of the passengers. <sup>45</sup>

You are instructed that a street railway company, in letting its passengers on and off its cars, is bound to stop its cars, and wait a reasonable time for the passengers to get on and off, and also to

<sup>40</sup> *Terre Haute Traction & Light Co. v. Payne*, 89 N. E. 413, 45 Ind. App. 132.

<sup>41</sup> *Barringer v. St. Louis, I. M. & S. Ry. Co.*, 85 S. W. 94, 73 Ark. 548. This is proper, in connection with other instructions as to the duty of the carrier in case the conductor knew that plaintiff was in the act of alighting, or knew that by reason of some condition he needed assistance.

<sup>42</sup> *Barringer v. St. Louis, I. M. & S. Ry. Co.*, 85 S. W. 94, 73 Ark. 548.

<sup>43</sup> *Little Rock, etc., R. Co. v. Atkins*, 46 Ark. 423.

<sup>44</sup> *Little Rock, etc., R. Co. v. Atkins*, 46 Ark. 423.

<sup>45</sup> *Girardo v. Wilmington & Philadelphia Traction Co.*, 90 A. 476, 5 Boyce, 25.



use and exercise all reasonable care to secure the safety of the passengers. What would be, in any particular case, a reasonable time, depends of course upon the conditions existing at the time. While, therefore, the common carrier is held to strict care in the safe transportation of its passengers, yet it must be borne in mind that it is by no means an insurer of their safety, but is only responsible for its own negligence in case of injury. <sup>46</sup>

§ 1632(3). Florida

On the question of the length of time I charge you that if you believe from the evidence that the employés of the railroad company, the defendant in this case, did not stop the train for a reasonable length of time for the plaintiff to leave the train, and that he was a passenger on that train, and that by reason of the negligence on the part of the defendant company in not giving him a reasonable time to leave the train he was injured in attempting to leave it, and such negligence on the part of the defendant company and its employés was the proximate cause of the injury alleged in the declaration which was sustained by him, if you believe he was injured, then he would be entitled to recover. <sup>47</sup>

The jury are instructed that it is the duty of a railroad company to give a reasonably sufficient time at its stopping places for its passengers to safely alight from their trains. <sup>48</sup>

The jury are instructed that the time required for a passenger to leave a train depends upon the circumstances of each particular case. Whether the stop on the day of this accident was reasonably sufficient under the circumstances in evidence is a question for you to determine. <sup>49</sup>

§ 1632(4). Indiana

You are instructed that it is the duty of the railroad to stop its trains for a reasonable time at way stations, in order that passengers may get on or off the cars with safety; and the railroad company is liable when its conductor, or other servant, gives a starting signal while a passenger is obviously in the act of getting on or off its said train; but if the train has stopped a reasonable time, and the passenger has given no notice of an intention to alight, and the conductor does not see him in the act of alighting, the railroad company is not liable for the act of the conductor in starting the train. <sup>50</sup>

You are instructed that, if you find that the plaintiff was in good health and not suffering from any physical infirmities, and was able to walk and go about without assistance and as an ordinary person,

<sup>46</sup> *File v. Wilmington City Ry. Co.*, 80 A. 623. 7 Pennewill, 463.

<sup>47</sup> *Atlanta & St. A. B. Ry. Co. v. Kelly*, 82 So. 57, 77 Fla. 479.

<sup>48</sup> *Florida Ry. Co. v. Dorsey*, 52 So. 963, 59 Fla. 260.

<sup>49</sup> *Florida Ry. Co. v. Dorsey*, 52 So. 963, 59 Fla. 260.

<sup>50</sup> *Lake Erie & W. R. Co. v. Beals*, 98 N. E. 453, 50 Ind. App. 450.



and if, by the exercise of reasonable diligence and expedition, the plaintiff could have left her seat in said car and proceeded to the steps of said car and alighted therefrom in safety before said train started to leave the station, and if none of the defendant's servants had any knowledge that plaintiff intended to alight, then you should find for the defendant.<sup>51</sup>

§ 1632(5). Mississippi

The court instructs the jury for the plaintiff if they believe from the evidence that the plaintiff, at ———, on the evening of the injury, purchased a ticket for ———, and boarded the railroad company's passenger train to go to ———; that she chose and occupied the seat near the front end of the ladies' coach for the purpose of speedily alighting from the train when the same should reach ———; that the conductor of the train took up plaintiff's ticket before reaching ———; that plaintiff was ——— or ——— years of age, and appeared to be about that age, and was seen by the conductor at the time he took up her ticket; that just before reaching and at the usual distance from ——— the flagman, whose duty it was to do so, came to the ladies' coach where plaintiff was, and announced the station, "———,"; that she waited in her seat until the train stopped at ——— in the usual place where passengers ordinarily alight, and immediately after the train stopped she got up and started for the front steps of the said coach for the purpose of alighting from the train; that the train stopped an insufficient length of time for her to get off; that by the time she got on the said steps the train was again in motion; that the train had then moved not exceeding a half a car length, or ——— feet, and was going very slowly; and that plaintiff, while using ordinary care and caution, attempted to alight from the train by way of the said steps at this point, and in so attempting to alight from the train fell or was thrown to the ground—then the jury must find for the plaintiff, although the jury believe that the train was in motion when she attempted to alight therefrom.<sup>52</sup>

The court instructs the jury for the plaintiff that it was the duty of the railroad company to use the utmost caution and extraordinary vigilance in transporting its passengers and in delivering them at their destination. Passengers are entitled to be safely delivered at their destination by being allowed to alight from the cars without danger. It was the duty of the railroad company, if its employes knew she was attempting to get off the train, to ob-

<sup>51</sup> Lake Erie & W. R. Co. v. Beals, 98 N. E. 453, 50 Ind. App. 450.

<sup>52</sup> Yazoo & M. V. R. Co. v. Hatch, 35 So. 941.

serve whether the plaintiff had actually alighted from the car before the train was started again, and if the railroad company failed to so observe whether she had alighted before the train was started again, and by starting the train injured the plaintiff while she was using due care in alighting from the train, then the jury must find for the plaintiff.<sup>53</sup>

§ 1632(6). Missouri

The court instructs the jury that if you believe from the evidence the defendant, on or about ———, managed, conducted, and operated a cable street railroad in a north and south direction along ——— street in ———, on which it carried passengers for hire, and that on or about said date plaintiff became a passenger upon a car, the motive power of which was an endless cable, on said railroad, then being managed, controlled, and operated by defendant on its said street railroad by its servants and agents upon and in charge thereof, and paid his fare to be carried as a passenger thereon to ——— and ——— streets in said city, and that when the said car upon which plaintiff was a passenger as aforesaid arrived at the south side of ——— street, it was stopped or slowed down so as to be almost stopped by defendant's servants and agents in charge of said car at the usual place for that purpose, to allow passengers to get on and off of said car, and that upon the stopping of said car or the slowing of the speed of said car so that it was almost stopped, for the purpose aforesaid, the plaintiff attempted to alight therefrom, and that in attempting to alight from the car under such circumstances, and in his conduct in so doing, he was exercising the same care and caution an ordinarily prudent person would exercise under similar circumstances, and while he was in the act of so doing, the defendant, acting by and through its servants and agents upon and in charge of said car, carelessly and negligently, and without allowing plaintiff a reasonable time to get off of said car, and without any warning to plaintiff, caused or permitted said car to be suddenly started and jerked forward, whereby the plaintiff was thrown violently from said car to the pavement, and was thereby wounded, and the bones of his left leg near the hip were broken, and he was thereby disabled and rendered a cripple for life, then your verdict must be for the plaintiff.<sup>54</sup>

The court instructs the jury that it was the duty of defendant, as a common carrier of passengers, by its agents and employes, to have stopped its passenger cars at the depot platform at ———,

<sup>53</sup> Yazoo & M. V. R. Co. v. Hatch, 35 So. 941.

<sup>54</sup> Setzler v. Metropolitan St. Ry. Co., 127 S. W. 1, 227 Mo. 454.

a sufficient length of time to have made it safe for ingress and egress of passengers in and from the same, and to enable them to get on and off in safety.<sup>55</sup>

The court instructs the jury that it was the duty of the defendant, as a common carrier of passengers in ———, for hire, when it stopped its car, whether in consequence of cars being on ——— street, or from any other reason, not to start the same again while the plaintiff was in the act of getting off the car, if the fact that plaintiff was in the act of alighting was known to the conductor having charge of the same; and, as a common carrier of passengers, it was defendant's duty to give plaintiff a reasonable opportunity to alight from its car before starting the same, if the fact that plaintiff desired to alight was known to the conductor in charge of the car. And if the jury believe from the evidence that on the ——— day of ———, the plaintiff was a passenger upon one of the street cars of the defendant, operated by it on ——— street, in the city of ———, and while such car of defendant, in which plaintiff and others were being conveyed as passengers, was passing along ——— street, south of ——— street, it had stopped for any purpose, and when so stopped the plaintiff was in the act of getting off said car, with the knowledge of the conductor of said car, and while in the exercise of due diligence on her part, and that said car was started while plaintiff was so getting off, and, before she had a reasonable time to do so, she was thereby thrown down upon the street, and was injured, the defendant is liable for the damages thereby sustained by plaintiff, and the verdict should be for the plaintiff.<sup>56</sup>

The court instructs the jury that it was the duty of defendant's servants and employes, on the occasion in question, to stop the train long enough for plaintiff, by the exercise of ordinary care and diligence, considering her age, sex, and physical condition, to get off the train safely before it was started, or suffered to start. And if the jury believe from the evidence that the plaintiff, as soon as the train stopped, got up from her seat, and walked at once, and as fast as she reasonably could, out on the platform, and down the step on the car, without stopping on the way, then she did all the law required of her, so far as diligence on her part in getting off the train was concerned. And if, under such circumstances, the defendant's servants or employes started the train while she was proceeding to alight, still using due and reasonable haste in getting off the train, such starting of said train was an act of negli-

<sup>55</sup> Shoush v. Missouri Pac. Ry. Co.,  
102 S. W. 591, 125 Mo. App. 386.

<sup>56</sup> Jackson v. Grand Ave. Ry. Co.,  
24 S. W. 192, 118 Mo. 199.

gence on the part of defendant, and a breach of its duty to plaintiff as a passenger on its road.<sup>57</sup>

§ 1632(7). *Montana*

You are instructed that a passenger in alighting from a car of a common carrier is entitled to a reasonable time in which to get off of the car after he has been given an opportunity to do so; and if you believe from the evidence that the plaintiff was a passenger on a car of the defendant, and that the same was started after having been stopped, if you find it did stop, without allowing him such reasonable time in which to alight, then the defendant is liable for any injuries he may have received by reason of the car starting, provided you believe from the evidence that plaintiff was in the exercise of reasonable and ordinary care to avoid injury to himself, or was not guilty of contributory negligence as defined in these instructions.<sup>58</sup>

§ 1632(8). *Nebraska*

You are instructed that a passenger upon a railroad train is entitled to a reasonable time to leave or alight from the car in which he is riding when a train is stopped for that purpose; and when reasonable time is not in fact given in which to alight in safety, if, in attempting to do so, injuries result to him, he is entitled to recover from the railroad company for such injuries, unless in doing so he is guilty of criminal negligence, as elsewhere defined in these instructions, or unless in doing so he is violating some express rule or regulation of said railroad, actually brought to his notice.<sup>59</sup>

§ 1632(9). *Pennsylvania*

You are instructed that it is alleged by the plaintiff that when the cars arrived at ——— station, which was the point of her destination, the train was not stopped a sufficient time to enable her to get off in safety, and that in consequence thereof she sustained serious injuries. This is the first question that presents itself for your consideration; for, if the defendant was not guilty of negligence, if the train stopped a sufficient time to enable the plaintiff to get off in safety, by using that degree of care required of every prudent person, then there can be no recovery in this case.<sup>60</sup>

§ 1632(10). *South Carolina*

You are instructed that a railroad company engaged in carrying passengers for hire is held to the exercise of the highest degree of care in that business. The carriage extends from the incipient reception of the passenger on the cars to his disembarkation there-

<sup>57</sup> *Hickman v. Missouri Pac. Ry. Co.*, 4 S. W. 127, 91 Mo. 433.

<sup>58</sup> *Lehane v. Butte Electric Ry. Co.*, 97 P. 1038, 37 Mont. 564.

<sup>59</sup> *Omaha & R. V. R. Co. v. Chollette*, 49 N. W. 1114, 33 Neb. 143.

<sup>60</sup> *Leggett v. Western New York & P. R. Co.*, 21 A. 996, 143 Pa. 39.

from on the place provided for his reception. The jury must fix the standard of the highest degree of care, and inquire if the railroad company came up to it or fell short of it. The statute law requires the company shall cause its trains to entirely stop at a station "for a time sufficient to let off passengers." What is a sufficient time? is a question for the jury under all the circumstances of each case. When the train stops, what must the conductor do, if anything, to secure the disembarkation of passengers? He must stop a time sufficient to let them off. The statute law so declares. But it would be an assumption of your powers by me to charge you he should or not look to see if the passengers have disembarked, or to charge you he should do any other specific act. The jury must take into consideration the speed of trains, the distance traversed, the number of the stops, the crowds carried, the habits of men, and inquire if, under all the circumstances there present, the conductor exercised the highest degree of care in the particular case. If he did, the company is absolved from liability. If he did not, the company is liable if such shortcoming was one of the proximate causes of an injury to a passenger.<sup>61</sup>

§ 1632(11). Texas

The court instructs the jury that, if the train was stopped a reasonably sufficient length of time to enable plaintiff's wife to have alighted before it started, and she negligently failed to do so, and the conductor, not knowing and having no reason to believe that she was in the act of getting off, caused the train to start, and she was injured, plaintiff would not be entitled to recover.<sup>62</sup>

You are instructed that, if you believe from the evidence that the plaintiff was a passenger on the train of the defendant, as alleged in his petition, and shall further believe from the evidence that when said train reached the town of ——— the employes in charge of said train negligently and carelessly failed to stop said train a sufficient length of time to allow plaintiff to leave the same in safety, and that by reason of said negligence, if any, the plaintiff was injured as charged in his petition, you will find for the plaintiff damages, if any, as hereinafter instructed, unless, under the evidence and the instructions hereinafter given, you find for the defendant.<sup>63</sup>

§ 1632(12). Washington

You are instructed that it was the duty of the street car company in the case now on trial to have stopped its car at ——— a rea-

<sup>61</sup> Shealey v. South Carolina & G. Ry. Co., 45 S. E. 119, 67 S. C. 61.

<sup>62</sup> St. Louis Southwestern Ry. Co. of Texas v. Addis (Civ. App.) 142 S. W. 955.

<sup>63</sup> Missouri, K. & T. Ry. Co. of Texas v. McElree, 41 S. W. 843, 16 Tex. Civ. App. 182.

sonably sufficient length of time to enable all passengers on said car who desired to alight from the car at that place to do so with safety; if they used reasonable care on their part to do so, and if you find that the street car company failed on its part to give the plaintiff a reasonable time to alight from the car before starting the same, then that would be negligence on its part in that regard. If you find from the evidence in this case that the plaintiff was standing on the car platform ready to alight therefrom, or was in the act of alighting from the car when the defendant suddenly started the car and threw the plaintiff off in the manner substantially as alleged in his complaint, then the defendant would be liable for the injuries he may have sustained by reason of their having so started the car.<sup>64</sup>

### § 1633. Duty to announce station

#### § 1633(1). Florida

You are instructed that if you believe from the evidence that the plaintiff was a passenger on a passenger or excursion train of the defendant company at the time alleged, and that he notified the company or its agents and employes that he desired to get off the train at the town of ———, and that the employes did not notify him when they reached the town of ———, and did not give him sufficient or reasonable length of time within which to alight from the train, and that he discovered for himself that the train was at the town of ———, and attempted to alight, and was standing on the platform or the steps of the train, and that the train gave a jerk, caused by the agents or employes of the defendant company, and that such jerk caused the plaintiff to lose his balance, so that it became necessary for him to jump to prevent his falling, then it would be your duty to find a verdict for the plaintiff for such damages as you believe he may have sustained, or as the evidence may show he has sustained.<sup>65</sup>

#### § 1633(2). Kentucky

You are instructed that, if the jury believe from the evidence that the defendant's agents in charge of the train in question failed to announce twice ——— station in the car in which plaintiff was riding within a reasonable time before its arrival at that station, or that the defendant failed to light its platform in such a manner as to afford the passengers a reasonably safe means of alighting from the train while the train stopped for that purpose, and that the plaintiff, by reason of such failure to announce the station, was delayed in getting off the train, and, when he undertook to get

<sup>64</sup> Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595.

<sup>65</sup> Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.



off, the train started suddenly as he was stepping from it, and he received the injury sued for by reason of the failure to announce the station or to have the platform lighted while the train stood at the platform for the purpose of receiving or letting off passengers, the jury should find for him the damages he thereby sustained, unless they find as set out in No. ———.<sup>66</sup>

§ 1633(3). **Wyoming**

You are instructed that, as plaintiff herself states that she was acquainted with the station of ———, knew when the train stopped there that she had arrived at her destination, and at once, when the train so stopped, left her seat to alight, it is immaterial whether the train was or was not called by any one on approaching ———, and you will therefore entirely disregard the allegation in plaintiff's petition, as also all evidence showing such call not to have been so made.<sup>67</sup>

§ 1634. **Duty, after stopping, to give passenger notice of all movements of car or train**

You are told that the carriers of passengers by steam are held to a high degree of care and are responsible for a very small degree of negligence. They are bound to provide safe and convenient means of ingress and egress to and from their cars, to remain stopped at stations a reasonable length of time to permit passengers to leave the cars with safety. When a train has stopped at a station, and before the passengers have had time to alight, it is their duty to give the passengers notice in some way of all moves of the train. If in this case you find from a preponderance of the evidence that the defendant failed in the discharge of its duty in either of these respects while the plaintiff was a passenger on the train, and that such failure caused the injury without fault on plaintiff's part, your verdict should be for the plaintiff.<sup>68</sup>

§ 1635. **Suddenly starting car while passenger alighting**

§ 1635(1). **Arkansas**

You are instructed that, if you find from the evidence that the deceased was a passenger on the defendant's road from ——— to ———, and that, when the train was approaching ———, the employés announced the name of the station in the customary manner, and that, after passing the city limits, the train came to a stop before it reached the depot, and the deceased went from her seat in the coach to the platform and steps of the car under such cir-

<sup>66</sup> Chesapeake & O. R. Co. v. Robinson, 123 S. W. 308, 135 Ky. 850.

<sup>67</sup> Chicago, B. & Q. Ry. Co. v. Lampman, 104 P. 533, 18 Wyo. 106, 25 L.

R. A. (N. S.) 217, Ann. Cas. 1912C, 788.

<sup>68</sup> St. Louis, I. M. & S. Ry. Co. v. Briggs, 113 S. W. 644, 87 Ark. 581.



cumstances as would lead a reasonably prudent person to believe, and she did believe, that the train had stopped for passengers to ———, and that she acted as a reasonably prudent person, and that in attempting to get off the train moved suddenly forward without sufficient time for her to alight, and that, by reason thereof, she was thrown from the steps of the car, then you will find for the plaintiff.<sup>69</sup>

The court instructs the jury that, if they find from a preponderance of the evidence that plaintiff was a passenger on said train for the station of ———, then it became and was the duty of the said defendant to cause its said train to stop at ——— and remain at a standstill for a reasonable length of time, sufficient to enable plaintiff to alight therefrom in safety, in the exercise of ordinary care and diligence on his part; and if in this case you should find from a preponderance of the evidence that the station of ——— was announced by the defendant, and thereafter the train came to a stop, and that plaintiff thereupon immediately proceeded to the platform of the caboose and was attempting to alight therefrom, and that the train of defendant upon which the plaintiff was riding was suddenly moved by the defendant, and that plaintiff was thereby, while in the exercise of ordinary care, injured, then is the plaintiff entitled to recover.<sup>70</sup>

**§ 1635(2). California**

You are instructed that the relation of passenger and carrier continues to exist while the passenger is expeditiously alighting from the car; and the carrier is bound to exercise the same high degree of care in affording a passenger a reasonable opportunity to alight in safety as in carrying her safely; and if you find from the evidence submitted to you in this case that while the plaintiff was alighting from the car of the defendant company the car upon which she had been riding was started by the defendant before she had a reasonable opportunity to reach a place of safety and by reason thereof the injuries complained of were inflicted, then your verdict should be for the plaintiff.<sup>71</sup>

You are instructed that, if you find from the evidence that the plaintiff became a passenger on one of the defendant's cars; that she paid her fare and received a transfer entitling her to continue her journey on another of the defendant's cars from the transfer point; that she alighted at the point indicated by the conductor of the car upon which she was riding; and that the car from which

<sup>69</sup> St. Louis, I. M. & S. Ry. Co. v. Rush, 111 S. W. 263, 86 Ark. 325.

<sup>70</sup> Abelson v. St. Louis, I. M. & S. Ry. Co., 105 S. W. 81, 84 Ark. 181.

<sup>71</sup> Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93.

she had alighted was started before she had a reasonable opportunity to reach a place of safety, using in that behalf the care which an ordinarily prudent person would have used under the circumstances, then your verdict should be for the plaintiff.<sup>72</sup>

You are instructed that it is the duty of a street railway company to afford a reasonable time for its passengers to alight from its cars at the place where the car stops for that purpose, and if a passenger is injured without fault on his part, while on the steps of a car slowing down for the purpose of enabling passengers to alight, preparatory to alighting when the car has stopped, by reason of a sudden starting of the car, the burden is thrown upon the company to show that the injury was not the result of its own act of negligence.<sup>73</sup>

You are instructed that, if the jury find from the evidence that the plaintiff arose from her seat and stepped down onto the step with intent of alighting while the car was standing still, and that such act was observed by the motorman or conductor, such act was a sufficient notice to the employés in charge of said car of her desire to alight therefrom; and if the jury further believe that, while she was in the act of alighting, the car was suddenly started through the negligent act of the employé in charge of said car, and the plaintiff was thereby thrown to the ground and injured, she is entitled to recover.<sup>74</sup>

§ 1635(3). Delaware

You are instructed that if you believe, from the preponderance of evidence in this case, after a careful consideration on your part, that while the plaintiff was in the act of alighting from the car of the defendant at ——— and ——— streets, on the ——— day of ——— last, that the company negligently started the car forward or backward, so as to cause her to lose her footing and throw her from the car, she would be entitled to your verdict, unless she contributed to the accident.<sup>75</sup>

§ 1635(4). Florida

The jury are instructed that, if the jury find from the evidence that, when the train stopped at her destination, "the plaintiff in reasonable haste commensurate with her age and incumbrance of baggage directly proceeded to alight, and that, before she could clear herself from the steps of the train, the train was started with such

<sup>72</sup> *Boa v. San Francisco-Oakland Terminal Rys.*, 187 P. 2, 182 Cal. 93.

<sup>73</sup> *Froeming v. Stockton Electric R. Co.*, 153 P. 712, 171 Cal. 401, Ann. Cas. 1918B, 408.

<sup>74</sup> *Joyce v. Los Angeles Ry. Co.*, 82 P. 204, 147 Cal. 274.

<sup>75</sup> *Reiss v. Wilmington City Ry. Co.* (Super.) 67 A. 153.

violent motion as to throw the plaintiff to the ground and injure her, then you should find for the plaintiff.<sup>76</sup>

§ 1635(5). *Indiana*

You are instructed that, if the car upon which the plaintiff was riding was stopped in obedience to a signal at said stopping place, and that at the time the plaintiff went upon, or was upon, the running board provided for the purpose, preparatory and for the purpose of alighting therefrom, and that while she was so situated, and before she could alight, but while in the act of alighting, and while using due care, the defendant's servants in charge of the car, without notice or warning to the plaintiff, negligently put the car in motion, and thereby, without negligence on plaintiff's part contributing thereto, threw her to the ground and injured her, the defendant would be liable.<sup>77</sup>

§ 1635(6). *Kentucky*

You are instructed that, if you believe from the evidence that, while plaintiff was in the act of alighting, the car was started, and that she, in order to balance herself, in the exercise of ordinary care, put her hand on the gate, and that her finger, or the ring upon her finger, caught in the wire mesh of the gate, and her hand was thereby injured, then the law is for the plaintiff, and you should so find. But unless you so believe from the evidence, the law is for the defendant, and you should so find.<sup>78</sup>

§ 1635(7). *Massachusetts*

The jury are instructed that the plaintiff must show that a signal to start the car was given by the conductor, or that the car was started by the motorman without signal; but if you believe the testimony introduced by plaintiff you will be warranted in finding either that a signal to start was given by the conductor or that the motorman started the car without receiving a signal.<sup>79</sup>

§ 1635(8). *Michigan*

Well, gentlemen of the jury, as I have had occasion to say to most of you before on this panel, in cases of this description, the primary inquiry on your part is the question as to whether the defendant company was negligent, and then follows the question as to whether or not the plaintiff herself was free from contributory negligence. I don't think, in a case of this description, that it is either essential or of a great deal of assistance to you to define with any amount of accuracy or detail the meaning of the term "negligence." In general, you know what it is. For the purpose

<sup>76</sup> *Florida Ry. Co. v. Dorsey*, 52 So. 963, 59 Fla. 260.

<sup>77</sup> *Louisville & S. I. Traction Co. v. Korbe* (App.) 90 N. E. 483.

<sup>78</sup> *Louisville Ry. Co. v. Schwemmer*, 205 S. W. 685, 181 Ky. 641.

<sup>79</sup> *Gray v. Boston Elevated Ry. Co.*, 102 N. E. 71, 215 Mass. 143.

of this controversy, I say to you gentlemen this: That if the car was started up after it came to a full stop, while the plaintiff was in the position of danger, from which position the starting up of the car would have a natural tendency to throw her off the car and injure her, that would be negligence. If, on the other hand, the theory of the defendant is correct, and the plaintiff simply slipped as she was getting off the car, while the car was at a full stop, then there is no negligence on behalf of the company, and she cannot recover. Now, you have heard this short case. You have heard the conflicting claims of the complainant and the defendant. If the plaintiff's version of this accident is true, she is entitled to recover. If the defendant's version of the accident is true, she is not entitled to recover.<sup>80</sup>

**§ 1635(9). Missouri**

You are instructed that, if you find and believe from the evidence that the defendant negligently—that is, without exercising ordinary care—caused the car to jerk, jolt, or give a sudden movement at the time plaintiff was in the act of alighting therefrom, then you may find that the said defendant was guilty of negligence.<sup>81</sup>

The court instructs the jury that, if you should find and believe from the evidence that on ——— at about the hour of ——— p. m., plaintiff was a passenger upon an ——— avenue car, controlled and operated by the defendants herein, running eastward over and upon ——— street, in ———, and that, before said car had reached ——— street, a signal was given by the plaintiff, or some other passenger thereon, to stop said car at ——— street for the purpose of allowing passengers to alight therefrom and that said car was thereafter stopped at or near the intersection of said ——— street with ——— street, and at the usual and customary place where said east-bound cars were accustomed to stop for the purpose of discharging or receiving passengers, and if you should further find and believe from the evidence that plaintiff, at said time and place, attempted to alight therefrom by the way of the rear vestibule thereof, and that, while he was attempting so to do (if you find he was so attempting), and while said car was standing (if you find that the same was standing at said time), employés of the defendants in charge of and operating said car, at said time and place, carelessly and negligently, and without warning to plaintiff, caused or permitted said car to be started suddenly forward, and before the plaintiff had alighted therefrom, or had reasonable time so to do, and, that, by reason of said car being so started (if you find it was), the plaintiff was thrown therefrom to and upon the street, and in-

<sup>80</sup> *Cummings v. Detroit United Ry.*, 128 N. W. 206. 163 Mich. 304.

<sup>81</sup> *Ganahl v. United Rys. Co.*, 197 S. W. 159, 197 Mo. App. 495.

jured, and if you should further find and believe from the evidence that the agents, servants, and employes of the defendants in charge of and operating said car, by the exercise of the highest degree of care which would have been used by careful and skillful street railroad employes, under like circumstances, could have prevented such movement of said car at said time, and thereby have averted the injury to the plaintiff, and failed so to do, and if you further find and believe from the evidence that plaintiff, while in his attempt to alight from said car, was exercising ordinary care for his own safety in doing so, under the circumstances as shown you in the evidence, then the plaintiff is entitled to recover in this action, and you will assess his damages in accordance with another instruction given you herein.<sup>82</sup>

You are instructed that if you find and believe from the evidence that on the \_\_\_\_\_ day of \_\_\_\_\_, defendant was engaged in the operation of a street railway on \_\_\_\_\_ street in \_\_\_\_\_, that plaintiff was a passenger on one of defendant's cars in said city going west; that it was customary for passengers on said cars to notify the employes in charge of the same when they wished to alight from said cars by pushing a button provided for such use; that, before reaching \_\_\_\_\_ street, plaintiff notified the conductor in charge of said car that she wished to get off at said street by pushing such button; that said car stopped at \_\_\_\_\_ street, and the plaintiff started to get off the same; that while she was in the act of getting off said car, and in the exercise of ordinary care, if you find she was exercising such care, the servants and employes of defendant in charge of said car negligently and carelessly started the same before she had reasonable opportunity to alight therefrom and she was thereby thrown to the ground and injured, then you will find for the plaintiff and assess her damages at such sum as you may believe will reasonably compensate her for such injuries as you may believe from the evidence she has received, if any, not to exceed, however, the sum of \$\_\_\_\_\_.<sup>83</sup>

The court instructs the jury that if they believe from the evidence that plaintiffs were husband and wife at the time of Mrs. \_\_\_\_\_'s alleged injury, and that plaintiffs are now husband and wife, and that on \_\_\_\_\_, Mrs. \_\_\_\_\_, one of said plaintiffs, was being carried as a passenger on a street car, and that said car was then and there being operated by the defendant company on \_\_\_\_\_ avenue in the city of \_\_\_\_\_, for the transportation of passengers, and that she had paid to the conductor of said car her fare as a

<sup>82</sup> Clark v. Dunham (App.) 179 S. W. 795.

<sup>83</sup> Hutton v. Metropolitan Street Ry. Co., 150 S. W. 722, 166 Mo. App. 645.

passenger, and that thereafter, on said date, ———, said car stopped to permit said Mrs. ——— to alight at or near the intersection of ——— avenue and ——— street, and that while plaintiff Mrs. ——— was attempting to alight, and was in the act of alighting from said car, then and there the agents and servants managing and controlling the movements of said car at the time caused the said car to start forward with a sudden movement, and that the said plaintiff was thereby turned, jerked about, and wrenched, and that as a direct consequence of said starting of said car said plaintiff sustained any of the injuries mentioned in the instructions Nos. ——— and ——— (touching plaintiff's damages), and that during all of said events plaintiff was exercising ordinary care on her part in the circumstances, and if you further find from the evidence that in so starting said car the agents and operatives in charge of said car neglected and failed to observe the degree of care defined in the second instruction as the care devolving upon a carrier of passengers, and that, as a direct consequence of said failure or omission to exercise such care, said plaintiff Mrs. ——— was injured—then your verdict should be for the plaintiffs.<sup>84</sup>

The court instructs the jury that if you find and believe from the evidence that on ———, at about ——— o'clock p. m. thereof, plaintiff was a passenger on one of defendant's east-bound cars on ——— street, in ———, then it became the duty of defendant to exercise towards plaintiff the highest reasonably practical degree of care and foresight to safely carry plaintiff and to allow her to safely alight from said car. By the highest reasonably practical degree of care and foresight, as used in these instructions, is meant such care and foresight as a very prudent person would exercise under the same or similar circumstances; and, if you find and believe from the evidence that defendant failed to exercise said degree of care aforesaid by starting up its car while plaintiff was in the act of alighting therefrom, and before she had had a reasonable time under all the circumstances in evidence to alight therefrom, if you find and believe from the evidence defendant did so start said car, and that plaintiff was thereby thrown from said car onto the ground and injured, without any fault on her part contributing thereto, and while she was in the exercise of ordinary care and caution, then your verdict must be for the plaintiff.<sup>85</sup>

The court instructs the jury that if they shall believe and find from the evidence in this case that on the ——— day of ———, plaintiff was a passenger upon one of the electric street cars of the defendant's ——— line, exercising reasonable care and dili-

<sup>84</sup> Westervelt v. St. Louis Transit Co., 121 S. W. 114, 222 Mo. 325.

<sup>85</sup> Alten v. Metropolitan St. Ry. Co., 113 S. W. 691, 133 Mo. App. 425.



gence, and that when said car had reached about the middle of the block on ——— avenue, between ——— and ——— streets, plaintiff gave the customary signal to stop said car at the north side of ——— street, and that, when the said car had reached a point on ——— avenue about ——— to ——— feet from said ——— street, the conductor in charge of said car called out ——— street, and that plaintiff then left her seat in said car, and went out upon the rear platform of said car, and that said car came to a full stop, and that plaintiff then commenced to step down from the platform and step off said car, and that while she was in the act of stepping down from said car, and before she had alighted therefrom, the said car was negligently and carelessly moved suddenly forward, and by reason of such sudden forward movement of said car plaintiff was thrown violently from said car to the ground, and was injured, then your verdict in this case should be for the plaintiff.<sup>86</sup>

The court instructs the jury that if you believe from the evidence in this case that, when the train upon which the plaintiff was a passenger arrived at the depot of the defendant at ———, it came to a stop or was at rest at said depot, and the employes of the defendant requested the passengers thereon to alight therefrom, and thereupon within a reasonable length of time the plaintiff attempted, without negligence on her part, in so doing, as defined in the instructions, to alight from said train, and that while attempting to alight from said train the cars were suddenly jerked by the negligent act or careless conduct of those in charge of said train, without having given a reasonable length of time for plaintiff to alight from said car of said train, and that in consequence of such negligence of defendant's employes in suddenly jerking or moving said train the plaintiff, without negligence on her part directly contributing thereto, was injured, you will find for the plaintiff in a sum not exceeding \$———. <sup>87</sup>

The court instructs the jury that, if you believe from the evidence that on or about the ——— day of ———, plaintiff was a passenger on one of the defendant's cars proceeding westerly on ——— street in ———; that said car stopped at a point on said ——— street at or near the intersection of said ——— street with the west line of ——— street; that said point was a point where the defendant was accustomed to stop its cars for the purpose of

<sup>86</sup> Hufford v. Metropolitan St. Ry. Co., 109 S. W. 1062, 130 Mo. App. 638. Under the facts enumerated in this instruction, it was not necessary to refer to the usual stopping place.

<sup>87</sup> Van Cleve v. St. Louis, M. & S. E. R. Co., 101 S. W. 632, 124 Mo. App. 224.



taking on and letting off passengers; that while said car was stopped plaintiff started to alight, and while she was in the act of alighting, and before she had had reasonable time to alight, defendant started its car, and that plaintiff was thereby thrown to the pavement and injured; and that she was at the time in the exercise of ordinary care for her own safety—then your verdict will be for the plaintiff. By “ordinary” care, as used in this instruction, is meant such care as an ordinarily prudent person would exercise under like circumstances.<sup>88</sup>

The court instructs the jury that after a street car has once stopped at a usual stopping place where passengers leave the cars, it is then the duty of the agents in charge thereof to exercise a high degree of care to prevent the starting of the car while any passenger or passengers are attempting to alight therefrom. And if the jury believe from the evidence that the plaintiff was a passenger on a car operated by the defendants, and that the car stopped on ——— avenue in the city of ——— at a usual stopping place, and that while plaintiff was attempting to alight therefrom the agent or agents of the said defendants in charge of its said car failed to exercise a high degree of care to prevent the starting of the car while the plaintiff was in the act of alighting therefrom and the failure, if the jury so find, to exercise said high degree of care caused plaintiff to be injured, and that plaintiff was in the exercise of ordinary care, then the jury should find for the plaintiff and against the defendants.<sup>89</sup>

The court instructs the jury that if you find and believe from the evidence that the plaintiff in this action was a passenger on one of the cars owned and operated by the defendants on the ——— day of ———, and that the car upon which the plaintiff was a passenger stopped at a usual stopping place established by defendants where by custom it was a practice for passengers to leave the car, at or near the intersection of ——— Road with ——— avenue of the city of ———, state of ———, and that while the car was so stopped plaintiff attempted to alight therefrom, and that while plaintiff was leaving the said car and before he had time to safely leave it, the said car, on account of negligence of the agent of the defendants in charge thereof started suddenly forward causing plaintiff to be thrown to the street whereby he was injured, and that plaintiff was at the time exercising ordinary care for his own safety, then you should find in favor of the plaintiff and against the defendants.<sup>90</sup>

<sup>88</sup> Green v. Metropolitan St. Ry. Co., 99 S. W. 28, 122 Mo. App. 647.

<sup>89</sup> Gilroy v. St. Louis Transit Co., 92 S. W. 1152, 117 Mo. App. 663.

<sup>90</sup> Gilroy v. St. Louis Transit Co., 92 S. W. 1152, 117 Mo. App. 663.

The court instructs the jury that if the plaintiff was a passenger on the defendant's car, and upon approaching ——— avenue signaled the defendant's servants to stop the same for the purpose of permitting her [plaintiff] to alight therefrom, and thereupon said car did stop at or near said intersection, at a point which you may believe and find from the evidence at that time was recognized and habitually used by the defendant for discharging passengers from its cars, and that thereupon plaintiff proceeded, with all reasonable expedition, to alight from said car, and that, while she was in the act of so alighting, the servants of defendant in charge of said car, whose duty it was to control the movements thereof, caused the same to suddenly start forward without giving the plaintiff any warning of their intention so to do, and that in consequence thereof, the plaintiff was thrown from the car and injured, the verdict should be for the plaintiff, unless the plaintiff was guilty of negligence.<sup>91</sup>

The court instructs the jury that if they believe from the evidence that the car upon which plaintiff was a passenger came to a stop between ——— street and ——— avenue, and that the conductor saw plaintiff pass from her seat out onto the platform for the purpose of alighting from the car, then it was the duty of the conductor to have held the car stationary until she alighted, or warn her not to alight, if, by the exercise of a very high degree of care, such as would be exercised by careful and skillful men under the same circumstances, he could have done so.<sup>92</sup>

You are instructed that, if the jury find from the evidence that plaintiff was a passenger on defendant's cars, that the agents and servants of defendant in charge of said car knew at what point plaintiff desired to alight, and that, when they reached said point, said agents and servants of defendant did not stop a sufficient length of time to permit the plaintiff, acting with reasonable care and diligence for one of his years, to alight in safety from said cars, and that by reason thereof the plaintiff, in attempting to alight was thrown from said car and injured, then he is entitled to recover.<sup>93</sup>

§ 1635(10). Nebraska

The court instructs the jury that, before the plaintiff would be entitled to recover against the defendant she must establish by preponderance of the evidence that, while she was in the act of alighting from the car, it then standing still, the car was suddenly started forward, and that this was the proximate cause of her being

<sup>91</sup> McCaffery v. St. Louis & M. R. R. Co., 90 S. W. 816, 192 Mo. 144.

<sup>92</sup> Cobb v. Lindell Ry. Co., 50 S. W. 310, 149 Mo. 135.

<sup>93</sup> Ridenhour v. Kansas City Cable Ry. Co., 13 S. W. 889, 102 Mo. 270.

thrown to the pavement. Should she establish such fact by preponderance of the evidence, you will find for plaintiff. But should she fail to establish such fact, to such degree, then you will find against her.<sup>94</sup>

§ 1635(11). North Carolina

I charge you that if you shall find from the evidence, by its greater weight, that the train was slowed down on approaching the depot at ———, at the usual place of slowing down the train, and shall further find from the evidence that the train came to a stop before the plaintiff attempted to alight from the train, and that just as the plaintiff was in the act of alighting and before he had a reasonable time to alight, and before the passengers who were to alight at the station had a reasonable time to alight, the defendant's engineer suddenly, without notice, moved the train forward, which motion of the train caused the plaintiff to fall, or struck him and knocked him down, and the train ran over his foot and injured him, it is your duty to answer the first issue, "Yes," although the plaintiff was getting off on the opposite side of the train from the station, and on the side that passengers were not accustomed to alight.<sup>95</sup>

§ 1635(12). Oregon

You are instructed that if, after a careful examination of all the evidence in this case, you are satisfied, by a preponderance thereof, that at the time the plaintiff was injured she was led to believe, by the words and acts of the defendant's employé, and had reasonable grounds to believe, that the train had arrived at the station at which she wished to alight, and you find that the train had stopped and was standing at the time she passed from the platform of the car to the steps of the car, and after she had reached the steps of the car, and while there, she was thrown to the ground by the sudden start or jerk of the car, or in any other manner, and injured in the manner detailed to you by the witnesses, then you will be justified in finding that the injury occurred through the neglect or want of care of the defendant company, and the plaintiff is entitled to a verdict at your hands.<sup>97</sup>

§ 1635(13). Texas

You are instructed that, if, you find from the evidence that at the time alleged the plaintiff was a passenger on one of defendant's passenger trains, going from ——— to ———, and that, upon the arrival of the train at ———, the plaintiff, without negligence

<sup>94</sup> Flood v. Omaha & C. B. St. Ry. Co., 152 N. W. 293, 98 Neb. 124.

<sup>95</sup> Kearney v. Seaboard Air Line Ry., 74 S. E. 593, 158 N. C. 521.

<sup>97</sup> Smitson v. Southern Pac. Co., 60 P. 907, 37 Or. 74.

or unreasonable delay on his part, attempted to alight from the train, and that, while he was so attempting to alight therefrom, those in charge of the train put it in motion, whereby the plaintiff was thrown to the ground and injured substantially as alleged, and you further find from the evidence that the train had not stopped at the station a reasonably sufficient length of time to enable the plaintiff to alight therefrom in safety, and that, under all the facts and circumstances of the case, it was negligence in those in charge of the train to start it when they did, and that the plaintiff's injuries were the proximate result of such negligence, then the plaintiff would be entitled to recover for such injuries.<sup>98</sup>

Guided by these instructions, if you believe from a preponderance of the evidence that the defendant's passenger train, after being stopped at ——— station, was started up by the employés in charge thereof, before a reasonable time had elapsed for passengers thereon to alight, and that the plaintiff's wife was, while in the act of alighting, if she was, by the motion of the train, thrown to the ground, and injured in any of the respects alleged in plaintiff's petition, and you believe the defendant's servants, in the moving and handling of said train, at the time and in the manner they did, did that which very prudent, cautious, and competent persons would not have done under the circumstances, and that the manner of such moving and handling of the train was the direct cause of plaintiff's wife being thrown from the train, if she was, you will return a verdict for plaintiff; but, unless you so find, you will return a verdict for defendant. However, if you do not believe from a preponderance of the evidence that the servants in charge of said train failed to stop the same the time that very cautious, prudent, and competent persons would have done under the circumstances in order to allow passengers thereon to alight at said ——— station, or if you do not believe from a preponderance of the evidence that plaintiff's wife was thrown from the train while she was in the act of alighting therefrom, or if you believe the servants in charge of said train stopped the same the length of time that very prudent, cautious, and competent persons would have done under the circumstances, to enable passengers to alight therefrom while the said train was thus stopped, if it was, or if you believe that Mrs. ——— failed to notify any agent or servant of defendant of her purpose or desire to get off said train at ——— Station, and, in so failing, omitted to do that which a person of ordinary prudence would have done under the circumstances, and thereby directly contributed to her injury, or if you believe that in at-

<sup>98</sup> Galveston, H. & S. A. Ry. Co. v. Berry, 109 S. W. 393, 49 Tex. Civ. App. 521.

tempting to alight from said train while the same was in motion, if she did, or, in the manner of alighting therefrom, she did that which a person of ordinary prudence would not have done under the circumstances, or if you believe that she was caused to be thrown, or that she fell, from the said train by the failure on her part to use the care that a person of ordinary prudence would have done in alighting from the car under the circumstances, or if you believe she jumped from the said moving train, and that in so doing she did what a person of ordinary prudence would not have done under the same or similar circumstances, you will, in either event named in this paragraph, find a verdict for defendant, although you should further find from the evidence that the defendant company was also negligent in the particulars alleged by plaintiff.<sup>99</sup>

The jury are instructed that, if you find from the evidence that on the \_\_\_\_\_ day of \_\_\_\_\_, plaintiff purchased a ticket at \_\_\_\_\_, over the defendant's road to \_\_\_\_\_, and boarded one of the defendant's passenger trains at \_\_\_\_\_, bound for \_\_\_\_\_, and that she became and was a passenger on said train; and if you further find from the evidence that when the train on which plaintiff was riding, reached \_\_\_\_\_, she used reasonable diligence to get off said train, and if said train did not stop at \_\_\_\_\_ long enough for her to have alighted therefrom in safety, and if while she was endeavoring to get off of said train it was negligently started, and if by reason thereof, she was caused thereby to lose her balance and to be thrown from the steps of the car to the ground or she was compelled to jump from said steps to the ground and was injured without fault or negligence on her part; or if you find that plaintiff started to alight from said train and while going down the steps of the car that the agents and servants in charge of, and operating, said train negligently and carelessly and without notice or warning to plaintiff caused said coach and train to be suddenly moved one or more times and that such movement or movements, if any, caused plaintiff to lose her balance and thereby to be thrown from said steps to the ground below or that said movement or movements caused plaintiff to jump from said steps to the ground and she was thereby injured; or if by reason of the negligence, if any, of the parties operating said train in failing to assist her to get off, if you find there was a failure, and if you find that such failure was negligence, and if by reason thereof she was caused to fall and be injured without fault or negligence on her part; and if you further find that such negligence of defendant, if any, was the proximate

<sup>99</sup> Galveston, H. & N. Ry. Co. v. Morrison, 102 S. W. 143, 46 Tex. Civ. App. 186.

cause of her injuries, if any, then in either event you will find for the plaintiff, unless you find for the defendant under the instructions hereinafter given you.<sup>1</sup>

You are instructed that, if you believe from the evidence that on ———, the plaintiff, with his father and mother, were passengers on one of the defendant's trains, bound for the station of ———, and if you further believe that as soon as the train stopped at ——— the plaintiff and his father arose from their seats, and proceeded at once to leave said train; and if you further believe that while attempting to alight from the train, the plaintiff reached the steps of the car; and if you further believe that while plaintiff was on the steps of the car (if you find he was) the servants of the defendant in charge of the train suddenly started the train; and if you further believe the servants in charge of said train failed to stop the same a reasonable length of time for the passengers to get off without injury to themselves; and if you further believe that the sudden starting of the train (if you find it was suddenly started) threw the plaintiff from the car steps to the platform below; and if you further believe that the plaintiff fell on his side, and was injured, as alleged; and if you further believe the plaintiff and his father, in attempting to alight from said train (if you find they did), used such haste and caution as persons of ordinary prudence would have exercised under the same circumstances; and if you further believe the servants in charge of said train were guilty of negligence in starting the train under the circumstances (if you find they suddenly started the same); and if you further believe the plaintiff's injuries, or any part of them, are the direct and proximate result of the negligence of the defendant—then, in that event, you will find for the plaintiff; but unless you so believe you will find for the defendant.<sup>2</sup>

The jury are instructed that if the jury believe, from the evidence, that defendant's employes, after having stopped its train at ——— station on the occasion in question, and after having warned passengers to alight, and while the plaintiff was in the act of alighting, caused the train to jerk, and threw her on the ground and cross-ties, and that such acts amounted to a failure on the part of defendant's employes to use that high degree of care which very cautious and prudent and competent persons usually exercise under the same or similar circumstances to those existing at that time, and that such want of care was the direct and proximate cause of injury to the person of the plaintiff, which caused her physical pain,

<sup>1</sup> St. Louis Southwestern Ry. Co. of Texas v. Kennedy (Civ. App.) 96 S. W. 653.

<sup>2</sup> St. Louis S. W. Ry. Co. of Texas v. Byers (Civ. App.) 70 S. W. 558.



or physical and mental pain, you will return a verdict for the plaintiff, unless you further believe, from the evidence, that the plaintiff, on the occasion in question, failed to exercise ordinary care to avoid injury which prudent and cautious persons usually exercise under the same or similar circumstances to those existing on this occasion, and that such failure to use such care contributed directly and proximately to the injury of said plaintiff, in which event you will return a verdict for the defendant, notwithstanding the defendant's employes may have also been guilty of negligence which contributed directly and proximately to the injury of said plaintiff.<sup>3</sup>

§ 1635(14). *Virginia*

The court instructs the jury that it is the duty of common carriers, such as street railway companies, to use extraordinary care and caution to see that passengers are not injured in getting on or off their cars, and that it was the duty of the defendant company, their servants and employes, to take due and proper precaution to see that no one was in the act of alighting before moving their car ahead after the same had been stopped at a regular point for stopping; and if the jury shall believe from the evidence that the plaintiff, without negligence on her part, was in the act of alighting from said car, and that the defendant company, their servants or employes, failed to perform their duty in this behalf, and by reason thereof the plaintiff was injured, then the jury shall find for the plaintiff.<sup>4</sup>

§ 1635(15). *Washington*

The court instructs the jury that if you believe, from a fair preponderance of the evidence, as the court will hereafter define the same, that, while the car was stopped, plaintiff, in the exercise of due care and diligence on his part, was in the act of alighting from said car, and that the defendant, by its conductor, knowing the same, or, by the exercise of extraordinary care and diligence on the part of such conductor, having opportunity to know it, started the car while the plaintiff was so getting off, not having had a reasonable time so to do, and thereby injured the plaintiff, then your verdict should be for the plaintiff.<sup>5</sup>

You are instructed that if you should believe, from the evidence in this case, that the plaintiff, while alighting from one of defendant's cars at a place where it had stopped to permit her to alight, had certain of her clothing caught on anything connected with the

<sup>3</sup> *Houston & T. C. R. Co. v. Dotson*, 38 S. W. 642, 15 Tex. Civ. App. 73.

<sup>4</sup> *Richmond Traction Co. v. Williams*, 46 So. 292, 102 Va. 253.

<sup>5</sup> *Weksl v. Puget Sound Traction. Light & Power Co.*, 150 P. 443, 86 Wash. 404.



car, and that the conductor saw, or might have seen, by exercising the care I have told you the law requires, that her clothing was thus caught, but that said conductor started said car while said passenger was thus entangled, and that she was injured thereby as alleged in the amended complaint, then I instruct you that such conductor would be guilty of negligence which is chargeable against the company.<sup>6</sup>

**§ 1636. Same—Duty of conductor, on receiving starting signal from flagman, to avoid injury to alighting passenger**

You are instructed that, although you may believe from the evidence that it was necessary to have a flagman at ——— and ——— streets, and that a flagman was so kept to notify or signal for cars to cross or to stop, still, if you find from the evidence that the car stopped south of ——— street, and, while it was so stopped, plaintiff started to alight from said car, and the conductor saw her attempting to alight while said car was stopped, it was his duty to cause said car to remain standing until plaintiff had a reasonable time to alight, notwithstanding the flagman may have signaled for the car to cross.<sup>7</sup>

The court instructs the jury that if it was necessary, to avoid collisions between defendant's cars and those on the ——— street line, then the defendant had the right to adopt the regulation that the cars of defendant, when stopped before reaching ——— street, should go forward on the signal of the watchman to the gripman, without any bell from the conductor, provided that you believe, in carrying out this regulation, the defendant gave such notice as was reasonably possible, under the circumstances, to the passengers, that they should only alight on the further crossing.<sup>8</sup>

**§ 1637. Same—Starting signal given by outsider**

**§ 1637(1). Missouri**

The court instructs the jury that if they believe from the evidence that the conductor stopped the car at ——— street to let Mrs. K. and plaintiff get off said car, and that Mrs. K. got off, and, before plaintiff could get off, some one, not an employé of the defendant, without the knowledge or authority of the conductor, rung the bell, and gave the motorman the signal to start, and in pursuance of said signal the motorman started the car, and plaintiff fell off, then there was no negligence on the part of defendant, and plaintiff cannot recover in this case, and their finding will be for defendant.<sup>9</sup>

<sup>6</sup> Morrison v. Seattle Electric Co., 115 P. 1076, 63 Wash. 531.

<sup>7</sup> Jackson v. Grand Ave. Ry. Co., 24 S. W. 192, 118 Mo. 199.

<sup>8</sup> Jackson v. Grand Ave. Ry. Co., 24 S. W. 192, 118 Mo. 199.

<sup>9</sup> Krone v. Southwest Missouri Electric Ry. Co., 71 S. W. 712, 97 Mo. App. 609.

## § 1637(2). Rhode Island

You are instructed that, if the jury find that the car upon which the plaintiff was riding on ———, came to a full stop before the plaintiff attempted to alight therefrom, and before she had fully alighted was started from a signal to start being given by some person not authorized by the defendant to give such signal, and if the jury further find that the accident which happened to the plaintiff could not have been prevented after the giving of such an unauthorized signal by the exercise of due diligence on the part of the conductor or motorman in charge of said car, then the verdict must be for the defendant.<sup>10</sup>

## § 1638. Duty of carrier after giving reasonable opportunity to leave car

## § 1638(1). United States

You are instructed that, if the jury find and believe from the evidence that in obedience to a signal defendant's servants in charge of its car caused the same to come to a stop at or near the intersection of ——— street and ——— avenue, in the city of ———, in order to discharge passengers, then and there desiring and offering to alight at said point, and there remained standing a sufficient length of time to afford reasonable opportunity for a woman of ordinary activity to alight from said car, and that after so waiting defendant's conductor signaled or notified the motorman in charge of said car to proceed on his journey; and if you find from the evidence that in obedience to said signal said motorman caused said car to move forward and that the speed of the same was increasing; and if you find from the evidence that at the time or after the giving of said signal for said car to go ahead, or that while said car was again moving forward, plaintiff arose from her seat and started toward the rear platform of said car, or had already stepped upon or was in the act of stepping upon the rear platform of said car when plaintiff's companion, ———, or some other passenger, hallooed to the conductor to stop said car, if you find they or either of them did so halloo; and if you find from the evidence that said conductor, in obedience to such command or request, signaled his motorman to stop the car, and that the motorman in obedience to said signal caused his car to stop, and that in stopping said car under said circumstances said motorman exercised that degree of care that a careful and skillful motorman would be expected to exercise under the same or similar circumstances—then plaintiff cannot recover, and your verdict will be for defendant, and this is true although you may further find from

<sup>10</sup> Moore v. Woonsocket Street Ry. Co., 92 A. 980.

the evidence that said car was stopped suddenly and with a jerk, and that the jerking motion of said car caused plaintiff to fall.<sup>11</sup>

§ 1638(2). *Florida*

The jury are instructed that after reasonable alighting time for passengers has elapsed the conductor of a train should then avoid all injury to a passenger that he possibly can when he knows or sees that he is about to suffer some damage.<sup>12</sup>

§ 1638(3). *Indiana*

You are instructed that, if a car stops at a place where cars are accustomed to stop, for the discharge of passengers, a passenger desiring to alight has a right to assume that the car will remain standing long enough to enable all that desire to do so, to safely alight from said car. You are instructed that stopping a reasonable time for a passenger to alight from such car is not sufficient, but it is the duty of the conductor or other person in charge of the said car to see and know that no passenger is in the act of alighting from such car, or in a dangerous position, before putting the car of which he is in charge in motion again.<sup>13</sup>

§ 1638(4). *Mississippi*

You are instructed that a common carrier is bound to delay at a station or stopping place only a reasonable length of time for the purpose of allowing passengers to alight, unless those in charge know, or have reason to know, that some passenger has not got off, and is desiring to do so.<sup>14</sup>

You are instructed that passengers on a street car, when at their place of destination, should leave the car with reasonable dispatch; and after the car has stopped a reasonable time for passengers to get off, and as soon as all passengers destined for a particular place, or intending to get off there, have apparently left, and the conductor has no notice that any one else is trying to get off, then the conductor may properly start his car.<sup>15</sup>

You are instructed that, if the car had stopped a reasonable time, and the plaintiff did not step from the car until after the car had started, and was not, at the time of starting the car, apparently in the act of leaving it, and the conductor did not know, or have any notice, or have reason to know that the plaintiff was intending or desiring to get off there, then there was no negligence on his part in starting the car.<sup>16</sup>

<sup>11</sup> *St. Louis Transit Co. v. Thompson* (C. C. A. Mo.) 137 F. 713, 70 C. C. A. 405.

<sup>12</sup> *Florida Ry. Co. v. Dorsey*, 52 So. 963, 59 Fla. 260.

<sup>13</sup> *Louisville & S. I. Traction Co. v. Korbe* (App.) 90 N. E. 483.

<sup>14</sup> *Gilbert v. West End St. Ry. Co.*, 36 N. E. 60, 160 Mass. 403.

<sup>15</sup> *Gilbert v. West End St. Ry. Co.*, 36 N. E. 60, 160 Mass. 403.

<sup>16</sup> *Gilbert v. West End St. Ry. Co.*, 36 N. E. 60, 160 Mass. 403.

You are instructed that, if the jury find that the car had waited a reasonable length of time for passengers to alight, and that the plaintiff delayed, and was not apparently in the act of leaving the car when the bell was given for the car to start, and the conductor had no notice or knowledge of the plaintiff's intention or desire to get off, then there was no negligence in starting the car.<sup>17</sup>

You are instructed that the conductor was not bound to know that every passenger had left the car that was intending to leave it at that place, in the absence of any sign of such intention; and if, after waiting a reasonable time, he took reasonable means to see whether passengers were at the time leaving the car, and no one appeared to be leaving it, and the conductor did not know, or have any reason to know, that the plaintiff was intending to get off, there was no negligence in starting the car.<sup>18</sup>

§ 1638(5). **Missouri**

You are instructed that, if the jury find from the evidence that defendant's car came to a stop in front of or near to ———'s store, and there remained standing a sufficient length of time to permit passengers then and there desiring and offering to alight from said car to do so, and then started forward, and that thereafter, and while said car was so moving forward plaintiff's wife arose from her seat, and started to leave said car, and that defendant's servants in charge of said car then stopped the same in the shortest time and space possible with the means and appliances then at hand, then plaintiff cannot recover in this action, and your verdict will be for the defendant.<sup>19</sup>

You are instructed that, if the jury find from the evidence that the train was stopped at ——— station a sufficient length of time for the female plaintiff to conveniently alight, considering her age and physical condition, and, without any fault of defendant's servants in charge of said train, she failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was attempting to alight, or was in the act of alighting, caused the train to start while she was so alighting, or attempting to alight, then defendant is not liable.<sup>20</sup>

§ 1638(6). **Texas**

You are instructed that, if you believe from the evidence that the train stopped at ——— a sufficient length of time for the passengers to get off in the exercise of ordinary dispatch, the defendant had the right to start the train, unless it knew there were other

<sup>17</sup> Gilbert v. West End St. Ry. Co., 36 N. E. 60, 160 Mass. 403.

<sup>18</sup> Gilbert v. West End St. Ry. Co., 36 N. E. 60, 160 Mass. 403.

<sup>19</sup> Shareman v. St. Louis Transit Co., 78 S. W. 846, 103 Mo. App. 515.

<sup>20</sup> Hickman v. Missouri Pac. Ry. Co., 4 S. W. 127, 91 Mo. 433.

persons who desired to get off, and if it did so start it after such time, without such knowledge, you will return a verdict for defendant.<sup>21</sup>

**§ 1638(7). Wyoming**

You are instructed that in case the train in question was stopped a sufficient time for plaintiff to alight, those operating such train were under no obligation to ascertain if plaintiff had actually gotten off or not.<sup>22</sup>

**§ 1639. Same—Duty of carrier as dependent upon knowledge that passenger is alighting**

You are instructed that, if you believe from the evidence that the defendant, in the operation of its train of cars on which the plaintiff was a passenger, stopped its said train to permit passengers to alight therefrom and to receive other passengers thereon, and that, after stopping such train for such time, the same was then put in motion in the ordinary and customary way, and that while the train was so stopped the plaintiff had a reasonable and sufficient time, by the use of ordinary care and prudence, in which to leave said train while the same was standing still, but did not do so, and thereafter, without the knowledge of the defendant or any of its employes in charge of said train, went to the rear end thereof for the purpose of making his exit therefrom, and that, while attempting said exit, said train was put in motion, and by reason thereof the plaintiff lost his balance and fell or jumped from said train while the same was in motion, then, in such event, the defendant would not be guilty of negligence in the operation of its said train and car, and it would be your duty to find for the defendant, even though you should find that the plaintiff was injured by reason of the falling or jumping from the train in the manner alleged in the declaration, and that such falling or jumping by the plaintiff from said train was actually caused by the sudden starting of the train in motion.<sup>23</sup>

**§ 1640. Duty as to passenger going on platform while train in motion for purpose of alighting**

**§ 1640(1). Missouri**

You are instructed that negligence cannot be imputed to one who has not sufficient capacity or discretion to understand danger, and use proper means to guard against it, and the mere fact that plaintiff was on the steps, if he was there, when there was room

<sup>21</sup> St. Louis Southwestern Ry. Co. of Texas v. Haynes (Civ. App.) 86 S. W. 934.

<sup>22</sup> Chicago, B. & Q. Ry. Co. v. Lampman, 104 P. 533, 18 Wyo. 106, 25

L. R. A. (N. S.) 217, Ann. Cas. 1912C, 788.

<sup>23</sup> Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.

inside, does not absolve defendant from liability; and whether the steps were a more dangerous place than inside the car, and, if so, whether plaintiff had at the time sufficient capacity and discretion to understand that it was the more dangerous, are questions that the jury must determine under all the facts and circumstances in proof.<sup>24</sup>

**§ 1640(2). Texas**

The jury are instructed that while it devolves upon the defendant railroad company to use that highest degree of care, prudence, and foresight which prudent men engaged in the business of operating a railroad as usually conducted would employ—that is, such as is reasonably practicable—yet they are instructed that the defendant is not an insurer of the safety of its passengers, and if the jury believe from the evidence that the plaintiff did go out upon the platform of the defendant's car while the same was in rapid motion for the purpose of alighting therefrom, and that while upon said platform the plaintiff was thrown therefrom and injured by reason of the jerk or lurch of said train, still the plaintiff cannot recover for said injuries occasioned thereby, if the jury find they were so occasioned, unless they further believe from the preponderance of the testimony that said jerk or lurch was unusual or violent, and not such jerk or lurch as was incident to the ordinary and proper operation of said train, and further find that plaintiff was not guilty of contributory negligence in going upon said platform under all the circumstances which proximately in part brought about said injuries.<sup>25</sup>

**§ 1641. Suddenly starting or jerking train or car after slowing down and while passenger on platform for purpose of alighting**

See, also, ante, § 1635(2), note 73.

**§ 1641(1). Illinois**

The court instructs the jury that if you believe, from all the evidence in this case, that the plaintiff became and was a passenger upon a car of defendant, and that her fare was paid to the conductor, and that the plaintiff gave to the conductor on such car reasonable notice of her desire to get off of said car at the corner of ——— and ——— streets, as alleged in her declaration, it then and there became and was defendant's duty to stop said car at said place, upon arriving at the same, a sufficient length of time to enable plaintiff to alight therefrom in safety; and if the jury further believe, from all the evidence, that the defendant thereafter ran its

<sup>24</sup> Ridenhour v. Kansas City Cable Ry. Co., 13 S. W. 889, 102 Mo. 270.

<sup>25</sup> Houston & T. C. Ry. Co. v. Johnson (Civ. App.) 103 S. W. 239.



said car to the said corner of ——— and ——— streets, and was then and there in the act of slowing up or stopping said car, and that the plaintiff was then and there exercising all due care and caution for her own safety, and that while so exercising said care and caution she was preparing to alight from said car when it should come to a stop, and that such act or acts by her of preparing to alight at the time, under all the circumstances and in the manner shown by the evidence, were not negligence or carelessness on her part, and that the defendant then and there did not so stop the said car as that the plaintiff could safely alight therefrom, but suddenly started said car in such manner that it thereby then and there threw the plaintiff to the ground, and that such starting of the car was negligence on the part of the defendant, and that the plaintiff was thereby injured as charged in her declaration, and that plaintiff was during all the time in the exercise of due care and caution for her own safety, then the defendant would be liable to the plaintiff for such injury, and in such case you will find for the plaintiff.<sup>26</sup>

**§ 1641(2). Kentucky**

You are instructed that it was the duty of the employés in charge of the train in question to stop the same at the ——— station; and, if you believe that as the train approached the ——— station it slackened its speed and the plaintiff thereafter, while exercising ordinary care for his own safety, went upon the platform of the car with the purpose of alighting therefrom, and that after he reached the platform, and just before the train reached the ——— station, without warning or notice to the plaintiff the train was caused to suddenly increase its speed, and that because of such sudden increase, if any, the plaintiff was thrown from the train, you will find for the plaintiff; unless you so believe, you will find for the defendant.<sup>27</sup>

You are instructed that, if you believe from the evidence that ——— was a passenger on the train, as set out in No. ———, and that, as the train drew into the city of ———, the brakeman announced the station, and, after announcing the station, opened and left open the door of the car, and the train began to slacken its speed, and that thereupon ——— arose from his seat preparatory to getting off the train, and went to the door of the car, and while he was there and the train was running at a very slow rate of speed the train was negligently caused to make an unusual, unnecessary, and sudden jerk forward, with such force that ——— was thrown or knocked from the platform and caused to fall from the train

<sup>26</sup> Springfield Consol. Ry. Co. v. Hoeffner, 51 N. E. 884, 175 Ill. 634.

<sup>27</sup> Louisville & N. R. Co. v. Bland, 188 S. W. 468, 171 Ky. 424.



while exercising ordinary care for his own safety, as set out in No. ———, you will find for the plaintiff.<sup>28</sup>

You are instructed that, if you believe from the evidence that ——— was a passenger on the train, and that the brakeman called the station and opened the door of the car, and after this the train came to a stop and started up again without giving a reasonable time for ——— to alight, and he was thrown from the train and killed, you should find for the plaintiff.<sup>29</sup>

§ 1641(3). Texas

The court instructs the jury that, if you believe from the evidence that on the occasion in question, the defendant's train on which plaintiff was riding, was approaching the station at ——— and that one of defendant's employes in charge of said train called out said station and there indicated to plaintiff that the train was approaching same, and said train began to slow down, and that plaintiff left the coach in which he was riding and went on the steps thereof for the purpose of alighting therefrom, and if you believe that said train stopped or was running very slowly so that plaintiff could have alighted safely therefrom and was in the act of doing so or about to do so, and that said train was then suddenly started or jerked forward by defendant's employé or employes in charge of or operating same, and that thereby the plaintiff was thrown violently therefrom upon the ground and thereby received the injuries complained of, and that the sudden starting or jerking of said train was under the circumstance negligence on the part of defendant's employé or employes in charge of or operating same, and that such negligence was the proximate cause of plaintiff's injury, you will find for the plaintiff unless you find for the defendant under other instructions given you by the court.<sup>30</sup>

§ 1642. Duty as to person getting off while train in motion

§ 1642(1). Mississippi

The court instructs the jury, for the plaintiff, that although they may believe that the flagman of the train called to the plaintiff once or twice, in a tone of voice sufficiently loud to be heard by persons of ordinarily good hearing in the same position, not to get off at that time and place, and that the train would stop, and plaintiff either failed to hear him because of partial deafness or declined to regard his warning, and alighted from the train while in motion, and was thereby injured, yet before they can find for defendant they must further believe from the evidence that the said warning

<sup>28</sup> Illinois Cent. R. Co. v. Dallas' Adm'x, 150 S. W. 536, 150 Ky. 442.

<sup>29</sup> Illinois Cent. R. Co. v. Dallas' Adm'x, 150 S. W. 536, 150 Ky. 442.

<sup>30</sup> Chicago. R. & G. Ry. Co. v. Comstock (Civ. App.) 189 S. W. 109.

was given to her in time to have prevented the injury if plaintiff had acted upon the same with ordinary caution, and that if plaintiff had heard said warning, and had acted thereon as a person of ordinary care and prudence, after the same was given by the flagman, the injury would not have occurred.<sup>31</sup>

**§ 1642(2). Missouri**

You are instructed that, if you believe from the evidence defendant received and accepted the plaintiff as a passenger upon one of its street cars which it was then operating by its servants upon and in charge thereof, and that plaintiff was injured while a passenger of defendant, and while in the act of alighting from such car, by reason of the acts of the servants of defendant upon and in charge of said car operating the same failing to allow plaintiff a reasonable time to get off of said car, and causing or permitting said car to be suddenly started or jerked forward, then the defendant and its servants upon and in charge of said car operating the same were bound to exercise towards plaintiff, for his safety as a passenger on such car, in the respects referred to in the instructions, the highest reasonably practicable degree of care a very prudent person engaged in like business would exercise under similar circumstances to those disclosed by the evidence in this case.<sup>32</sup>

**§ 1643. Duty to prevent passenger from getting off moving car**

The court further instructs you that defendant's conductor was not bound to anticipate that plaintiff would attempt to alight from said moving car; and unless you shall believe from the evidence that defendant's conductor in charge of said car discovered plaintiff's intention to alight from said car while same was in motion, and, after so discovering said intention, said conductor could have, by ordinary care, warned the plaintiff in time to have prevented her from stepping from said car, and failed to do so, then the law is for the defendant, and you will so find.<sup>33</sup>

**§ 1644. Mutual mistake of passenger and conductor**

You are instructed that, if the plaintiff's effort to get off caused her to fall, and her fall and injuries were the result of mutual mistake and misunderstanding between her and the conductor in relation to the signals that passed between them, and the mistake was such as a reasonably prudent passenger and a careful and skill-

<sup>31</sup> Yazoo & M. V. R. Co. v. Hatch, 35 So. 941.

<sup>32</sup> Setzler v. Metropolitan St. Ry. Co., 127 S. W. 1, 227 Mo. 454.

<sup>33</sup> Paducah Traction Co. v. Tolar, 171 S. W. 1009, 162 Ky. 50.

ful conductor exercising a very high degree of care would make under like circumstances, then the plaintiff cannot recover.<sup>34</sup>

**§ 1645. Duty to set down passengers at suitable and safe place**

**§ 1645(1). Alabama**

The court charges the jury that if the defendant, by its employés, stopped its car for plaintiff to alight at a place where the step was so high from the ground that she could not alight without great danger of falling, such place was an improper one for such stop to have been made.<sup>35</sup>

**§ 1645(2). Arkansas**

You are told that it was the duty of the defendant to stop its train so that the plaintiff could alight upon the platform, and if it failed to do so, and the plaintiff was without her fault injured by reason thereof, your verdict should be for the plaintiff.<sup>36</sup>

You are further told that, in providing safe and convenient means of egress and ingress, it is the duty of the railroad company to provide lights at their stations for the safety of passengers arriving or departing at night, and if a passenger is injured, without fault on his or her part, by the failure to provide such lights, the company is liable. So in this case, if you believe from a preponderance of the evidence that the defendant failed to provide lights so that the plaintiff could see how to alight in safety, and that she was, without fault on her part, injured by reason of such failure to provide lights, your verdict should be for the plaintiff.<sup>37</sup>

**§ 1645(3). Georgia**

The court instructs the jury that it is the duty of a street car company to select a reasonably safe place for landing passengers, wherever it may stop a car for that purpose.<sup>38</sup>

**§ 1645(4). Illinois**

The jury are instructed that, if you believe from the evidence that the defendant stopped its trains for passengers to alight at ——— street and ——— avenue in the city of ——— at a place which was unsafe and dangerous for passengers to alight, and that plaintiff was told or encouraged to get off at such place, and while so doing she was injured, then the defendant would be liable, and the verdict should be for plaintiff, if she did not contribute to the accident by want of ordinary care, or by failure to observe ordinary care.<sup>39</sup>

<sup>34</sup> Cobb v. Lindell Ry. Co., 50 S. W. 310, 149 Mo. 135.

<sup>35</sup> Mobile Light & R. Co. v. Walsh, 40 So. 560, 146 Ala. 295.

<sup>36</sup> St. Louis, I. M. & S. Ry. Co. v. Briggs, 113 S. W. 644, 87 Ark. 581.

<sup>37</sup> St. Louis, I. M. & S. Ry. Co. v. Briggs, 113 S. W. 644, 87 Ark. 581.

<sup>38</sup> Macon Ry. & Light Co. v. Vining, 51 S. E. 719, 123 Ga. 770.

<sup>39</sup> Mayzels v. Chicago City Ry. Co., 177 Ill. App. 534.

## § 1645(5). Maryland

The jury are instructed that, if they believe from the evidence in the cause that the plaintiff, on ———, purchased of the defendant's agent in ———, a ticket which entitled her to be carried in one of the defendant's passenger cars on its railroad from ——— to ———, a station on the ——— branch of railroad in ——— county, ———, and that the defendant had provided a platform at said station of ——— for the safety of its passengers in alighting from its cars, that when the train upon which the said plaintiff was a passenger approached the said station of ——— it slackened its speed and nearly stopped at said station, but that the said plaintiff was not allowed sufficient time and opportunity to get off said train on to said platform, and before giving the said plaintiff sufficient time to get off said train on to said platform the said train moved on and went beyond said platform, and stopped at a point where the said defendant had provided no platform, or other means, for the said plaintiff to safely alight from its said cars, and that the defendant's conductor or agent told the said plaintiff to get off said cars at said point, and at the same time defendant's said conductor or agent used harsh and profane language in the presence and hearing of said plaintiff, and that the plaintiff was excited and alarmed by the use of said language, and, upon being told by said conductor or agent to get off said train, the plaintiff asked him "How?" and that the said conductor in answer thereto, replied, "Jump!" and that, laboring under said excitement and alarm, the plaintiff did then and there get off said train, and in so getting off was thereby injured in one of her limbs, then the plaintiff is entitled to recover in this action; and in assessing the damages to be allowed the plaintiff, the jury are to consider the health and condition of the plaintiff before the injury complained of, as compared with her present health and condition in consequence of said injury, and whether said injury is in its nature permanent, and also the mental and physical suffering to which she was and is subjected by reason of said injury, and to allow such damages as in their opinion will be a fair and just compensation for the injury which the plaintiff has sustained.<sup>40</sup>

## § 1645(6). Michigan

You are instructed that these are the things that are claimed to be negligent, and that I think you may consider: First, that there was no light there, as the plaintiff claims, if you find that to be a fact that there was no light there. Defendant claims that the brakeman had a lantern on his arm, and that it showed suffi-

<sup>40</sup> Baltimore & Ohio R. Co. v. Leapley, 65 Md. 571, 4 A. 891.

cient light for all purposes. Now, the plaintiff says that there wasn't any light; that the brakeman didn't have any light there at all. Now, if it was entirely dark there, or if it was so dark that the plaintiff could not see where to step, and the train stopped there for her to get out, and she missed her way by reason of not being able to see, when she thought it was safe for her to step down, then that might amount to such negligence, upon the part of the defendant, as would justify recovery, if you find it to be such. That is, it is for you to say whether or not that was such negligence as I have explained to you it consists of, and, if you find that that comes under the definition I have given you, then it is proper for you to base a verdict upon that, provided proof of other things are made, and you must find, in order to so determine, that that was the reason of the injury, that that was the cause of it. And it is claimed that the distance was great from the step to the ground, and that is for you to consider whether that was a proper distance to require a passenger to step down; and this woman is to be judged by her condition at that time, because it is shown in this case that the brakeman himself did have hold of her arm, and must have known, or ought to have known, something about the fact that it was a woman, and her size, etc., and anything that he could tell when he was there, and you should consider that in determining whether defendant was guilty of negligence in allowing her to step down that length of step. Now, it is claimed, also, that the box was placed upon tilting ground, and that it did tilt toward the west, and that is claimed as negligence. This is for you to consider under what I have stated to you of what negligence is, and it is for you to say whether placing of that box in that way, if you find it to be tilting, was negligence; defendant denying that the ground was slanting, and claiming that the ground was level at the time. It is claimed, also, on the part of the plaintiff that the box was placed too far under the step, and that plaintiff, when stepping off, instead of stepping on the box securely, stepped on the outside edge of it, and in that way she slid off the box, and that that caused the injury of which she complains. Now, I think you may consider these, and if you find that defendant was guilty of any act of negligence in any one of these four things, and that complainant was not at all negligent herself (that is, that no negligence on her part contributed to the injury), then it would be proper for you to find a verdict in her favor.<sup>41</sup>

§ 1645(7). *Missouri*

The court instructs the jury that, if you find and believe from the evidence that, on and prior to ———, the defendant ——— was

<sup>41</sup> *Chisholm v. Ann Arbor R. Co.*, 153 N. W. 818, 187 Mich. 214.

a corporation, and that it owned, operated, and maintained a double-track electric railway in the county of ——— commonly known as the ———, and that it owned, operated, and maintained in connection therewith a street car commonly known as a summer car, and that said car had a running board on the outer side, and an iron grill or guard wire on the inner side, and seats at right angles with the main axis of the car and constructed some distance above the running board, and that the defendant also owned, operated, and maintained a trolley, trolley wire, motor, controller, and other electrical appliances in the control and operation of a motorman, and used for the purpose of propelling said car over and along said electric railway, and that on and prior to said date the defendant also owned and maintained a stopping place for discharging its passengers, commonly known as ——— place, and that on and prior to said date the said place was not a reasonably safe place for the discharge of passengers, and that on said day plaintiff was a passenger on said car, and that her fare had been paid thereon to said place, and that the car had been signaled to stop at said place, and that the car had stopped there in obedience to said signal, if any, and that thereupon the plaintiff undertook to alight from said car, and that while she was attempting to alight from said car she was thrown or fell from said car, and that the defendant was guilty of negligence as elsewhere defined in these instructions, and that said negligence if any caused plaintiff to be thrown or to fall from said car, and that plaintiff was in the exercise of ordinary care at that time (by which is meant the exercise of such care as would be used by a person of ordinary care and caution under the same or like circumstances), and that said fall, if any, injured the plaintiff, and that her injuries, if any, were a direct result of said negligence, if any, on the part of said defendant, and that without said negligence, if any, the said injuries, if any, would not have been received, then you may return a verdict in favor of the plaintiff and against the defendant. <sup>42</sup>

The court instructs the jury that, if you find and believe from the evidence in this case that on and prior to ———, the defendant used and maintained the place described by the witnesses as B.'s stopping place as a stopping place for the discharge of its passengers, and that said place was not a reasonably safe place for that purpose, and that the defendant knew, or by the exercise of ordinary care would have known, that said place was not a reasonably safe place for said purpose, then you may find that said defendant

<sup>42</sup> Ganahl v. United Rys. Co. of St. Louis, 197 S. W. 159, 197 Mo. App. 495.



was guilty of negligence. By "ordinary care," as used in this instruction, is meant such care as would be used by persons of ordinary prudence and caution under the same or like circumstances as those shown by the evidence in this case.<sup>43</sup>

You are instructed that the defendant owed the plaintiff the duty of exercising that high degree of care which a very cautious and prudent person similarly situated would exercise for her own safety, including the matter of providing her with a safe means of egress from its train at the point of her destination, and the failure of the defendant to exercise such degree of care would constitute negligence, and if, from the evidence you believe that the plaintiff, on ———, was a passenger upon one of defendant's trains, and that her destination was ——— station, and that at ——— station the defendant stopped its train for the purpose of allowing plaintiff to disembark, and plaintiff in the exercise of ordinary care—that is, such care as an ordinarily prudent person similarly situated would exercise in her attempt to disembark from said train—was injured by reason of stepping into or falling into a hole or excavation that existed there, if you find such excavation or hole existing, and that the defendant was guilty of negligence in permitting such hole or excavation, if any there was, to be there, and in stopping its train and inviting plaintiff to alight there, if you find such was the fact, and that, as the direct and immediate result thereof, the plaintiff sustained the injury, then your verdict should be for the plaintiff.<sup>44</sup>

§ 1645(8). *New Hampshire*

The court charges the jury that it was the duty of the defendant, under its contract with the plaintiff, to provide suitable cars and conveniences for the safe carriage and delivery of the plaintiff at a suitable place at the termination of her journey, and to exercise the highest care in the performance of this service to guard against injury to the plaintiff, and that it was the duty of the plaintiff to exercise reasonable care to avoid injury during the journey. Was the plaintiff injured by alighting from the cars and walking to the station, and, if so, was the injury caused by the defendant's fault in leaving her at an unsuitable place? If the place was suitable, and the defendant fully performed the duty it owed to the

<sup>43</sup> *Ganahl v. United Rys. Co. of St. Louis*, 197 S. W. 159, 197 Mo. App. 495. In this case there was ample testimony that the place in question was not reasonably safe. It will be observed that the phrase "ordinary care" is used in this instruction to

express the degree of care required of the carrier, which phrase has support in some of the authorities, although in this jurisdiction it is not customarily used.

<sup>44</sup> *Rearden v. St. Louis & S. F. Ry. Co.*, 114 S. W. 961, 215 Mo. 105.



plaintiff, the defendant is not liable for any injury the plaintiff may have received. If the place was unsuitable, and the plaintiff received injury in consequence, the defendant is liable, unless the plaintiff's want of care contributed to the injury. Was the plaintiff in fault for being left at that place, or for leaving the car without objection, or saying anything about her feeble condition? Was she induced to alight there by the defendant's servants? Did her want of ordinary care contribute to her injury? <sup>45</sup>

**§ 1645(9). Texas**

You are instructed that, if you believe from the evidence on the occasion complained of by plaintiff that the ground or pavement provided by defendant, where plaintiff was required to alight, was rough and uneven, and at said place that defendant had provided no platform on which its passengers were to alight from its train, but a box to step from its train, placed upon said pavement, and if you further believe from the evidence that by reason of said uneven pavement, if it was uneven, said box placed upon the same was caused to tilt over when plaintiff stepped thereon to alight, and he was injured as alleged by him, if he was injured, or if you believe from the evidence that said box was unfit or unsafe for the purpose for which it was used, and by reason thereof it tilted or turned over when plaintiff stepped thereon to alight, and he received injury, if any, as alleged, and if you further believe from the evidence that the defendant failed to exercise that high degree of foresight as to possible dangers to its passengers and that high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons in providing said uneven pavement, if it was uneven, and placing said box thereon on which its passengers were to alight, or providing said box for said purpose, and if you further believe from the evidence that such failure, if any, was the proximate cause of the injury, if any, to plaintiff, as alleged by him then and in either event you will find for the plaintiff. If you do not so find, you will find for defendant. <sup>46</sup>

You are instructed that, if you believe that the approaches to said platform were so negligently constructed and lighted as that plaintiff could not see the danger of such approach, and that the place where he left the platform was one where a person would naturally get off, and he in the exercise of prudence attempted to leave the

<sup>45</sup> *Foss v. Boston & M. R. Co.*, 21 A. 222, 68 N. H. 256, 11 L. R. A. 367, 49 Am. St. Rep. 607.

<sup>46</sup> *Missouri, K. & T. Ry. Co. of Texas v. Dunbar*, 122 S. W. 574, 57 Tex. Civ. App. 411.

platform, and was injured thereby, without fault on his part, plaintiff would be entitled to recover.<sup>47</sup>

You are instructed that, if the railroad company did provide suitable and safe approaches to their platforms at ———, for the egress of its passengers, at such points as passengers would ordinarily or naturally go, properly lighted, and the plaintiff did not exercise proper and reasonable care, and walked off the platform in the dark, at a point not provided for passengers to leave, and it was a point that passengers would not naturally or ordinarily go to get off the platform, the plaintiff cannot recover.<sup>48</sup>

§ 1645(10). Virginia

The court instructs the jury that, if they believe from the evidence that at the time of the plaintiff's being injured there was no platform or other proper landing place at the train's stopping place at ———, and the defendant's servants did not assist the plaintiff to alight, and, for want of such platform or landing place and assistance in alighting the plaintiff was injured, without fault on her part, then the jury must find for the plaintiff.<sup>49</sup>

The court instructs the jury that, if they believe from the evidence the night on which the plaintiff was injured was intensely dark, and the vision of the plaintiff was further obstructed by a fierce snow-storm that was raging at the time, and that the defendant failed to light the station or stopping place at ———, and that in consequence of the defendant's failure to so light the station or stopping place at ———, the plaintiff, in attempting to alight from defendant's train, fell and was injured, without fault on her part, then the jury must find for the plaintiff.<sup>50</sup>

§ 1646. Same—Passenger on freight train

The jury are instructed that, if you believe from the evidence, that the defendant in this case, while the plaintiff was a passenger on its freight train on the day named in the declaration, on the arrival of said freight train at the station of ——— stopped its caboose reasonably near the platform at said station of ———, due regard being had to the surrounding situation and location, and stopped a sufficient length of time for the plaintiff to alight in safety in said village of ———, and if you further believe from the evidence that the plaintiff refused to alight and depart from said car, because said car had not reached the depot platform, then you should find the issues for the defendant.<sup>51</sup>

<sup>47</sup> Texas & P. Ry. Co. v. Brown, 14 S. W. 1034, 78 Tex. 397.

<sup>48</sup> Texas & P. Ry. Co. v. Brown, 14 S. W. 1034, 78 Tex. 397.

<sup>49</sup> Alexandria & F. R. Co. v. Haddon, 12 S. E. 289, 87 Va. 193.

<sup>50</sup> Alexandria & F. R. Co. v. Haddon, 12 S. E. 289, 87 Va. 193.

<sup>51</sup> Chicago & E. I. R. Co. v. Stonecipher, 90 Ill. App. 511.

**§ 1647. Care required where stop is made at unusual stopping place**

You are instructed that, if a car slows up or stops at an unusual stopping place, in such a manner as clearly to invite a passenger to alight and the passenger under such circumstances attempts to alight, using due and proper care, it is the duty of the person or persons having charge of the car not to suddenly start the car in such a manner as to endanger the safety of the alighting passenger.<sup>53</sup>

**§ 1648. Duty to passengers getting off at other places than station**

The court instructs the jury that, if it had been the custom for a considerable time for persons in the neighborhood of the coal chute, wishing to become passengers on the outgoing trains of the defendant, to enter upon the same, when they stopped at the coal chute, without tickets, and to pay the fares in money which were accepted by a conductor without objection, and that it had also been the custom for them to leave the trains on their return when the trains stopped at the said coal chute and of which the agent of the defendant operating the said trains had notice, then the said passengers alighting from said train would have the license to be upon the lands of the defendant, and, if they and others had habitually used ways and paths across the lands of the defendant for the purpose of coming to or going from such trains, then there would be a license for them to do so, but, if these facts did not exist, then one getting off the trains at that point and going on the lands of the defendant would be a trespasser.<sup>53</sup>

**§ 1649. Duty with respect to steps or stepping stools**

See also, ante, § 1645(6, 9).

**§ 1649(1). Iowa**

The jury are instructed that, if you find from a preponderance of the evidence that the plaintiff was a passenger on one of defendant's cars, and that she attempted to alight therefrom, but that by reason of the negligence of defendant's employes, or one of them, the step along the side of the car had not been let down so that she could step upon the same, and that, by reason of said step not being so let down, she fell to the pavement and was injured, and that she was not guilty of contributory negligence, then your verdict should be for the plaintiff; otherwise for the defendant.<sup>54</sup>

<sup>53</sup> Coyle v. People's Ry. Co. (Del.) 80 A. 638, 7 Pennewill, 454.

<sup>54</sup> Credle v. Norfolk & S. R. Co., 65 S. E. 604, 151 N. C. 50.

<sup>54</sup> Hutchels v. Cedar Rapids & M. C. Ry. Co., 103 N. W. 779, 128 Iowa, 279.

## § 1649(2). Texas

You are instructed that, if you believe from the evidence that the box upon which plaintiff stepped or attempted to step in alighting from defendant's train was an unsafe device to be used for so alighting, by reason of its size or position, or the character of the ground upon which it rested, and if you further believe that, by reason of said box being unsafe for use as such device, the plaintiff, in descending from the steps of defendant's car, fell and was injured, and if you further believe from the evidence that the defendant's servants were guilty of negligence in failing to furnish plaintiff a safe means for alighting from said train, or if you believe that defendant's servants upon said train were guilty of negligence in failing to furnish plaintiff personal assistance necessary to prevent her from falling, and if you further believe from the evidence that such negligence, if any, of defendant's servants was the proximate cause of plaintiff's injuries, if any, then you will find for the plaintiff against the defendant.<sup>55</sup>

You are instructed that, if you believe from the evidence, or a preponderance of the evidence, that the stepping stool used by defendants for passengers to alight on, at the time plaintiff was injured, was a reasonably safe appliance for the purpose, and it was properly placed on ground sufficiently smooth or even, so as to prevent it from turning or tilting by the use of due care on the part of passengers, and the defendants were not guilty of negligence in using it, nor otherwise guilty of negligence, you will find for defendants.<sup>56</sup>

## § 1650. Duty to assist passengers in alighting

The court instructs the jury that whether or not the failure of the parties in charge of said train to assist plaintiff's wife to get off of said train constituted negligence on the part of defendant is a question of fact to be determined by you under the circumstances in evidence, taking into consideration the failure on her part to ask for such assistance.<sup>57</sup>

The court instructs the jury that if you find from the evidence that, when the train on which plaintiff's wife was riding reached ———, she used reasonable diligence, situated and circumstanced as she was, to get off said train, and if said train did not stop at ——— long enough for her to have alighted therefrom in safety, and if while she was endeavoring to get off of said train it was

<sup>55</sup> Missouri, K. & T. Ry. Co. of Texas v. White, 55 S. W. 593, 22 Tex. Civ. App. 424.

<sup>56</sup> Missouri Pac. Ry. Co. v. Worth-

am, 10 S. W. 741, 73 Tex. 25, 3 L. R. A. 368.

<sup>57</sup> St. Louis Southwestern Ry. Co. of Texas v. Addis (Tex. Civ. App.) 142 S. W. 955.

started, and if by reason thereof, or if by reason of the negligence of the parties operating the train in failing to assist her to get off—if you find that such failure was negligence—she was caused to fall and be injured without negligence on her part, then you will find for plaintiff.<sup>58</sup>

**§ 1651. Duty to assist passengers under disability**

See, also, ante, § 1645(10)

**§ 1651(1). Maryland**

The jury are instructed that, if the jury find that the plaintiff was a woman about ——— months advanced in pregnancy, and was on the ——— traveling as a passenger on the train of the defendant from ——— to ——— with two children, one of them ——— years of age and the other about ——— years old, and a lot of packages, and had purchased a ticket for transportation to said station, and had been received as a passenger on a train which regularly stopped at said station, and had delivered up her ticket to the conductor upon demand, and when the train reached said station sufficient time was not allowed her to get off of the train on the platform or place provided for the safe exit of passengers, but was carried on said train beyond the platform, and the train was stopped at a place where no platform or other means were provided for the exit of passengers, and the plaintiff was then and there told by the conductor or agent in the management of the train to get off, and did get off as directed, but as carefully and prudently as her then mental and physical condition enabled her to do, and in getting off was injured, then the plaintiff is entitled to recover; and, in ascertaining the amount of damages to which the plaintiff is entitled, the jury are to consider the health and condition of the plaintiff before the injury, as compared with her present condition, and the probable duration of her injury, and also the mental and physical suffering to which she was and is subjected by reason of the injury, and to allow such sum as will be a fair and just compensation for these.<sup>59</sup>

**§ 1651(2). South Carolina**

You know, or are presumed to know, that it is the duty of a conductor, when passengers need assistance in getting off a train, to assist them off. I charge you that, if the conductor knew her [plaintiff's] condition, then it was his duty to have provided suitable means to provide against accident to her, in the condition in which he knew her to be.<sup>60</sup>

<sup>58</sup> St. Louis Southwestern Ry. Co. of Texas v. Addis (Tex. Civ. App.) 142 S. W. 955.

<sup>59</sup> Baltimore & Ohio R. Co. v. Leapey, 65 Md. 571, 4 A. 891.

<sup>60</sup> Madden v. Port Royal & W. O. Ry. Co., 19 S. E. 951, 41 S. C. 440.

**§ 1652. Same—Notice of disability**

You are instructed that, in determining the question of the care exercised by the plaintiff and by the defendant, the evidence that the plaintiff's husband informed Conductor J., at ———, that the plaintiff was feeble and would need assistance, and that J. said he would notify the conductor who was to take the train at ———, and it would be all right, and that the plaintiff's husband so informed her, is material. Knowledge communicated to J. was notice to the defendant of the plaintiff's condition, and she was not required to notify every other conductor and train hand on the train. Was the plaintiff in fault in relying upon the assurance given her that J. would notify the conductor who took the train at ———, and it would be all right? The question of care is to be determined upon the state of things existing at the time. If the plaintiff's want of due care under the circumstances in which she was placed contributed to cause her injuries, the verdict should be for the defendant. If the plaintiff received injuries through the fault of the defendant, and without fault on her part, she was entitled to a verdict for damages.<sup>61</sup>

**§ 1653. Duty to assist passenger incumbered with parcels**

I instruct you that defendant was bound to furnish passengers with safe and proper appliances and facilities for riding on its trains. Now, if that included the assisting of passengers from the train by the railroad company's handling whatever parcel or package the passenger has, if a railroad company of ordinary prudence would do that, then in this case it is bound to do that. As a matter of course, the railroad company, no more than any other individual, can be held to do that which is impossible, and the railroad company must go upon appearances as the facts and circumstances make these appearances, and if a passenger is burdened with baggage and the employé of the railroad company sees that, why, the railroad company is bound to, if it becomes necessary to the safe alighting of the passenger from the train, for the railroad company to assist in handling any package or boxes. It is not the duty of the railroad company to go through the train, and see each passenger to know whether he wants assistance, or to ascertain what baggage he might have to get off with. But if it is apparent, and would be apparent to a person of reasonable observation that the passenger is in need of assistance, then the railroad is bound to furnish assistance just the same as it is bound to assist a person in any other way prevented from safely alighting

<sup>61</sup> *Foss v. Boston & M. R. Co.*, 21 A. 222, 66 N. H. 256, 11 L. R. A. 367, 49 Am. St. Rep. 607.



without assistance, if the person is sick or aged or infirm, or in any peculiar circumstances which are apparent to the railroad company or comes to the knowledge of the railroad company, which renders a greater degree of care necessary, why the railroad company is bound to afford that additional assistance, and exercise that additional degree of care if such appearances are obvious. As a matter of course, the railroad company is not bound to exercise that same degree of care in the case of an ordinary person alighting from its train.<sup>62</sup>

**§ 1654. Effect of undertaking by outsiders to assist passengers to alight**

You are instructed that if, when the train arrived at the point where the alleged accident occurred, ——— and ———, who were passengers on said train, undertook to assist lady passengers to disembark from said train, and you further believe from the evidence that plaintiff's wife availed herself of their assistance, and that said ——— and ——— were incompetent or were negligent in the way that they assisted plaintiff's wife to disembark from said train, and that such negligence caused plaintiff's wife's injuries, if any she received, then you will return your verdict in favor of the defendant.<sup>63</sup>

**§ 1655. Duty to passenger re-entering train to get baggage**

You are instructed that if the plaintiff, with the knowledge of the conductor, re-entered the train for the purpose of getting off his baggage, then it became the duty of said conductor to hold the train for a reasonable time for plaintiff to enter said train, and get the balance of his baggage, and get off said train. If you find that said conductor did have such knowledge of plaintiff getting on said train for such purpose, and failed to hold said train a reasonable time for plaintiff to get off, and that by reason of such failure, if any, the plaintiff was put to the election of either being carried beyond his destination, or of jumping from said train while in motion, and you further find that in jumping from said train the plaintiff was not guilty of contributory negligence, as hereinafter defined, and you further find that as the direct result of the conductor's failure, if any, to hold said train a reasonable time for plaintiff to get the balance of his baggage and get off, as above explained, the plaintiff sustained the injury complained of, then, and in these events, you will find for plaintiff.<sup>64</sup>

<sup>62</sup> Horn v. Southern Ry., 58 S. E. 963, 78 S. C. 67.

<sup>63</sup> Missouri, -K. & T. Ry. Co. of

Texas v. Kemp (Tex. Civ. App.) 173 S. W. 532.

<sup>64</sup> Texas & P. Ry. Co. v. Born, 50 S. W. 613, 20 Tex. Civ. App. 351.



**§ 1656. Care required not to injure passenger after alighting**

The court instructs the jury that the motorman in charge of the car at the time had the right to presume that the deceased would not move from a position of safety and into one of danger, and there was no duty upon said motorman to stop said car until he saw, or by the exercise of ordinary care would have seen, said deceased in a position of imminent peril; therefore, if you find from all the evidence in the case that said deceased did move from a position of safety to a position immediately in front of the on-coming car and so close to same that the motorman in the exercise of ordinary care could not stop said car and avoid striking said deceased after discovering his peril, then the plaintiff is not entitled to recover in this case, and your verdict should be in favor of the defendant.<sup>65</sup>

**§ 1657. Same—Rate of speed****§ 1657(1). California**

The court instructs the jury that at the place where this accident is shown to have occurred there was no law regulating the speed of cars. The defendant had a right to propel its cars at any rate of speed which was consistent with the exercise of due care in the business of carrying passengers for hire.<sup>66</sup>

**§ 1657(2). North Carolina**

You are instructed that, although the plaintiff did not look and listen before entering upon the track, yet if the defendant was running its train in excess of four miles an hour in violation of the ordinance and that, if the defendant had not been running its train at that speed, the plaintiff's intestate would not have been killed, then the plaintiff would not be guilty of negligence which was the proximate cause of his death, and if the jury so find they should answer the issue, "No."<sup>67</sup>

**§ 1658. Instructions summing up matters from carrier's standpoint**

The court instructs the jury that, unless you believe from the evidence that defendant's servants failed to stop said train at the station of ——— a reasonable and sufficient length of time for plaintiff's wife, in the exercise of ordinary care, to safely alight therefrom, or unless you believe that defendant's servants in making the second stop stopped said train suddenly, with a quick and sudden jerk and lurch, or unless you believe that defendant's agents and servants in carrying plaintiff's wife past said station,

<sup>65</sup> Schall v. United Rys. Co. of St. Louis (Mo.) 212 S. W. 890.

<sup>66</sup> Stadler v. Pacific Electric Ry. Co., 138 P. 943, 23 Cal. App. 571.

<sup>67</sup> Dunn v. Atlantic Coast Line R. Co., 93 S. E. 784, 174 N. C. 254.

and in having her to alight at the place and in the manner and with the means furnished were guilty of negligence as defined in paragraph ——— hereof, or unless you find that plaintiff's wife was injured by the negligence, if any, of defendant's servants, or unless you find that the negligence of defendant's servants, if they were negligent, was the proximate cause of the injuries to plaintiff's wife, if she was injured, then and in either event you will find for the defendant.<sup>68</sup>

**§ 1659. General instruction covering both sides of case**

You are instructed that the plaintiff claims in his complaint that he started to alight from the car, and while one foot was on the step of the car and the other swung outward in the act of alighting, the car was caused to suddenly start and jerk, throwing the plaintiff to the ground with great force and violence, injuring and wrenching plaintiff's back and groin, promoting an inguinal hernia, from which injuries he became weak, sore, and sick, and disabled to work and perform his usual vocation as a farmer; that he is still suffering from such injuries; and that he will continue to suffer from said hernia for the rest of his life. He charges further that he was compelled to employ a physician at an expense of \$———; that he believes an operation will be necessary, at a cost of \$———, and on account of the injuries which he thus alleges he received he asks damages in the sum of \$———. The defendant in answer denies the statement of the plaintiff as to the manner of the car being started and injuring him, and denies that the plaintiff was injured in the manner or to the extent, or at all, as alleged by him; and denies all negligence on its part which in any way contributed to any injury which he may have sustained. And for a further and affirmative defense the defendant alleges: That if the plaintiff sustained any injuries at the time, place, and in the manner alleged in his complaint, that such injuries were caused by reason of his own carelessness and negligence in recklessly and heedlessly undertaking to alight from the car in an improper manner and while the car was in motion, and in failing to exercise his faculties in a way to observe, escape, and avoid the risk and danger of his position in attempting to alight from the car while the same was in motion, which was open and apparent to him and which could have been easily avoided had he taken proper care for his personal safety. The plaintiff, replying to this answer of the defendant, denies all negligence on his part which contributed to his injury. It is the duty of a street car company operating cars

<sup>68</sup> Shipley v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 199 S. W. 661.

within the city or on interurban lines to use a high degree of care in operating their cars and in stopping at stations, in order that persons getting on or off the car, who are themselves in the exercise of a reasonable degree of care, can do so with safety. And it is the duty of one who is getting on or off a car to use ordinary care for his own safety.<sup>69</sup>

You are instructed that a street car company is not an insurer of the safety of its passengers, but it is under obligations to use a high degree of care for their safety; and for any injury which a passenger sustains because of the failure of the company operating the car to use this high degree of care, the person so injured has a right of recovery for the injuries he may have received on account of the want of care on the part of the street car company. In the case at bar, if you find from the preponderance of the evidence in the case that the plaintiff received some or all of the injuries of which he complains by reason of the negligence of the conductor in charge of the car in starting the car before the plaintiff had completely alighted therefrom, at the time and place charged in his complaint, and you further find that he sustained the injuries of which he complains, or some of them, as the result of that negligence, and you also find from the evidence that the plaintiff himself was guilty of no negligence on his part that contributed to his injury, then I instruct you that your verdict in this case should be for the plaintiff, for such an amount as you think he is entitled to to compensate him for the injury or injuries so sustained. If, on the other hand, you find from the evidence that the street car company was not guilty of any negligence whatever, which was the proximate cause of such injuries as plaintiff may have sustained at the time in question, if you find that he sustained any injury, or if you find that although the street car company was negligent in some degree the plaintiff himself was also negligent in his manner of alighting from the car, and that his negligence was such that it contributed to his injury, then I instruct you that the plaintiff cannot recover, and your verdict should be for the defendant, because in order that a plaintiff may recover damages in such a case he must have himself been free from any negligent act on his part that contributed to his injuries.<sup>70</sup>

<sup>69</sup> Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595.

<sup>70</sup> Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595.

## 12. *Proximate Cause of Injuries*

Negligence of passenger as proximate cause of injuries, see post, § 1709.

### § 1660. Necessity of showing that negligence of carrier caused injuries

Sufficiency of evidence of proximate cause, see post, § 1731.

#### § 1660(1). Alabama

The court charges the jury that if you believe from the evidence that the plaintiff placed his foot or some part of his body against the trucks, and that this was the sole proximate cause of their falling, you should return a verdict for the defendant.<sup>71</sup>

#### § 1660(2). Arkansas

You are instructed that, even though you may believe from the evidence that plaintiff fell while she was attempting to board the train, and even though you may further believe that she was injured by the fall, yet this is not sufficient to entitle her to recover, unless she go further and prove by a greater weight of the evidence that the cause of such fall was some act of negligence on the part of the railway company, and, if she fell from some other cause other than some act of negligence on the part of the railway company, then she cannot recover, and your verdict will be for the defendant.<sup>72</sup>

You are instructed that, unless plaintiff has shown by a preponderance or greater weight of the evidence that the injuries alleged in her complaint are the result of some negligent act of the defendant, its agents or servants, then she cannot recover, it matters not how she may have received her injuries, or what the extent of her injuries is.<sup>73</sup>

#### § 1660(3). Delaware

Negligence, we may say, is never presumed. It must be proved, and the burden of proving it is on the plaintiff. And even though the defendant was negligent there could be no recovery unless such negligence was the cause of the injury complained of. If the defendant was guilty of no negligence, the plaintiff cannot recover no matter what injuries the plaintiff may have received or what caused them.<sup>74</sup>

You are instructed that negligence is defined to be the want of ordinary care, that is, the want of such care as a reasonably prudent careful man would use under similar circumstances. It is for

<sup>71</sup> O'Rourke v. Woodward, 77 So. 679, 201 Ala. 265.

<sup>72</sup> Huckaby v. St. Louis, I. M. & S. Ry. Co., 177 S. W. 923, 119 Ark. 179.

<sup>73</sup> Huckaby v. St. Louis, I. M. &

S. Ry. Co., 177 S. W. 923, 119 Ark. 179.

<sup>74</sup> Clayton v. Philadelphia, B. & W. R. Co. (Super.) 106 A. 577, 7 Boyce, 343.

you, gentlemen of the jury, to determine from the evidence whether there was any negligence that caused the accident, and if there was, whether it was the negligence of the defendant company. To entitle the plaintiff to recover at all it must have been shown to your satisfaction by a preponderance of the evidence, that the negligence which caused the injuries complained of, if any there was, was the fault of the defendant company.<sup>75</sup>

§ 1660(4). Maryland

The jury are instructed that, if they believe the facts stated in plaintiff's first prayer, and further believe plaintiff was injured by reason of the absence of such care and skill as it is required by plaintiff's first prayer to exercise in performing its said undertaking, then he is entitled to recover in this action, unless the jury find that by his own negligence he directly contributed to the injury he received.<sup>76</sup>

§ 1660(5). Oklahoma

You are instructed that in this case the negligent acts complained of are the gist of the action, and to entitle the plaintiff to recover, he must establish by a preponderance of the evidence that the alleged injuries resulted from the acts complained of. Negligence on the part of the defendant is the failure of the defendant or its servants employed in the operation of the train upon which the plaintiff was a passenger to perform a duty owing to the passengers arising out of the relation of the parties at the time.<sup>77</sup>

§ 1660(6). Texas

You are instructed that, if you find from the testimony that ———, at the time he left the defendant's train at or about ———, had sufficient intelligence to know and appreciate the peril of standing on a railroad track in front of an approaching engine in the manner in which he did, but that, after he left the train, his mental condition grew worse to such an extent that he could not appreciate the peril of standing on the track in front of the approaching engine as he did, then you are told that the failure of the defendant's employes to prevent him from leaving the train at or about ——— could not be the proximate cause of his injuries.<sup>78</sup>

The jury are instructed that, if they do not believe, from the evidence, that the defendant's employes were guilty of negligence, as hereinbefore defined, in the particulars specified and charged as acts of negligence in plaintiff's petition, or if plaintiff was guilty of

<sup>75</sup> *Girardo v. Wilmington & Philadelphia Traction Co.*, 90 A. 476, 5 Boyce, 25.

<sup>76</sup> *Philadelphia, Wilmington & B. R. Co. v. Anderson*, 72 Md. 519, 20 A. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483.

<sup>77</sup> *Chicago, R. I. & P. Ry. Co. v. Dizney*, 160 P. 880, 61 Okl. 176.

<sup>78</sup> *Chicago, R. I. & G. Ry. Co. v. Sears* (Civ. App.) 130 S. W. 1019.

such negligence, or if they do not find that plaintiff received any such injuries as she complains of, or that such injuries, if received, were not caused by such negligence, if any, on the part of defendant's employes, they will return a verdict for the defendant.<sup>79</sup>

**§ 1661. Defective equipment as proximate cause of accident**

**§ 1661(1). Kentucky**

The jury are instructed that, if they believe from the evidence that the defendant's train of cars, in which plaintiff was being carried as a passenger on the morning of the ——— day of ———, was thrown from the track, causing the injury to plaintiff complained of, wholly because of a fresh and contemporaneous break in an iron rail, or piece of an iron rail, on defendant's track, and under the train on which plaintiff was a passenger, and that such fresh break was caused wholly by frost or extreme cold, and that such cause was one which the highest degree of practicable care, skill, and caution consistent with operating the road at all could not have provided against, and that said train was not thrown from the track because of the mode of construction and repair of said track, and not because of any fault or neglect whatever of defendant, its agents or servants, then the jury should find for defendant as to the injuries to the person of plaintiff complained of. But if the jury believe from the evidence that frost or extreme cold was not the sole cause of the breaking of said rail, but only contributed thereto, and that the railroad track, where said rail broke, was in an unsafe and dangerous condition, that might have been remedied or guarded against by the exercise by defendant's employees of the highest degree of care and skill then practicable and then known to track repairers, and that such unsafe and dangerous condition of said railroad track of defendant at said point also contributed to cause the breaking of said rail jointly with the said frost and extreme cold, then the law is for the plaintiff, and he is entitled to compensatory damages.<sup>80</sup>

**§ 1661(2). Michigan**

You are instructed that the fact that the car in question did not have air brakes or electric brakes would make no difference in the case, unless the accident was caused or contributed to by lack of braking power.<sup>81</sup>

<sup>79</sup> *Houston & T. O. R. Co. v. Dotson*, 38 S. W. 642, 15 Tex. Civ. App. 73.

<sup>80</sup> *Louisville & N. R. Co. v. Fox*, 74 Ky. (11 Bush) 495.

<sup>81</sup> *Fortin v. Bay City Traction & Electric Co.*, 117 N. W. 741, 154 Mich. 316.



§ 1661(3). *Missouri*

You are instructed that, if you find and believe, from the evidence, that the accident happened by reason of the grip car leaving the track on which it was running, and that it was caused to do so by reason of the switch at the place in question having been interfered with by some outside parties or party, whether purposely or unintentionally, and that defendant had used all the care that was reasonably practicable in watching and inspecting its track and the switch in question, and had not, and could not by the exercise of ordinary care have, discovered that said switch had been interfered with, if you so find the fact, prior to the accident, then you are instructed that plaintiff cannot recover, and your verdict must be for defendant.<sup>82</sup>

§ 1661(4). *Texas*

You are instructed that, if you find that the broken flange was not the sole cause of the wreck, but you find the bad condition of the track, roadbed, and switch, or the fast running of the train, were concurring proximate causes of the wreck, and that it was the negligence of the company that brought about this condition, and plaintiff was injured thereby, then your verdict should be for the plaintiff.<sup>83</sup>

§ 1662. *Same—Unprecedented bad weather co-operating with neglect of duty to keep roadbed in repair*

You are instructed that, if the road had been out of repair before the bad weather set in, and proper judgment was not used beforehand to put the roadbed in good condition, and the injury resulted from a bad condition of the road, and imperfect and bad track and road, and the same could have been avoided by proper skill and judgment, then the company cannot defeat a recovery by proof that the accident was caused by an unprecedented bad spell of weather.<sup>84</sup>

13. *Contributory Negligence of Passenger*§ 1663. *Degree of care required in general*

Negligence of traveler by vessel, see post, § 4812.

§ 1663(1). *Delaware*

You are instructed that, on the other hand, there is a duty resting upon the passenger to act with prudence, and to use the means provided for his safe transportation with reasonable circumspection and care, and if his negligent act contributes to bring about

<sup>82</sup> *Logan v. Metropolitan St. Ry. Co.*, 82 S. W. 126, 183 Mo. 582.

<sup>83</sup> *Houston, E. & W. T. Ry. Co. v. Summers* (Civ. App.) 49 S. W. 1106.

<sup>84</sup> *Missouri Pac. R. Co. v. Johnson*, 10 S. W. 325, 72 Tex. 95.



the injury of which he complains, he cannot recover. It is also the duty of the passenger to see that the car has stopped, and that he may safely get on or off, and also to exercise all reasonable care to avoid danger. Reasonable care would be such care as a man of ordinary prudence would take under similar circumstances to avoid accident. The care should be in proportion to the risk to be incurred in all cases.<sup>85</sup>

**§ 1663(2). Illinois**

The jury are instructed, as a matter of law, that while it was the duty of the plaintiff at the time and place in question to exercise due care and foresight for her own safety, yet she was obliged to exercise only such care and foresight as is ordinarily exercised by reasonably careful persons under similar circumstances.<sup>86</sup>

**§ 1663(3). Indiana**

The jury are instructed that the plaintiff was bound to use reasonable care on her part to avoid injury, to which defendant's negligence, if any, may have exposed her. Reasonable care may be defined to be that degree of care which a prudent person would have exercised under the circumstances in which the plaintiff found herself at that time. By this test, was the plaintiff free from negligence herself? Might she, situated as she was, by the exercise of ordinary prudence, have avoided injury to herself, notwithstanding the negligent conduct of the defendant? If so, she cannot recover if she failed to exercise such care. In considering this question, all the evidence bearing upon the points indicated in the foregoing instruction as to defendant's negligence is proper to be considered also. If, in the light of all of these circumstances in evidence, a reasonably prudent person, exercising her faculties of sight and hearing, would have seen or heard and avoided the danger, or if the danger was apparent and easily avoidable to a person exercising reasonable care as before defined, the plaintiff cannot recover, if she negligently failed to avoid it, and must suffer the consequences of her own carelessness.<sup>87</sup>

**§ 1663(4). Kentucky**

You are instructed that ordinary care means the degree of care usually observed by ordinarily careful and prudent persons under the same or similar circumstances. Negligence means a failure to observe ordinary care. Gross negligence means a failure to observe slight care.<sup>88</sup>

You are instructed that contributory negligence means a failure

<sup>85</sup> *File v. Wilmington City Ry. Co.*, 80 A. 623, 7 Pennewill, 463.

<sup>86</sup> *Bower v. Chicago Consol. Traction Co.*, 156 Ill. App. 452.

<sup>87</sup> *Prothero v. Citizens' St. Ry. Co.*, 33 N. E. 765, 134 Ind. 431.

<sup>88</sup> *Louisville & N. R. Co. v. Smith*, 122 S. W. 806, 135 Ky. 462.

upon the part of the plaintiff, if he did so fail, to observe care for his own safety, as mentioned in instruction No. ———, and by reason of such failure he helped to cause or bring about his injuries, and when but for such failure he would not have been injured.<sup>89</sup>

**§ 1663(5). Maryland**

The jury are instructed that the degree of care required of a passenger is not the highest degree of care, but only the ordinary care which ordinarily prudent people are accustomed to exercise.<sup>90</sup>

**§ 1663(6). Missouri**

You are instructed that a passenger is required to use such care as would be used by an ordinarily prudent person under the same or similar circumstances, and the failure on the part of a passenger to use such care is negligence on his or her part.<sup>91</sup>

You are instructed that by the term "reasonable care" as used in these instructions is meant such care as would be used by an ordinarily prudent person under the same or similar circumstances.<sup>92</sup>

The jury are instructed that by the term "ordinary care," as used in other instructions herein, is meant that degree of care and diligence an ordinarily careful and prudent person would ordinarily use under like or similar circumstances.<sup>93</sup>

**§ 1663(7). Texas**

The jury are instructed that "negligence of a passenger" means the absence of that high degree of care to avoid injury to his or her person, while traveling on a train, or alighting therefrom, which very cautious and prudent persons usually exercise under the same or similar circumstances.<sup>94</sup>

The jury are instructed that the fault or negligence on the part of the plaintiff which will preclude him from a recovery, if there was negligence both upon his part and upon the part of the defendant, its agents or employees, is not the least degree of fault or negligence; but it must be of such a degree as to amount to the want of ordinary or reasonable care on his part, under the circumstances, at the time of the injury.<sup>95</sup>

**§ 1663(8). Washington**

The jury are instructed that the law does not require the plaintiff, in an action for personal injuries, to be absolutely free from

<sup>89</sup> Louisville & N. R. Co. v. Smith, 122 S. W. 806, 135 Ky. 462.

<sup>90</sup> Philadelphia, Wilmington & B. R. Co. v. Anderson, 72 Md. 519, 20 A. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483.

<sup>91</sup> Wellman v. Metropolitan St. Ry. Co., 118 S. W. 31, 219 Mo. 126.

<sup>92</sup> Wellman v. Metropolitan St. Ry. Co., 118 S. W. 31, 219 Mo. 126.

<sup>93</sup> Logan v. Metropolitan St. Ry. Co., 82 S. W. 126, 183 Mo. 582.

<sup>94</sup> Houston & T. C. R. Co. v. Dotson, 38 S. W. 642, 15 Tex. Civ. App. 73.

<sup>95</sup> Houston & T. C. Ry. Co. v. Gorbett, 49 Tex. 573.

any neglect whatever in order to recover, for such a requirement would impose upon him the duty of exercising extraordinary care and prudence, which is not the standard by which his neglect is measured. All the law required of the plaintiff is the exercise of ordinary care under the circumstances surrounding him, and this he may do although he may be guilty of some slight neglect in the broadest sense of that term.<sup>96</sup>

**§ 1663(9). Wisconsin**

The jury are instructed that if the plaintiff, in taking the train in question, acted as persons of common sense and ordinary prudence and intelligence usually act in like cases, then there was no such negligence on his part as would prevent a recovery by him in this action.<sup>97</sup>

**§ 1664. Care required of passenger in approaching station**

You are instructed that if you find and believe from the evidence that the plaintiff knew, or by the exercise of ordinary care on his part could have known, of the hole in the incline or wagon approach to the railroad crossing up which he was walking in going to defendants' depot or station platform, and by ordinary care could have avoided stepping in said hole, but that he failed to exercise such care for his own safety in this respect, then he cannot recover in this case.<sup>98</sup>

You are further instructed that it was the duty of the plaintiff, while waiting for the arrival of the train on which he was to take passage, to occupy the premises provided by defendants for passengers, and in going to and from the defendants' depot and station platform to use the ways and means provided for that purpose. So, if you find and believe from the evidence that the defendants had provided a passageway for the use of passengers in going to and from defendants' depot and station platform, and that the plaintiff, after purchasing his ticket for passage on defendants' train, did not remain on the premises provided by defendants for passengers, but left said depot and station platform, and in returning thereto did not use the ways and means provided by defendants for that purpose, but went onto the incline or wagon approach to a road crossing over defendants' tracks, and while on said incline or wagon approach he stepped into a hole therein and was injured, and further find from the evidence that said incline or wagon approach was not provided by defendants for passengers

<sup>96</sup> McCormick v. Seattle Electric Co., 96 P. 220, 49 Wash. 652.

<sup>97</sup> Curtis v. Detroit, etc., R. Co., 27 Wis. 158.

<sup>98</sup> Gurtman v. Lusk (Mo.) 208 S. W. 61.

or intended passengers, nor for their use in going to and from defendants' depot, station platform, and trains (and without a direct or implied invitation so to do), then the plaintiff, in going onto said incline or wagon approach, was guilty of negligence which will bar him from recovering in this case.<sup>99</sup>

**§ 1665. Duty to look and listen on approaching train for purpose of becoming passenger**

**§ 1665(1). Kansas**

You are instructed that the obligation which rests upon a traveler, to stop, look, and listen before crossing a railway track which intersects a highway, does not apply to a passenger in going from the depot to board his train, and this distinction you are authorized to take into consideration in determining the propriety of the conduct of the deceased, if you find him a passenger at the time in question.<sup>1</sup>

You are instructed that it was not negligence in and of itself for the plaintiff not to look and listen for approaching trains on defendant's intervening track when he was about to cross the same to get from the station to his train on the west track, if you so find. But, nevertheless, it was incumbent upon him to use such care and attention in crossing said intervening tracks as would ordinarily be expected of persons of ordinary and reasonable prudence under like circumstances, and he had the right to assume that the defendant company would so regulate its trains that intervening tracks would be free from danger when the passenger train on the west track stopped at the station to receive passengers.<sup>2</sup>

**§ 1665(2). Kentucky**

You are instructed that it was the duty of the plaintiff, before he entered upon the passway between the said two trains, to exercise ordinary care for his own safety, and to stop and look and listen to ascertain whether he could cross the track without injury from the said trains; and, if he failed to discharge either of these duties, and by reason of such failure he helped to cause or bring about the injuries of which he complains, and he would not have been injured but for his contributory negligence in that respect, then the law is for the defendant, and so you should find, even though you may believe from the evidence that the defendant was negligent in failing to give notice of the fact that the train was about to be backed to close the passageway, if such is the fact, unless you

<sup>99</sup> Gurtman v. Lusk (Mo.) 208 S. W. 61.

<sup>1</sup> Saunders v. Atchison, T. & S. F. Ry. Co., 148 P. 657, 95 Kan. 537.

<sup>2</sup> Saunders v. Atchison, T. & S. F. Ry. Co., 148 P. 657, 95 Kan. 537.

shall further believe from the evidence that when the plaintiff came in peril from the train, the employes of the defendant in charge of the train could, by the exercise of ordinary care, have discovered his peril, and by ordinary care have prevented his injury.<sup>3</sup>

**§ 1666. Implied invitation to cross tracks to board car**

The jury are instructed that, if they shall find from the evidence that it was necessary for the deceased, in order to take the ——— accommodation train, then on the south track of the defendant's road at ———, if the jury so find, to cross the north track of said defendant's road, and that said ——— train was then engaged in receiving and discharging passengers, all of whom were compelled to cross said north track, in going either to or from said train, and that passengers were passing, and did pass, across said north track, then the deceased had the right to consider that these circumstances amounted to an implied invitation on the part of the defendant to the deceased to cross the said north track, and to an implied assurance that it would be safe for him to do so.<sup>4</sup>

**§ 1667. Care required in boarding car**

You are instructed that if you find defendant's car was headed south and had been stopped for the receipt of passengers, that plaintiff had a right to assume that the west side was the proper side to board said car, and in the absence of knowledge to the contrary, or reasonable ground for believing to the contrary, she would not be guilty of contributory negligence in attempting to board said car on said side, except as elsewhere instructed.<sup>5</sup>

**§ 1668. Withdrawing from one car to enter another**

You are instructed that passengers have no right to enter or pass through a baggage car attached to the train on which they are about to take passage; and, if the evidence discloses that the plaintiff got upon the platform of the rear car, and, either with or without opening the door, discovered that the car, or that portion of it next to the platform upon which he got, was set apart for baggage, it would not be negligence upon his part to withdraw therefrom to seek his proper place in a car intended for passengers, without going through the baggage car.<sup>6</sup>

**§ 1669. Boarding train or car while in motion**

**§ 1669(1). California**

The jury are instructed that everyday observation and experience show that it is not necessarily negligent to attempt to

<sup>3</sup> Louisville & N. R. Co. v. Smith, 122 S. W. 806, 135 Ky. 462.

132 P. 195, 89 Kan. 613, 48 L. R. A. (N. S.) 974.

<sup>4</sup> Baltimore & O. R. Co. v. State, 60 Md. 449.

<sup>6</sup> Union Pac. Ry. Co. v. Sue, 41 N. W. 801, 25 Neb. 772.

<sup>5</sup> Haas v. Wichita R. & Light Co.,

board a moving street car. Whether it is or not depends upon the circumstances of each case. While it might be negligence for a man to try to board a car running very rapidly, it might not be negligence to try to board the same car running very slowly. It might be negligence to try to board a moving car of one kind, but not so to try to board a moving car of a different kind. It might be negligence for one man to try to board a car moving at a given rate, but not so for another man to try to board the same car at the same place in the same manner and moving at the same rate. You are the judges of the question whether it was negligence for plaintiff to try to board the car in question in this case, and for that purpose you are to take into consideration all the evidence in the case and all the circumstances surrounding him at that time.\*

§ 1669(2). Illinois

The jury are instructed that, if you believe from the evidence that the plaintiff attempted to board the car in question while the car was moving, then you should find the defendant not guilty.<sup>7</sup>

§ 1669(3). Kentucky

You are instructed that if, at the time the plaintiff attempted to board defendant's car, it was running at a rate of speed which to a person of ordinary prudence and care would have been dangerous to attempt to board same, it was negligence on the part of the plaintiff to attempt to board said car; and, if they believe from the evidence that he did attempt to board said car when it was running at such a rate of speed, they should find for the defendant.<sup>8</sup>

§ 1669(4). Missouri

You are instructed that, while it was the duty of defendant, as a carrier of passengers, to exercise a high degree of care, in receiving and protecting plaintiff if she sought to enter defendant's car as a passenger, yet plaintiff ought on her part to exercise ordinary care when seeking to become a passenger, and if she entered, or attempted to enter, defendant's car while it was in motion, she did so at her own peril, unless the jury further believe that defendant's servants in charge of the car by their conduct invited her to enter before the car stopped; and if the jury further believe that defendant's conductor, and others, if any, acting upon the request of defendant's servants, publicly warned those seeking to become passengers to stay off the car until it stopped, and that notwithstanding plaintiff entered, or attempted to enter, the car before it stopped, then plaintiff was not received as a passenger and was not

\* Nilson v. Oakland Traction Co., 10 Cal. App. 103, 101 P. 413.

<sup>7</sup> Gannon v. Chicago Ry. Co., 185 Ill. App. 124.

<sup>8</sup> Kentucky Traction & Terminal Co. v. Walts, 180 S. W. 356, 167 Ky. 236.



exercising ordinary care on her part, and the verdict must be for defendant.<sup>9</sup>

The court instructs the jury that if you find from the evidence that plaintiff attempted to board one of defendant's cars when it was running at a speed of eight or ten miles an hour, or at a greater rate of speed, and that the speed of the car caused him to be thrown and injured, then, if you so find and believe, the court instructs you that plaintiff is not entitled to recover, and your verdict will be for defendant.<sup>10</sup>

You are instructed that, if you believe from the evidence that the direct cause of ———'s death was not negligence on the part of defendant's employes, but negligence of his own in trying to board an electric railway train while the same was in motion, then you should find a verdict for the defendant.<sup>11</sup>

§ 1669(5). Oklahoma

You are instructed that, on the other hand, if you believe that the train had not slowed up to take on passengers, and was running at a dangerous rate of speed, and the plaintiff, knowing that fact, attempted to board the said running train, and he was thrown to the ground and injured, the defendant would not be liable therefor.<sup>12</sup>

You are instructed that, should you believe from the evidence that the cause of the fall was the fact that the plaintiff failed to catch a handhold in attempting to board a running passenger train of the defendant, when the said train was running at a rate of speed dangerous for him to attempt to get on the defendant would not be liable for the injuries resulting from the fall.<sup>13</sup>

§ 1669(6). Oregon

The court instructs the jury that, if you should find from the evidence in this case that after this train had started in motion, after having been stopped and giving a reasonable opportunity to people to board it, it was started again in motion, and this plaintiff ran after the train and attempted to board the car, and by reason thereof was injured, then she will have contributed to the injury in this case; and the law of this state is that there are no degrees of negligence, and when both parties contribute to the injury, when both parties are guilty of negligence contributing to the injury, the law simply leaves the parties where it finds them, and

<sup>9</sup> Flaherty v. St. Louis Transit Co., 106 S. W. 15, 207 Mo. 318.

<sup>10</sup> Spencer v. St. Louis Transit Co., 86 S. W. 593, 111 Mo. App. 653.

<sup>11</sup> Sly v. Union Depot Ry. Co., 36 S. W. 235, 134 Mo. 681.

<sup>12</sup> Webb v. Missouri, O. & G. Ry. Co., 179 P. 17.

<sup>13</sup> Webb v. Missouri, O. & G. Ry. Co., 179 P. 17.



the result of that, of course, is that no recovery will be had in the case.<sup>14</sup>

§ 1669(7). Texas

You are instructed that, should you find that plaintiff was guilty of negligence in attempting to board a moving train and that such negligence, if any, proximately caused or contributed to his injury, if any, the plaintiff cannot recover, and you will so find.<sup>15</sup>

You are instructed that, if you find from the evidence that the plaintiff attempted to get on a moving train, and that he knew it was dangerous to make such attempt, and if you further find that it was negligence on his part to make such attempt in the manner he did, if he did make such attempt, and if you find that such negligence, if any, causing or approximately contributed to cause his injuries, then you will find a verdict for the defendant.<sup>16</sup>

§ 1669(8). Virginia

The court instructs the jury that if they believe from the evidence that plaintiff was an old man, and attempted to board the defendant's car without invitation from the defendant or its agents. while it was in motion, very much crowded, both inside and on the platform, and while he was incumbered with a cane and umbrella, and that after getting a footing on the car he let go his hold on the railing to catch at his hat, and fell, he was guilty of contributory negligence, and they must find for the defendant, unless they believe from the evidence that the defendant could have prevented the accident by due care on their part.<sup>17</sup>

§ 1670. Taking overcrowded train

You are instructed that it is claimed by the defendant that it was negligence in E. to take this train at all in its overcrowded condition, because he had knowledge that there was another train. In considering that question, you must put yourself in the place of E., as far as possibly you can, from the evidence which you believe. You may take into consideration the time of night, and the stipulation in the ticket that it was not good beyond the special train, ———. You must consider in that connection whether or not E. had notice such as he was called upon to believe and rely upon that there was another train, with sufficient room in it, upon which he could ride, and upon which his ticket would be good. If you find that E. was brought to A. upon one train, before he could be charged with negligence for not having taken another

<sup>14</sup> *Tompkins v. Portland Ry., Light & Power Co.*, 150 P. 758, 77 Or. 174.

<sup>15</sup> *Missouri, K. & T. Ry. Co. of Texas v. Davis* (Civ. App.) 108 S. W. 1022.

<sup>16</sup> *San Antonio & A. P. Ry. Co. v. Trigo* (Civ. App.) 101 S. W. 254.

<sup>17</sup> *Reynolds v. Richmond & M. Ry. Co.*, 23 S. E. 770, 92 Va. 400.

train than the one he came upon you must find that the railroad company took such steps that he had actual knowledge, upon which he might rely, that there was another such a train; that there was not a duty devolving upon E., simply because he found the train upon which he got to A. was crowded, to wait for other transportation upon the sole presumption that other transportation would be furnished.<sup>18</sup>

**§ 1671. Care required of passenger while in transit**

**§ 1671(1). United States**

The jury are instructed that, if they find that the plaintiff left the point designated as the place for passengers to wait for the train for ———, and went to a point nearer to the burning tank, for his own pleasure, or to gratify his curiosity, or to see the burning tank, and was there injured, and that he would not have been injured had he remained at the point designated, then he is not entitled to recover, and the jury should find for the defendant.<sup>19</sup>

**§ 1671(2). Kentucky**

The court instructs the jury that it was the duty of the plaintiff on the occasion in the evidence referred to, while riding on the defendant's train, to exercise ordinary care for his own safety; and if you believe from the evidence that on the occasion referred to he failed to exercise that degree of care, and by reason of such failure upon his part, if he did so fail, he so far contributed to cause or bring about his injury that, but for such failure upon his part, he would not have been injured, the law is for the defendant and the jury should so find, although you may believe from the evidence that some one or more of the agents of the defendant company were also negligent.<sup>20</sup>

**§ 1671(3). Missouri**

The court instructs the jury that if you find and believe from the evidence that plaintiff got upon the car in question before the car started, or while it was in motion, and rode upon said car some distance with each hand holding to the guard rail in a reasonably safe position and place upon said car, and that thereafter he let go of one of said guard rails and fell from the car, your verdict will be for the defendant.<sup>21</sup>

<sup>18</sup> *Pennsylvania Co. v. Paul* (C. C. A. Ohio) 126 F. 157, 62 C. C. A. 135.

<sup>19</sup> *Chicago, St. P., M. & O. Ry. Co. v. Myers* (C. C. A. Minn.) 80 F. 361, 25 C. C. A. 486.

<sup>20</sup> *McDermott v. Louisville & N. R. Co.*, 206 S. W. 6, 182 Ky. 22.

<sup>21</sup> *Quinn v. Metropolitan St. Ry. Co.*, 118 S. W. 46, 218 Mo. 545.

§ 1671(4). **Ohio**

You are instructed that it is the claim of the defendant that this boy while he was seated upon the step of the car was safe, and that he arose from the place where he was sitting and stood up, and therefore it was more dangerous, and that in doing that he did not exercise this ordinary care. Gentlemen, you will take into consideration the circumstances under which—if there is any proven—by which he arose from his seat and stood up. Determine whether, by doing that act, he exercised the care which an ordinarily prudent person would have exercised under the same or similar circumstances. If you shall find, gentlemen of the jury, that the defendant failed to exercise this high degree of care which I have called your attention to and find that the ward, ———, did not exercise ordinary care, then that would defeat his right of recovery, no matter how negligent the defendant may have been.<sup>22</sup>

§ 1671(5). **Oklahoma**

You are instructed that, if you find from the evidence that the plaintiff knowing that the conductor in the performance of his duty as such was required to open and pass through the door in question, and the plaintiff took hold of the said door for the purpose of preventing the conductor from coming through and held to said door, notwithstanding the efforts of the conductor to open same, then you are instructed that the plaintiff is guilty of contributory negligence, and your verdict should be for the defendant, although you may believe from the evidence that the conductor was guilty of negligence in failing to see that the plaintiff's hand and arm was in such condition that he could not extricate himself, unless you further find from the evidence that the plaintiff desisted from his efforts to hold the door and gave notice to the conductor that he had desisted in time to enable the conductor to cease the effort to open the door and avoid injury to the plaintiff.<sup>23</sup>

§ 1672. **Taking position attended with greater danger than other parts of vehicle of transportation**

The jury are instructed that, if plaintiff took up a position more dangerous than some other parts of the train when he was permitted to ride, he should be held to have assumed the risk of the more dangerous position, yet he did not assume thereby any risk of danger resulting from and proximately caused by the negligence of defendants, their agents and servants.<sup>24</sup>

<sup>22</sup> Stark Electric R. Co. v. Brooks, 114 N. E. 245, 94 Ohio St. 324.

<sup>23</sup> Shawnee-Tecumseh Traction Co. v. Newcome, 158 P. 1193, 59 Okl. 271.

<sup>24</sup> Knox v. Robbins (Tex. Civ. App.) 151 S. W. 1134.

**§ 1673. Same—Voluntary surrender of seat to other passengers**

The jury are instructed that the court cannot say, as a matter of law, that a passenger surrendering his seat to one less able to stand than himself should be held guilty of contributory negligence upon that ground. The mere fact of surrendering his seat (as the testimony in this case, it seems to me, shows) to a couple of ladies who were old and infirm, would not, of itself, constitute negligence and relieve the defendant of liability. As I have explained, the burden of proof is upon the plaintiff to establish the defendant's negligence, and that his injuries resulted therefrom, by a fair preponderance of the evidence.<sup>25</sup>

**§ 1674. Occupying place not intended for passengers****§ 1674(1). Arkansas**

You are instructed that, although you may find from the evidence that deceased at the time of the wreck was a passenger on defendant's train, yet, if you believe from a preponderance of the evidence, taking into your consideration all the facts and circumstances detailed by the witnesses, that at the time of the wreck deceased was occupying any other part of the train than that provided by the defendant for the use of passengers, and that by reason thereof he was thrown from the train and received the injury complained of, then your verdict will be for the defendant.<sup>26</sup>

**§ 1674(2). Kentucky**

The court instructs the jury that if they believe from the evidence that the plaintiff or ——— insisted upon taking the invalid and chair into the baggage car, and attended upon the patient there, and at the time there were other seats and accommodation upon the train for safely carrying the patient and her attendants, and that plaintiff would not have been injured, except for his so riding in the baggage car, they will find for the defendant.<sup>27</sup>

**§ 1675. Standing on platform or steps****§ 1675(1). Delaware**

You are instructed that the platforms and steps of railway cars are for the purpose of providing safe and convenient means of ingress and egress to and from the cars; and if a passenger unnecessarily stands upon such platforms or steps in a dangerous position, while the car is in motion, and because of so doing is thrown off the car, such passenger is guilty of negligence and cannot recover.<sup>28</sup>

<sup>25</sup> Trumbull v. Erickson (C. C. A. Colo.) 97 F. 891, 38 C. C. A. 536.

<sup>26</sup> St. Louis, I. M. & S. R. R. Co. v. Evans, 137 S. W. 568, 99 Ark. 69.

<sup>27</sup> Chesapeake & O. Ry. Co. v. Jordan, 76 S. W. 145.

<sup>28</sup> File v. Wilmington City Ry. Co., 80 A. 623, 7 Pennewill, 463.

§ 1675(2). **Florida**

You are instructed that a passenger on a railroad train, after said train has stopped at a regular station, has a right to go upon the platform of the coach in which the said passenger may be and within the time allowed by the rules of the company for the stopping of said train at said station, providing the said passenger being on the said platform does not interfere with the proper management of said train and with persons alighting therefrom or getting thereon, and that it is not negligence per se so to do, and that the mere fact of the passenger being upon the platform under such circumstances does not constitute negligence on the part of the passenger.<sup>29</sup>

§ 1675(3). **South Carolina**

You are instructed that the fact of an injury resulting to a passenger while standing on the platform of a moving coach is not per se evidence of negligence in the passenger for taking such a position, but all the circumstances surrounding the case are to go to the jury, and they are to determine whether the railroad is liable in damages.<sup>30</sup>

§ 1675(4). **Texas**

You are instructed that if you believe from the evidence that the plaintiff was riding on the rear platform and on one of the steps of the coach, and you further believe from the evidence that the step was defective, and that by reason of the condition of the roadbed and track the coach swayed and rocked, and further believe from the evidence that plaintiff by virtue of the swaying and rocking of the coach and the defective step was thrown from the same and injured; yet if you further believe from the evidence that he knew the step was defective, and knew the coach was swaying and rocking from side to side, he would be held to have assumed the risks arising therefrom, and could not recover, unless he was so lacking in intelligence and discretion as not to be able to understand the danger incident to his position.<sup>31</sup>

You are instructed that, if you believe from the evidence that in going upon the platform and steps of defendant's train, at the time he did, in view of the speed the train was going at the time, as you find the same from the evidence, the plaintiff failed to exercise such care and prudence as a reasonably prudent man would have used under the same circumstances, you will find for the defendant, although you may further believe that the defendant, its agents, serv-

<sup>29</sup> Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.

<sup>30</sup> Doolittle v. Southern Ry. Co., 40 S. E. 133, 62 S. C. 130.

<sup>31</sup> Walling v. Trinity & Brazos Valley Ry. Co., 106 S. W. 417, 48 Tex. Civ. App. 35.

ants, and employes, were guilty of negligence in any or all of the matters charged in the petition.<sup>32</sup>

**§ 1675(5). Washington**

You are instructed that it is the duty and obligation of common carriers for hire to furnish passengers with seats for their accommodation, and, if you believe from the evidence in this case that the defendant received the deceased ——— as a passenger, the said deceased thereby became entitled to a seat; and, if he was prevented from obtaining a seat by reason of the car being overcrowded, you are instructed that it was not negligence for said deceased to stand or be upon the platform of said car, providing you believe that in standing upon said platform the said deceased was exercising ordinary care and prudence, and would have been safe from injury if said car had been run in a careful manner.<sup>33</sup>

**§ 1676. Getting on running board of street car**

You are instructed that it is the plaintiff's claim that this boy came to his death through the negligence of the defendant company, and not through any negligence of his own. If the plaintiff can substantiate that claim, she is entitled to recover a verdict at your hands. I charge you, in the first place, that it was not negligence for this dead boy to take a position upon the running board, if at the time he got upon the car there was sufficient room for him to get upon the board and maintain an upright position next to the car. The running board is something like 18½ inches, so that standing next to the stanchion there would be at least two feet between the stanchion of the open car and the nearest point of the ——— street car, a space ample for any man to stand in safety, if the cars were operated in an ordinarily careful and prudent manner. Therefore it would not be negligence for this boy to take position upon the running board; neither would it be negligence, on the part of this defendant company, to permit him to take a place upon the running board. People have ridden upon the inside and outside running boards of these cars for years. There is no question that the company permits passengers to ride there, and there is no question that passengers habitually, when the cars are otherwise crowded, take their position upon those boards rather than wait for another car. So I charge you there was no negligence either in the company permitting him to stand there nor in his taking the position, if at the time he took the position there was room for him to get his feet upon the platform and maintain an upright position, standing upon the steps; because if he had

<sup>32</sup> Ebert v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 49 S. W. 1105.

<sup>33</sup> Halverson v. Seattle Electric Co., 77 P. 1058, 35 Wash. 600.



that opportunity, and could have maintained that position, then it was a place, while dangerous, yet with the exercise of care upon his part, and due operation of the cars on the part of the defendant, would have been safe.<sup>84</sup>

**§ 1677. Care required from passenger taking position on inner foot-board of street car**

The jury are instructed that it was the duty of the plaintiff, in going upon the western or inner foot board of the car upon which he entered, to exercise such degree of care as the position he was in rendered reasonably necessary to prevent his being struck by passengers on the car or by the car passing on the other track; and if the jury believe from the evidence that the plaintiff, while upon such running or foot board, could, by standing upright thereon, and not leaning outwardly towards the cars on the other track, have avoided being struck by a passenger on or by the passing car, and that he failed to maintain such upright position and in consequence of such failure was struck and injured, then the plaintiff is not entitled to recover, and your verdict must be for the defendant.<sup>85</sup>

**§ 1678. Standing on platform in violation of rule of carrier**

**§ 1678(1). Massachusetts**

The jury are instructed that the sign attached to the hood of the car before and at the time of the accident, which read as follows: "Notice. All persons are forbidden to be on the front platform of this car, and this company will not be responsible for their safety. Per order of the directors"—sets up a reasonable rule, and that, if the plaintiff was intentionally violating the rule, he cannot recover, unless you find from the evidence that, notwithstanding the sign, the rule, if it ever was intended to be a rule, had been allowed by the defendant to become a dead letter, so that in effect the case was as if there never had been such a rule.<sup>86</sup>

**§ 1678(2). Nebraska**

The jury are instructed that, if you find that at and prior to the time in question there existed an express rule or regulation of the defendant that passengers should not stand upon the platform of the cars while the train was in motion, and that such rule or regulation was actually before that time brought to plaintiff's knowledge by means of notices posted upon the doors of defendant's cars, and if he went upon the platform of the moving train in vio-

<sup>84</sup> *Kallis v. Detroit United Ry.*, 119 N. W. 906, 155 Mich. 485.

<sup>85</sup> *Simonton v. St. Louis Transit Co.*, 106 S. W. 46, 207 Mo. 718.

<sup>86</sup> *Sweetland v. Lynn & B. R. Co.*, 59 N. E. 443, 177 Mass. 574, 51 L. R. A. 783.



lation of such rule, and attempted to step therefrom to the depot platform, and in so doing sustained the injuries sued for, he could not recover in this case; but if he was in the act of leaving the train at the time the train started, then the standing upon such platform would not be a violation of such rule, although the train may have been in motion.<sup>87</sup>

**§ 1679. Leaving safe place to go out on platform**

The jury are instructed that, if you find from the evidence in the cause that the plaintiff was a passenger on one of defendant's cars, and was occupying a seat inside, in a safe place; and you further find that said car was crowded with passengers, and all the seats were taken, and that the plaintiff arose and vacated his seat to accommodate some lady passengers who had entered the car, and that, on account of the crowded condition of said car, instead of standing therein he voluntarily left it and passed out to the platform, and remained standing on the outside, where the accident occurred,—then as to whether or not in so conducting himself he was guilty of negligence is a question of fact, which I submit to you. If his conduct in this respect, in doing what he did under the circumstances, was the conduct of an ordinarily prudent and cautious man, then he was not guilty of negligence. If, on the other hand, in going out upon the platform, under the circumstances, he did that which a prudent and cautious person would and ought not to do, then he would be guilty of negligence.<sup>88</sup>

**§ 1680. Going upon platform while train stopping at intermediate station**

The court instructs the jury that a passenger upon a railroad train, after said train has stopped at the regular station, has a right to go upon the platform of said coach in which said passenger may be, and within the time allowed by the rules of the company for the stopping of said train at said station, so that said passenger, being upon said platform, does not interfere with the proper management of said train, or with passengers alighting therefrom or getting thereon; and that it is not per se negligence so to do, and that the mere fact of a passenger being upon the platform of a coach under such circumstances does not constitute negligence upon the part of said passenger.<sup>89</sup>

**§ 1681. Resting arm on window sill**

The jury are instructed that if they believe from the evidence that the plaintiff's arm was resting on the sill of the window, the

<sup>87</sup> *Omaha, etc., R. Co. v. Chollette*, 49 N. W. 1114, 33 Neb. 143.

<sup>88</sup> *Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 21 Ind. App. 466.

<sup>89</sup> *Southern R. Co. v. Smith*, 28 S. E. 173, 95 Va. 187.

placing of his arm on the window-sill of the passenger-car window by the plaintiff was not necessarily contributory negligence on his part.<sup>40</sup>

**§ 1682. Leaning out from, or projecting part of body from, car**

**§ 1682(1). District of Columbia**

The jury are instructed that, if they shall find from the evidence that, at the time and place in question, the plaintiff was a passenger on the car of the defendant company, and was seated immediately adjacent to a window in said car, and that the opening of the said window was guarded by four iron bars, each of the diameter of about one-half an inch, which bars extended across the said openings above the sill of the said window, parallel to each other and at a distance of ——— inches from each other, the lowest one of which was at a distance of ——— inches from said sill, and the remaining three of which were distant successively ——— inches from each other, then the jury are instructed that the presence of the said bars in the said place was a warning to the plaintiff that it was dangerous for her to project any part of her body beyond the said bars; and if the jury shall find further from the evidence that the plaintiff at the time and place in question was seated immediately in front of one of the said windows, and rested her arm upon the topmost of said bars, and projected her hand to the extent of about ——— inches beyond the said top bar, and was thereupon injured by having her hand so projected strike against a trolley pole of the company situated at the distance of ——— inches from said top bar, and maintained there for the purpose of the operation of the said road, and if the jury shall further find from the evidence that an ordinarily prudent person in the then position of the plaintiff and under the surrounding circumstances would not have so projected her said hand, then their verdict should be for the defendant.<sup>41</sup>

The jury are instructed that, in determining whether plaintiff was negligent, you would have to take into consideration, not only what she knew from past experience as a traveler over this road with respect to the presence and proximity of poles, but you would have to take into consideration every other physical condition that was patent to her observation. In other words, you have to consider, not only what she actually knew, but what she ought to have known from what she saw with her eyes, and what she felt with her hands and arms. Therefore you have to consider what a reasonable person should have understood the significance of the

<sup>40</sup> Carrico v. West Virginia Cent. & P. Ry. Co., 14 S. E. 12, 35 W. Va. 389.

<sup>41</sup> Chapman v. Capital Traction Co., 37 App. D. C. 479.

bars at the window to be, whether or not a reasonable person should have understood the significance of those bars to be that there was danger of contact with obstructions outside of the bars, or whether a reasonable person would not have been called upon, by the presence of the bars, to believe that that was the significance which the company intended them to carry to the passengers who sat at the windows. The court cannot say as a matter of law that, although the plaintiff confessedly knew there were poles along the line of the right of way, there could be no justification which would warrant her for a moment in forgetting that the pole was likely to be there. That is a matter of fact that you will have to consider with all other facts which tend to the determination of the question whether, with what she knew and what she saw, the nature of the car and the window and the bars and the like, a person of reasonable prudence would have extended his hand from the window to the degree that she extended her hand. How far she extended her hand is another question of fact, which you will have to decide from the evidence. You have to examine and determine in detail just how far she put her hand out, and whether, under all the circumstances of her environment and actual knowledge at the moment, a person of reasonable prudence and caution, situated exactly as she was situated at that very place, knowing what she knew, seeing what she saw, and understanding the other physical conditions that were brought to her mind by her senses, would not have extended the hand as far as she extended hers, and thus come in contact with the pole. If you so find, then plaintiff was negligent in adopting that conduct that a person of reasonable prudence and caution would not have adopted under the circumstances.<sup>42</sup>

§ 1682(2). Iowa

You are instructed that, if plaintiff was sitting in an apparently dangerous position, next to an open space, without any barrier to protect him from falling or being thrown from the car, and, while so sitting, carelessly leaned outward to spit, and, by reason of such leaning outward, fell from the car, then such leaning was negligence on his part, and was the proximate cause of his injury, and defendant's agents and servants who were operating the car were not under any obligations to anticipate any such action on the part of plaintiff, or to ward or guard him against such act, or against the consequences that might result therefrom; and, under such circumstances, plaintiff would not be entitled to recover any sum

<sup>42</sup> Chapman v. Capital Traction Co., 37 App. D. C. 479.

whatever in this action, and your verdict should be for the defendant.<sup>43</sup>

§ 1682(3). Missouri

The jury are instructed that, although the plaintiff was injured by having his arm broken, yet if, at the time of said injury, plaintiff, by negligence or carelessness, had his arm out of the window of said car, and such negligence or carelessness contributed directly to the happening of such injury, the verdict should be for defendant.<sup>44</sup>

§ 1683. Passing from one car to another

§ 1683(1). Illinois

The jury are instructed that, if you believe from the evidence that the plaintiff, while on his passage from ——— to ——— was guilty of carelessness and unnecessarily exposing himself to danger by wrestling or scuffling on the cars, or by imprudently and unnecessarily passing from one car to another while the cars were in motion, and that such carelessness or imprudence contributed in any way to produce the injury complained of, then the plaintiff cannot recover.<sup>45</sup>

§ 1683(2). Virginia

The court instructs the jury that, although they may believe from the evidence in this cause that the said defendant company was guilty of negligence in the manner of constructing or maintaining its electric wire over and above the track of the ——— Railroad Company, still plaintiff had no right to attempt to pass from one car to another while the cars were passing under the said wire, if in so doing he increased the danger of an accident from the said wire; and if, from the evidence in the case, they believe that the said plaintiff did attempt to pass from one car to another while passing under said wire, and by so doing did increase the danger and chance of the accident, he cannot recover in this case, and the jury must find for the defendant.<sup>46</sup>

§ 1684. Attempt to go from one car to another to find a seat

The jury are told that if the plaintiff was unable to find a seat in the car which he first entered, and he was informed by the conductor that he might find a seat in the forward car, and, in attempting to pass to the next car, he exercised reasonable care and cau-

<sup>43</sup> Fitch v. Mason City & C. L. Traction Co., 100 N. W. 618, 124 Iowa, 665.

<sup>44</sup> Barton v. St. Louis, etc., R. Co., 52 Mo. 253, 14 Am. Rep. 418.

<sup>45</sup> Galena, etc., R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323.

<sup>46</sup> Danville Street Car Co. v. Watkins, 34 S. E. 884, 97 Va. 713.

tion, those circumstances do not constitute contributory negligence.<sup>47</sup>

**§ 1685. Going from one car to another to get drinking water**

You are instructed that, if you find from the evidence in this case that ——— was a passenger on defendant's train on the ——— day of ———, then his going to the place where water was kept, or to the watercloset, even while the train was going at a rapid rate of speed, was not of itself negligence, and, if there was no water in the coach in which he was riding, he would have the right to go from one coach to the other for the purpose of getting water, or to go from the white end of the combination car to the other end for the purpose of getting water, and he would not necessarily be guilty of negligence in doing so, but he would have a right to go there and to stand there while drinking his water, provided the standing was not so protracted or uncalled for that it became unnecessary or imprudent.<sup>48</sup>

**§ 1686. Care required from passengers on freight train**

You are instructed that, if you find from the evidence that the plaintiff was a passenger on a freight train, then he was bound to know that it was not operated like a passenger train, that it did switching, and that the jolts and jars were greater than on a passenger train; and if his failure to exercise care with reference to any of these things contributed to produce the injury of which he complains, this bars his recovery, and your verdict must be for the defendant.<sup>49</sup>

You are instructed that, if the jury should find from the evidence that plaintiff was a passenger on defendant's train, and that the station of ——— was announced, or that such train had arrived at such station, and that plaintiff, while the train was moving slowly, went out upon the platform of the car in which he was riding, to be in readiness to step off when such car fully stopped, and that, instead of stopping fully, such car moved violently and suddenly, and with greater violence than is ordinarily incident to the movement of a freight train, and that by reason of such sudden and violent movement plaintiff was thrown and injured, it is for the jury to say, under all the facts and circumstances of the case shown in evidence, whether the plaintiff was guilty of contributory negligence; and if you further believe that the plaintiff did under the circumstances what an ordinarily prudent man would have done,

<sup>47</sup> Chesapeake & O. Ry. Co. v. Clowes, 24 S. E. 833, 93 Va. 189.

<sup>48</sup> St. Louis, I. M. & S. R. Co. v. Evans, 137 S. W. 568, 99 Ark. 69.

<sup>49</sup> Abelson v. St. Louis, I. M. & S. Ry. Co., 105 S. W. 81, 84 Ark. 181.

then he was not guilty of contributory negligence, and is entitled to recover in this case.<sup>50</sup>

You are instructed that if you find, from the evidence, that the injury was caused or contributed to by the plaintiff's getting up before the train came to a stop, and after passengers had been warned to keep their seats, your verdict must be for the defendant.<sup>51</sup>

**§ 1687. Care required from passenger on mixed train**

You are instructed that in the operation of mixed trains jars of great, unusual, and unnecessary violence would be evidence of negligence on the part of the trainmen, and you are further instructed that, as a matter of law, it is not necessarily negligence for a passenger to be standing on a mixed train, but, on the other hand, one has a right to so stand, provided the standing is not so protracted or uncalled for that it becomes unnecessary or imprudent.<sup>52</sup>

**§ 1688. Care required from passenger on freight elevator**

I charge you gentlemen of the jury that if you believe from the evidence that the plaintiff leaned or rested his weight on the trucks, and that as a proximate result of his so doing he was injured, then your verdict must be for the defendant.<sup>53</sup>

The court charges the jury that, even though you believe from the evidence that the gating protecting the floors of the building from the elevator shaft should have entirely covered the shaft on each floor, and even though the jury may believe from the evidence that the trucks should not have been carried in the elevator at all, and even though the jury believe from the evidence that the trucks were placed in the elevator in such a position that they were caused to fall by the vibration of the elevator, or the manner in which it was running, yet if the jury are further reasonably satisfied from the evidence that the plaintiff negligently leaned against the trucks or his foot or body touched the trucks, or any other part of his body, and that this conduct on his part proximately contributed even in the slightest degree to cause the trucks to fall, you should find a verdict for the defendant.<sup>54</sup>

<sup>50</sup> *Abelson v. St. Louis, I. M. & S. Ry. Co.*, 105 S. W. 81, 84 Ark. 181.

<sup>51</sup> *Abelson v. St. Louis, I. M. & S. Ry. Co.*, 105 S. W. 81, 84 Ark. 181.

<sup>52</sup> *St. Louis, I. M. & S. Ry. Co. v. Hartung*, 128 S. W. 1025, 95 Ark. 220.

<sup>53</sup> *O'Rourke v. Woodward*, 77 So. 679, 201 Ala. 265.

<sup>54</sup> *O'Rourke v. Woodward*, 77 So. 679, 201 Ala. 265.



**§ 1689. Care required in movements preparatory to alighting****§ 1689(1). Alabama**

The jury are instructed that it is not negligence as a matter of law for a passenger on a street car to get up from her seat when a car is slowing down for the station, and go upon the platform preparatory to alighting therefrom, when it stops at the station.<sup>55</sup>

**§ 1689(2). Arkansas**

You are instructed that a passenger should inform himself of the carrier's regulations, and should occupy a seat inside the car, and if he negligently stands or gets up to get off while the train is moving, and this conduct on his part contributes to produce the injury of which he complains, he cannot recover, and your verdict should be for the defendant.<sup>56</sup>

You are instructed that it is well settled that one who is injured by the mere negligence of another cannot recover any compensation for the injury, if he by his own ordinary negligence contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him. Therefore, if you find from the evidence that the plaintiff negligently got up while the car was moving and undertook to get off, and that this act in any degree contributed to produce the injury of which he complains, he cannot recover, and your verdict must be for the defendant.<sup>57</sup>

**§ 1689(3). California**

You are instructed that it is for you to determine whether or not a passenger is guilty of negligence in going upon the platform of a car, or the steps thereof, preparatory to alighting therefrom when the car stops.<sup>58</sup>

**§ 1689(4). Colorado**

The jury are instructed that, on the other hand, the plaintiff, as a passenger on such car of the defendant, was bound to use ordinary care to guard against accident or injury. And by such ordinary care is meant that care which a person of common prudence takes of his own concern, or that degree of care which men of common prudence exercise about their own matters and their own personal safety. And in determining what would be ordinary care in a particular case, reference must be had to all the circumstances and surroundings of that case. And if, all the circumstances and surroundings considered, the plaintiff in this case used

<sup>55</sup> Birmingham Ry., Light & Power Co. v. Barrett, 60 So. 262, 179 Ala. 274.

<sup>56</sup> Abelson v. St. Louis, I. M. & S. Ry. Co., 105 S. W. 81, 84 Ark. 181.

<sup>57</sup> Abelson v. St. Louis, I. M. & S. Ry. Co., 105 S. W. 81, 84 Ark. 181.

<sup>58</sup> Froeming v. Stockton Electric R. Co., 153 P. 712, 171 Cal. 401, Ann. Cas. 1918B, 408.



such ordinary care in preparing to get off the defendant's car, and in alighting therefrom, then he is not guilty of contributory negligence in producing the injury complained of, and for which this suit is brought. And getting up from his seat and preparing to get off of the car before the car had fully come to a standstill, but while it was very slightly moving, was not contributory negligence on the part of the plaintiff, unless such getting up from his seat and otherwise preparing to get off the car and alighting therefrom was done in a careless or negligent manner, all the circumstances and surroundings considered; for, if such negligence—if there was any—on the part of the plaintiff was slight, or the remote cause of the injury, he may recover, notwithstanding such slight negligence or remote cause.<sup>59</sup>

**§ 1689(5). Delaware**

You are instructed that a passenger has a right to leave his seat and prepare to leave the car after he has given notice of his intention so to do, which right is coupled with his duty to act with prudence, and to use the means provided for his safe exit with reasonable circumspection and care; and if his negligent act contributes to bring about the injury complained of, he cannot recover. It is the duty of the passenger to exercise reasonable care in preparing to alight from a car. A passenger familiar with the railway at the place of the accident, and the operation of the cars there, is bound to avail himself of such knowledge.<sup>60</sup>

**§ 1690. Care required in alighting**

**§ 1690(1). California**

The court instructs the jury that, if they believe from the evidence that the car came to a stop, and that while it was standing still the plaintiff stepped down onto the step of the car with the intent of alighting therefrom, and that while on said step the car moved suddenly forward in consequence of the negligent act of the conductor or motorman, and she was thereby thrown off and injured, and if they further believe that the conduct of the plaintiff under the circumstances was that of an ordinarily prudent person, then she was not guilty of contributory negligence, and would be entitled to recover.<sup>61</sup>

**§ 1690(2). Delaware**

You are instructed that there is also a duty resting upon the passenger, who is in duty bound to act with reasonable care and prudence, and if the negligent act of the passenger contributes to

<sup>59</sup> *Denver Tramway Co. v. Reid*, 35 P. 269, 4 Colo. App. 53.

<sup>60</sup> *Freeman v. Wilmington & Phila-*

*delphia Traction Co.*, 80 A. 1001, 3 Boyce, 107.

<sup>61</sup> *Joyce v. Los Angeles Ry. Co.*, 82 P. 204, 147 Cal. 274.

bring about and is the proximate cause of the injury complained of no recovery can be had. It is the duty of the passenger to use all reasonable care in alighting from a car.<sup>62</sup>

You are instructed that, on the other hand, there is a duty resting upon the passenger to act with prudence, and to use the means provided for his safe transportation with reasonable circumspection and care, and, if his negligent act contributes to bring about the injury complained of, he cannot recover. It is the duty of the passenger to exercise reasonable care in alighting from a car. A passenger familiar with the railway at the place of the accident, and the operation of the cars there, is bound to avail himself of such knowledge.<sup>63</sup>

§ 1690(3). Iowa

You are instructed that, if the jury find that the plaintiff's injuries were due to the act of the plaintiff in attempting to alight from said car while in motion, or to the fact that she attempted to alight therefrom in an improper way or manner, the defendant would not be liable herein; and if the injuries suffered by the plaintiff was the result of the negligence of the defendant operating with that of the plaintiff, the two being the proximate cause of the plaintiff's injuries, the plaintiff cannot recover herein.<sup>64</sup>

§ 1690(4). Kentucky

You are instructed that it was incumbent upon the decedent to exercise such care for his own safety as might be reasonably expected of a person of ordinary prudence situated as he was, and if you believe from the evidence that he failed to do this, and but for such want of care on his part he would not have been injured, you should find for the defendant.<sup>65</sup>

§ 1690(5). Missouri

The court instructs the jury that, by the ordinance read in evidence, when street cars are required to stop at the intersection of streets to allow passengers to alight, the cars are required to run past the further side of the street, and stop so as to leave the rear platform of said car slightly over the further crossing, and that plaintiff was chargeable with notice of said ordinance. And if it appear from the evidence that, owing to the great number of vehicles, street cars, and passengers habitually crossing ——— and ——— streets in different directions, said street crossing was

<sup>62</sup> *Girardo v. Wilmington, etc., Co.*, 90 A. 476, 5 Boyce, 25.

<sup>63</sup> *Benson v. Wilmington City Ry. Co.*, 75 A. 793, 1 Boyce, 202.

<sup>64</sup> *Lang v. Marshalltown Light,*

*Power & Ry. Co.*, 147 N. W. 917, 166 Iowa, 548.

<sup>65</sup> *Illinois Cent. R. Co. v. Dallas' Adm'x*, 150 S. W. 536, 150 Ky. 442.

a dangerous one, so that, for the safety of persons using said ——— and ——— streets, and the street cars and other vehicles traversing the same, it was reasonably necessary that flagmen should be kept stationed at said crossing to notify the gripmen when to move the cars forward, instead of the conductor's signal, in crossing said ——— street, and that flagmen were so kept, and that the car was moved across said ——— street on the signal of said flagman, then plaintiff had no right to assume that said car had stopped, and would remain standing near the south side of said ——— street, for the purpose of permitting her to alight, but she was chargeable with knowledge of the said danger, and manner of controlling the movement of said cars. And if you believe from the evidence that plaintiff, negligently, under all the instructions, attempted to alight from said car before it had crossed said ——— street to the north side thereof, your verdict must be for the defendant. And plaintiff was guilty of negligence if she attempted to alight from said car at a time and under circumstances when a person of ordinary prudence would not have done so.<sup>66</sup>

§ 1690(6). Texas

The court instructs the jury that, if you find that said train did not stop long enough at ——— to enable plaintiff's wife, in her condition and circumstances, to get off in safety, and if, when she was trying to get off the train started, and if while it was moving she undertook to get off and was injured, and if in so trying to get off a moving train she was herself guilty of want of ordinary care as defined to you hereinafter, then you will find for the defendant.<sup>67</sup>

The court instructs the jury that it was the duty of plaintiff's wife to exercise ordinary care for her own safety. "Ordinary care" means such care as an ordinarily prudent and careful person similarly situated and circumstanced as plaintiff's wife was would have exercised, and a failure to exercise such care would be "negligence" on her part.<sup>68</sup>

The court instructs the jury that, if you find from the evidence that plaintiff's wife in attempting to get off said train failed to exercise "ordinary care" for her own safety and thereby contributed to her fall, or if she was guilty of negligence (that is, if she failed to exercise ordinary care) while attempting to get off said train while it was in motion, if she did so under circumstances surrounding her and if she thereby caused or contributed to her fall,

<sup>66</sup> Jackson v. Grand Ave. Ry. Co., 24 S. W. 192, 118 Mo. 199.

<sup>67</sup> St. Louis Southwestern Ry. Co. of Texas v. Addis (Civ. App.) 142 S. W. 955.

<sup>68</sup> St. Louis Southwestern Ry. Co. of Texas v. Addis (Civ. App.), 142 S. W. 955.

then you will find for the defendant, even though you should find that the defendant was guilty of any or all the negligence charged against it.<sup>69</sup>

Gentlemen of the jury, you are instructed that if from the evidence you believe that the plaintiff, in disembarking or alighting from the train while the train was in motion, stepped straight out from the car step, and that the manner of his leaving the train caused him to fall or caused his injury, then as he recognized that the train was moving when he undertook to leave it, he assumed the risk or chance of such injury as resulted to him, and the defendant would not be liable therefor, though you may believe that an ordinarily prudent and careful person would under the same circumstances have attempted to have alighted from the train in the same manner that he did, and under such circumstances, if you find they exist, your verdict should be for the defendant. In this connection you are instructed that plaintiff did not assume the risk from stepping from the steps of the car in the manner shown by the evidence, unless the jury believe from the evidence that he understood and it appeared to him that such manner of stepping from the train put him in danger of injury.<sup>70</sup>

You are further instructed that if you believe from the evidence that the defendant used ordinary care, as above explained, in stopping its said train to allow plaintiff sufficient time, by the use of ordinary diligence, to leave said train in safety, and that plaintiff failed to use such diligence to leave said train as a man of ordinary prudence would have used under like circumstances, and that the want of such care, if any, on his part, was the immediate, proximate cause of his injury, then you will find for the defendant.<sup>71</sup>

**§ 1691. Getting off while incumbered with grips or parcels**

You are instructed that, if you find from the evidence that as plaintiff attempted to alight from said train he carried a grip and valise on his back and in his hand, and if you further find that an ordinarily prudent person, situated and circumstanced as plaintiff was would not have attempted to alight from said train incumbered with said grip and valise, and if you further find that in attempting to so alight, if he did, he failed to exercise that degree of care that an ordinarily prudent person would have exercised under the same or similar circumstances and that such failure, if any, caused or contributed to his injury, or if you find that as plaintiff was coming down the steps he stumbled and started to fall, and

<sup>69</sup> St. Louis Southwestern Ry. Co. of Texas v. Addis (Civ. App.) 142 S. W. 955.

<sup>70</sup> St. Louis Southwestern Ry. Co.

of Texas v. Bryant, 103 S. W. 237, 46 Tex. Civ. App. 601.

<sup>71</sup> Missouri, K. & T. Ry. Co. of Texas v. McElree, 41 S. W. 843, 16 Tex. Civ. App. 182.

he was caught by the defendant's servant, and was prevented from falling, then in either event you will find for the defendant.<sup>72</sup>

**§ 1692. Leaving train or car while in motion**

**§ 1692(1). Alabama**

The court instructs the jury that, even though you may believe from the evidence in this case that ——— undertook to alight from the train while it was in motion, such conduct would not constitute contributory negligence, unless you are reasonably satisfied from the evidence that the risk taken by ——— in so attempting to alight was such risk as a man of ordinary care and prudence would not have undertaken under the circumstances.<sup>73</sup>

The court charges the jury that if you believe from the evidence that plaintiff's intestate, ———, voluntarily stepped off the car while it was in motion, and against the earnest protest of the defendant's servant who was the flagman of said train, and was acting within the scope of his employment, and who offered to have the train stopped to let him get off, and notwithstanding this he stepped off of said car, he then assumed all the risk of alighting safely, and plaintiff cannot recover.<sup>74</sup>

You are instructed that if you believe, from all the evidence, that the plaintiff attempted to get off of the car while it was in motion, and that at the time she did attempt to get off a reasonably prudent person situated as she was would not have attempted to get off, then the plaintiff was guilty of contributory negligence.<sup>75</sup>

**§ 1692(2). Arkansas**

The court instructs the jury that, if you believe plaintiff jumped from the moving train because defendant's train operatives threatened to have him arrested when he got to ———, and further believed that the train was, at the time he jumped off, going too fast for an ordinarily prudent person to alight therefrom in safety, your verdict should be for the defendant.<sup>76</sup>

**§ 1692(3). California**

The court instructs the jury that, to entitle the plaintiff to recover in this action, it must appear from the evidence that the injuries sustained by the plaintiff were occasioned by the carelessness or negligence on the part of defendant or its servants or employés as charged in the complaint, and were not the result of the plaintiff's own fault; and if you believe from the evidence that

<sup>72</sup> St. Louis Southwestern Ry. Co. of Texas v. Johnson (Tex. Civ. App.) 94 S. W. 162.

<sup>73</sup> Louisville & N. R. Co. v. Dilburn, 59 So. 438, 178 Ala. 600.

<sup>74</sup> Louisville & N. R. Co. v. Dilburn, 59 So. 438, 178 Ala. 600.

<sup>75</sup> Sweet v. Birmingham Ry. & Electric Co., 39 So. 767, 145 Ala. 667.

<sup>76</sup> St. Louis, I. M. & S. Ry. Co. v. Duffey, 183 S. W. 748, 122 Ark. 429.

the plaintiff was injured in consequence of her voluntary alighting from the car of defendant, at the time of the accident, when it was in motion, then your verdict should be for defendant.<sup>77</sup>

§ 1692(4). **Colorado**

The court instructs you that it was the duty of the plaintiff, in seeking to alight from the cars of the defendant company, to wait until such cars came to a full stop, or were moving so slowly that, under all the circumstances, including the time of night and her sex and condition, it was safe for her to step off; and if she sought to alight from the car before such time, although unless she did so she might be carried by the point where she desired to get off, she was negligent, and cannot recover in this case.<sup>78</sup>

§ 1692(5). **Delaware**

You are instructed that, if you find it is proved in this case that the defendant company had knowledge of the plaintiff's feeble condition the care required to be exercised was such as such condition reasonably required. But, if the defendant had no such knowledge, it was not required to use greater care because of her condition. But in no event was the plaintiff released of exercising care in getting off the train. She was required to use her senses and avoid all danger so far as she could in the exercise of proper care. She had no right to attempt to get off the train when it was in rapid motion, even though she was directed to do so.<sup>79</sup>

You are instructed that the defendant company pleads that it is not guilty of the negligence as charged, and contends that the car upon which plaintiff was riding on its regular trip northward on ——— street, stopped at the southerly side of ——— street for the taking on and discharge of passengers, this point being a regular stopping place; that the car then proceeded around the curve into ——— street, at a very moderate rate of speed, and that while the car was still in motion, the plaintiff stepped without notice to the conductor from the running board of the car and in so doing fell to the ground. If these facts as contended for by the defendant have been proven to your satisfaction by the preponderance of the evidence, your verdict should be for defendant.<sup>80</sup>

§ 1692(6). **Indiana**

The jury are instructed that the fact that the plaintiff undertook to alight from the car at a time when the car was still in motion

<sup>77</sup> *Joyce v. Los Angeles Ry. Co.*, 82 P. 204, 147 Cal. 274.

<sup>78</sup> *Denver Tramway Co. v. Owens*, 36 P. 848, 20 Colo. 107.

<sup>79</sup> *Clayton v. Philadelphia, B. & W.*

*R. Co. (Super.)* 106 A. 577, 7 Boyce, 343.

<sup>80</sup> *Girardo v. Wilmington & Philadelphia Traction Co.*, 90 A. 476, 5 Boyce, 25.



does not necessarily make her guilty of contributory negligence. As to whether she could alight from the car at the time she undertook to do so with safety, is a question of fact for you, gentlemen, to determine from all the facts and circumstances in the case. If you find from the evidence, that, at the time she undertook to alight from the car, she could have done so with safety, by the exercise of due diligence, and care, then she would not be guilty of contributory negligence, even though you find that the car had not come to a full stop but was still moving.<sup>81</sup>

§ 1692(7). **Kentucky**

The court further instructs you that if you believe from the evidence in this case that, at the time and place complained of by plaintiff, she left her seat in defendant's car and attempted to get off of said car while same was in motion, and which she knew to be in motion at the time, and at a place where she knew it did not stop to discharge passengers, and this without any notice or warning to defendant's conductor in charge of said car, then the law is for the defendant, and you will so find.<sup>82</sup>

You are instructed that the calling of the station by the brakeman and the opening of the door of the car was an invitation to the passengers to get ready to alight, but was an invitation to alight only after the train had stopped, and if you believe from the evidence that the decedent was not knocked or thrown from the car by a negligent and unnecessary jerk of the train, as set out in No. ———, but voluntarily attempted to get off the train before it stopped, and was thus injured, or if he was not a passenger on the car, as set out in No. ———, you should find for the defendant.<sup>83</sup>

§ 1692(8). **Michigan**

You are instructed that, while it was the duty of defendant to stop its car to afford the plaintiff an opportunity to alight, yet the failure to do so would not give the plaintiff the right to jump from the moving car.<sup>84</sup>

§ 1692(9). **Missouri**

You are instructed that, if you believe and find from the evidence that plaintiff went down by the conductor and brushed by said conductor, and if you further believe and find from the evidence the plaintiff stepped down on the step of said street car while the same was in motion, and stepped down on the street sideways facing the east, and if you further believe and find from the evi-

<sup>81</sup> *Wabash River Traction Co. v. Baker*, 78 N. E. 196, 167 Ind. 262.

<sup>82</sup> *Paducah Traction Co. v. Tolar*, 171 S. W. 1009, 162 Ky. 50.

<sup>83</sup> *Illinois Cent. R. Co. v. Dallas*, Adm'x, 150 S. W. 536, 150 Ky. 442.

<sup>84</sup> *McDonald v. City Electric Ry. Co.*, 100 N. W. 592, 137 Mich. 392.



dence that defendant's conductor tried to keep plaintiff from alighting from said street car while the same was in motion, and plaintiff paid no heed to said conductor's warning, your verdict must be for the defendant.<sup>85</sup>

You are instructed that, if the jury find from the evidence that defendant's car stopped to let off passengers in front of ———'s store or place of business on ——— avenue, and then started forward, and that after said car had so started forward and was moving away from said point, plaintiff's wife attempted to alight from said car while it was so moving away, and was thereby thrown and injured, then plaintiff cannot recover in this action, and your verdict will be for the defendant.<sup>87</sup>

The court instructs the jury that if the plaintiff alighted from said car while the same was in motion, and going at such rate of speed that a person of ordinary care and prudence would not have alighted, under the circumstances, then she was guilty of contributory negligence and cannot recover in this cause, whether the defendant was negligent or not; and, if you find from the evidence that she did so alight, then your verdict will be for the defendant.<sup>88</sup>

§ 1692(10). Montana

You are instructed that if from the evidence you believe that the conductor or person in charge of the car on which plaintiff was riding as a passenger, if you find he was so riding, was informed by plaintiff that he desired to alight at the corner of ——— and ——— streets, and that the said conductor or person in charge of said car assented to such request, and if you further believe that said car did as a matter of fact stop at the said corner of ——— and ——— streets, then you are instructed that the plaintiff had the right to assume that the defendant company through its conductor or other person in charge of said car and controlling its movements would give plaintiff a reasonable opportunity to alight from said car without injury to himself. And you are further instructed that if said car did so stop at the said corner of ——— and ——— streets, and that the plaintiff, exercising the care and prudence that a reasonably careful man under like circumstances would have used, did attempt to alight from said car, and while engaged in such attempt to alight therefrom the said defendant company through its agents in charge of said car did not give him a reasonable opportunity to get off of said car, then you are instructed that, even though the said car started while plaintiff was so engaged in attempting to

<sup>85</sup> *Tanchof v. Metropolitan St. Ry. Co.* (App.) 177 S. W. 813.

<sup>87</sup> *Shareman v. St. Louis Transit Co.*, 78 S. W. 846, 103 Mo. App. 515.

<sup>88</sup> *Jackson v. Grand Ave. Ry. Co.*, 24 S. W. 192, 118 Mo. 199.

get off of said car, nevertheless, said conduct on the part of the plaintiff did not necessarily render plaintiff guilty of contributory negligence, unless you believe from all of the evidence that a reasonably prudent man in attempting to get off of said car would not have conducted himself as the plaintiff did at the time and under the circumstances when he was attempting to alight from the street car in question. In determining whether plaintiff was guilty of negligence on his part which directly contributed to his injury, you are instructed that you are to take into consideration all of the facts in this case, and from them determine whether plaintiff, under the circumstances, conducted himself as a reasonably prudent man would have done under like circumstances; and, if from the evidence you believe that a reasonably prudent man under like circumstances would have acted in the same manner as plaintiff acted, then you are instructed that plaintiff was not guilty of contributory negligence.<sup>89</sup>

§ 1692(11). **Nebraska**

You are instructed that if, from the evidence in this case, you find that the defendant's train did not stop at the station at ——— long enough to enable the plaintiff to leave the car in which she was riding, and reach the platform, while the train was standing, and before it was again started, and that she was thrown or precipitated therefrom, or that she stepped off therefrom onto the depot platform, after the train was started and was in motion, it is for you to say, upon consideration of all the evidence upon that question, whether she was guilty of "criminal negligence," as elsewhere defined in these instructions.<sup>90</sup>

§ 1692(12). **New York**

You are instructed that, if the jury believe that, while the car was being slowed up, in order to stop in response to the plaintiff's request, the plaintiff, without waiting for the car to be stopped, stepped off the car while in motion, and thereby sustained his alleged injury, then the plaintiff was guilty of contributory negligence, and the defendant is entitled to a verdict on that ground.<sup>91</sup>

§ 1692(13). **Oklahoma**

You are instructed that, if you believe that the conductor of said car tried to keep plaintiff from alighting, and plaintiff carelessly and recklessly and without any cause or occasion therefor, voluntarily stepped off the said car, while moving, without any regard for her own safety, and that the injuries of plaintiff were caused by

<sup>89</sup> *Lehane v. Butte Electric Ry. Co.*, 97 P. 1038, 37 Mont. 564.

<sup>90</sup> *Omaha & R. V. R. Co. v. Chollette*, 49 N. W. 1114, 33 Neb. 143.

<sup>91</sup> *Saffer v. Dry Dock, E. B. & B. R. Co.*, 5 N. Y. Supp. 700, 53 Hun. 629.

her own negligence contributing thereto, and without which they would not have been caused, then your verdict should be for defendant.<sup>92</sup>

§ 1692(14). Texas

The jury are instructed, in connection with the issue of whether the plaintiff, at and just before the time he was injured, was guilty of contributory negligence, that if you find and believe from a preponderance of the evidence that, after the plaintiff entered the coach of defendant company, and after the train had started, the plaintiff went to the rear end of the smoker, and attempted to alight therefrom while said train was in motion, and walked down said steps for the purpose of getting off of said train, knowing at the time the speed of said train, and you further find and believe from the evidence that when he reached the bottom step of the coach he immediately stepped off on the ground in the way and manner that you find from the evidence that he did step off, if you find that he did step off of said train, and you further find and believe that a man of ordinary prudence would not have attempted to get off of the train while it was in motion, and at the speed it was running, and in the way and manner that the plaintiff attempted to get off of said train, then you are instructed that the plaintiff would, in law, be guilty of contributory negligence, and you should answer this question, "Yes."<sup>93</sup>

The court instructs the jury that, although you may believe from the evidence that plaintiff's wife jumped or stepped from the train in question after it was in motion, whereby she received the injury complained of, yet if you further believe from the evidence that she had used ordinary care and reasonable dispatch under the circumstances to alight from said train before it started, and that while the plaintiff's wife was descending the steps of said train the same was suddenly, carelessly, and without warning to her set in motion by defendant, and that the starting of the train under the circumstances was negligence, and that the plaintiff's wife was thereby placed in a perilous position, then it is for you to determine from the evidence whether the plaintiff's wife acted in jumping or stepping from the train as a reasonably prudent person would have done under like circumstances; and if you believe from the evidence that under the surrounding circumstances the plaintiff's wife was not guilty of negligence in so doing, but acted as a reasonably prudent person would have done under like circumstances, then the fact of her so stepping or jumping from said train while

<sup>92</sup> Oklahoma Ry. Co. v. Christenson, 148 P. 94, 47 Okl. 132.

<sup>93</sup> Houston, E. & W. T. Ry. Co. v. Lynch (Civ. App.) 208 S. W. 714.

the same was in motion will not prevent the plaintiff from recovering in this case.<sup>94</sup>

The jury are instructed that, in passing on the question whether or not plaintiff was himself guilty of contributory negligence in getting off the train, which helped to bring about the accident whereby he was injured, if he was injured, you will consider the speed of the train, the nature and character of the ground where he got off, the hour of the day or night, distance from the step to the ground, age and physical condition of the plaintiff at the time, his experience or want of experience in getting off trains in motion, the manner in which he got off of the train, and all his surroundings at the time and all the circumstances and facts in evidence in the case, and say from it all whether or not a person of ordinary care and prudence would have attempted to get off the train under the same circumstances and in the same way he did. If you find he would, then the plaintiff would not be guilty of contributory negligence in doing so; and if you find that a person of ordinary prudence and care would not have attempted to get off of the train, in the way the plaintiff did, under the same circumstances, then the plaintiff would be guilty of contributory negligence, which would defeat his right to recover, and you will find for the defendant.<sup>95</sup>

You are instructed that if you should find and believe from the evidence herein that at the time and place of the accident complained of plaintiff attempted to alight from one of defendant's cars while the same was in motion, and that a person of ordinary care would not have so acted under the same or similar circumstances, it would be your duty to return your verdict for the defendant, and in the event you so find and believe you will return your verdict for the defendant.<sup>96</sup>

You are further instructed that if you believe from the evidence that, at the time plaintiff attempted to leave said train, it was running at such speed as rendered it unsafe for plaintiff to attempt to leave the train, and that plaintiff did, while the train was so moving, negligently attempt to leave said train, and that his effort so to do was the immediate, proximate cause of plaintiff's being injured, then you are instructed that he cannot recover in this case, and you should find for the defendant.<sup>97</sup>

The jury are instructed that if they believe, from the evidence,

<sup>94</sup> St. Louis Southwestern Ry. Co. of Texas v. Addis (Civ. App.) 142 S. W. 955.

<sup>95</sup> St. Louis Southwestern Ry. Co. v. Cunningham, 106 S. W. 407, 48 Tex. Civ. App. 1.

<sup>96</sup> Dallas Consolidated Electric St. Ry. Co. v. Lasch (Civ. App.) 99 S. W. 729.

<sup>97</sup> Missouri, K. & T. Ry. Co. of Texas v. McElree, 41 S. W. 843, 16 Tex. Civ. App. 182.

that the plaintiff attempted to get off the train at ——— station while the train was moving, with or without a suggestion from defendant's employes for passengers to then alight at ——— station, the jury will determine, from all the evidence as to the circumstances and conditions existing at the time, whether so alighting was an act which very cautious and prudent persons would or would not usually attempt under such or similar circumstances; the suggestion of defendant's employes, if any, for her to alight, not alone justifying her in alighting, but being a circumstance to be considered, with all the other evidence, to determine whether she was in the exercise of such care as above stated in attempting to alight from the train when she did. If, upon the whole evidence, you find that plaintiff, in attempting to alight from the train when and in the manner that she attempted to alight, did not observe that degree of care which very prudent and cautious persons usually exercise under the same or similar circumstances to those then existing, and that such want of care, either in the particulars alleged by defendant, or in any other particulars, as plaintiff pleads that the injury occurred without negligence on the part of plaintiff, was the proximate cause of or contributed directly to, the injury, if any, that she received, you will return a verdict for the defendant.<sup>98</sup>

**§ 1692(15). Wisconsin**

The jury are instructed that, if you believe from the evidence that the train of cars upon which the plaintiff had taken passage had stopped a sufficient time for the plaintiff to have left them upon the platform where passengers leaving the defendant's cars usually land, and had again started on their course, and had passed the platform provided by the defendant for passengers to get out of the cars upon, and that the plaintiff then left the platform of the car rather than be carried by, he was guilty of carelessness, and cannot recover in this action.\*

**§ 1693. Same—Passenger incumbered with bundles**

You are instructed that a passenger, when he desires to alight, must exercise reasonable care and precaution for his own safety. In this case, if the plaintiff attempted to alight while the car was in motion, that was not necessarily negligence on her part; and that is a circumstance which you should take into consideration, in connection with the rest of the evidence in the case, in determining whether or not she was in the exercise of due care. There is evidence here that the car was moving slowly at the time she attempt-

<sup>98</sup> *Houston & T. C. R. Co. v. Dotson*,  
38 S. W. 642, 15 Tex. Civ. App. 73.

\* *Davis v. Chicago & N. W. R. Co.*,  
18 Wis. 175.

ed to alight. The defendant has called witnesses who say that at the time the car was moving slowly, perhaps a mile and a half or two miles an hour, or at any rate very slowly, according to the testimony of the defendant. According to those circumstances, it would not be negligence to attempt to alight, even though the car was in motion at that time. Whether or not she was guilty of negligence, if she attempted to alight while the car was in motion is for you to determine, in consideration of all the circumstances in the case. They say she had bundles in her arms, incumbered with them, and that she passed through in front of other passengers sitting on the seat with her, and that she attempted to alight from the running board while the car was in motion, and was thrown. If you should find that she attempted to leave the car while it was in motion, then determine for yourselves whether it was reasonable for her, under all the circumstances, to attempt to leave the car under those circumstances. If you find she attempted to leave that car while it was in motion, and in doing so it was negligence for her to do so, and that negligence contributed to the accident, then your verdict should be for the defendant, because she cannot recover if her own negligence contributed to this accident.<sup>99</sup>

**§ 1694. Getting off car at unusual or improper place**

**§ 1694(1). Alabama**

The court instructs the jury that, if the evidence shall reasonably satisfy the jury that the defendant carried ——— beyond the point where it had been requested to stop the car for her to alight, and stopped the car for her to leave it at an unusual and improper place, where she left it and was hurt in doing so, and that in getting off at that place she did no more than an ordinarily careful prudent person would have done under like circumstances, then she was not guilty of contributory negligence.<sup>1</sup>

**§ 1694(2). Illinois**

The jury are instructed, as a matter of law, that if you believe from the evidence that the plaintiff got off defendant's car at an improper place or in an improper manner, and if you further believe that such action on the part of the plaintiff was a want of ordinary care, which contributed to the injuries complained of, then your verdict must be for the defendant.<sup>2</sup>

<sup>99</sup> Brown v. Rhode Island Co. (R. I.) 102 A. 985.

<sup>1</sup> Mobile Light & R. Co. v. Walsh, 40 So. 560, 146 Ala. 295.

<sup>2</sup> North Chicago St. R. Co. v. Eldridge, 38 N. E. 246, 151 Ill. 542.



**§ 1694(3). Missouri**

The jury are instructed that, although the jury may believe from the evidence that the plaintiff informed the conductor that she wanted to get off at ——— street, and although the car stopped before reaching ——— street, yet if the jury believe that such stop was not made for passengers to alight, but for the gripman to await the signal from the watchman to cross ——— street, and if the plaintiff was told not to get off at that place, but she did get off, and in so doing was thrown down and injured, then she cannot recover in this action, and your verdict will be for the defendant.<sup>3</sup>

**§ 1695. Leaving train on opposite side from station**

The court instructs the jury that if the defendant had prepared, on the side of the track opposite that on which the plaintiff attempted to leave the train, a platform for the use of passengers in leaving the train, and the plaintiff knew, or by the exercise of reasonable diligence could have known, of said platform, and plaintiff voluntarily attempted to leave the train where there was no platform, and thereby increased the danger of injury to himself in leaving the train, and if the jury believe from the evidence that, if the plaintiff attempted to get off the train on the side where the platform was, he would not have been injured, then they should find for the defendant.<sup>4</sup>

**§ 1696. Duty of passenger to observe method of operating car**

The court instructs the jury that if they believe from the evidence that it was reasonably prudent, for the safety of the traveling public, that the defendant should stop or slow down its cars before reaching ——— street, and await the signal of the watchman, then it became the duty of the defendant to make such stop or slow down, and passengers riding on defendant's cars must take the responsibility of informing themselves of the methods so to be observed in operating defendant's road at that point; and plaintiff had no right to undertake to alight at that point, and, if she did so, it was at her own risk, and she cannot recover, unless the jury shall further find from the evidence that the car had come to a full stop, and that said car was started up again while plaintiff was alighting therefrom, with actual knowledge of the conductor that she was so alighting at the time.<sup>5</sup>

<sup>3</sup> Jackson v. Grand Ave. Ry. Co., 24 S. W. 192, 118 Mo. 199.

<sup>4</sup> Louisville & N. R. Co. v. Payne (Ky.) 104 S. W. 752.

<sup>5</sup> Jackson v. Grand Ave. Ry. Co., 24 S. W. 192, 118 Mo. 199.



**§ 1697. Acts in obedience to direction of trainmen**

You are instructed that, where a passenger acts in conformity to a permission or direction given by a conductor or other agent of the carrier, acting within the scope of his employment, and such conduct on his part will not expose him to a known or apparent danger which a prudent man would not incur, he will not be guilty of contributory negligence, although his conduct may result in bringing injury on him. Misdirections by persons in charge of a train as to the proper place for passengers to get off will render the carrier liable to one who, acting in reasonable reliance on the directions given is injured.<sup>6</sup>

**§ 1698. Boarding, or alighting from, moving car at direction of trainman****§ 1698(1). Delaware**

You are instructed that an illustration of this principle is furnished by cases with reference to injuries received by a passenger who attempts to get on board of, or alight from, a train while moving. Such an act is generally regarded as contrary to reasonable prudence, but, if it is done in response to the invitation or direction of the person in charge of the train, the passenger may thereby be exonerated from fault. But this is not true if the act is manifestly, to the judgment of a reasonable person, imprudent, or contrary to the authority of the employee who gives the direction. The mere advice or counsel of those in charge of the train as to getting on or off while the train is in motion will not be enough to excuse the passenger in doing a negligent or wrongful act.<sup>7</sup>

You are instructed that if the trainman announced, "All out for \_\_\_\_\_!" and followed that by saying to the plaintiff, "Get off!" it is for the jury to say whether the plaintiff was warranted in believing that she was ordered to get off before reaching the station, taking into consideration the condition of the plaintiff.<sup>8</sup>

**§ 1698(2). Iowa**

You are instructed that, if the plaintiff undertook to board the train in question while it was in motion, and by reason thereof got injured, then she is guilty of contributory negligence, and cannot recover in this case, unless she was directed by some employé of the defendant in charge of the train, and her obedience to such instruction would not lead her into apparent danger, such as an ordinarily prudent person would not assume.<sup>9</sup>

<sup>6</sup> Clayton v. Philadelphia, B. & W. R. Co. (Del. Super.) 106 A. 577, 7 Boyce, 343.

<sup>7</sup> Clayton v. Philadelphia, B. & W. R. Co (Super.) 106 A. 577, 7 Boyce, 343.

<sup>8</sup> Clayton v. Philadelphia, B. & W. R. Co. (Super.) 106 A. 577, 7 Boyce, 343.

<sup>9</sup> Pence v. Wabash R. Co., 90 N. W. 59, 116 Iowa, 279.

You are instructed that if the plaintiff, having stepped upon the first step of one of the cars of train in question, and before getting into the car, attempted to get off the same, whether the train was in motion or not, and fell while attempting to get off, or just after getting off, and received the injuries complained of from such fall, then the defendant is not liable for such injuries, unless she was directed to get off by an employé of the defendant in charge of the operation of said train, and obedience to such direction would not lead her into any apparent danger, such as the ordinarily prudent person would not assume.<sup>10</sup>

**§ 1699. Taking unsafe position at direction of trainman**

The jury are instructed that it is the duty of the passenger on the car to follow the reasonable instructions and directions of those in charge of the car, in regard to moving from one point of the car to another, unless it is apparent to the passenger, in exercising ordinary care, that the movement would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with its operations, and that they have a reasonable knowledge of what is safe and prudent for the passenger, in giving such instructions or directions. Therefore if in this case one of the servants of the defendant—the conductor in charge of the car—directed the plaintiff to stand on the platform, where he was standing when the accident occurred, it was the duty of the plaintiff to do so, unless it was known and apparent to him at the time that it would be unsafe for him, in the exercise of ordinary care and prudence, to leave the car and stand upon the platform; and if, while standing upon the platform, you find he was injured without any fault of his, but while standing there at the direction of the servant of the company, then, under these circumstances, even though you should find that his position was an unsafe one, yet this would not defeat plaintiff's right to recover, provided the danger was not apparent to him when he obeyed the instructions given, and took his position on the platform.<sup>11</sup>

The jury are instructed that it is the duty of a passenger on a car to follow the reasonable instructions of those in charge of the car in regard to moving from one part of the car to another, unless it is apparent to the passenger that the movement would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with the operations of the car, and that they have a reasonable knowledge of what is safe and prudent for the passengers, in giving such instructions. Therefore, if you find from the evidence that one of the servants of

<sup>10</sup> *Pence v. Wabash R. Co.*, 90 N. W. 59, 116 Iowa, 279.

<sup>11</sup> *Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 21 Ind. App. 466.

the defendant directed the plaintiff to move to that part of the car where the accident occurred, it was the duty of the plaintiff so to do, unless it was known and apparent to her that it would be unsafe for her to do so, and, in the absence of apparent danger, she had a right to assume that it was safe for her to move to and stand at the place where the defendant's servants directed her to move to in the car. And if you find that it was an unsafe place for the plaintiff to stand, and that without her fault she was required by reason of her moving to stand at such place, then your finding should be for the plaintiff.<sup>12</sup>

**§ 1700. Injuries resulting from needless attempt of passenger to avoid injury**

The jury are instructed that, if plaintiff was sitting in said car, and did not know he was in a dangerous place, and some person informed him that he was in a dangerous position, and, believing he was in a dangerous position, attempted to change to a safer place in said car, and that in said attempt he was thrown, by the movement of said car, against some freight or machinery, and injured as alleged, and if you further believe that, in attempting to make such change of position, he acted according to the dictates of prudence and as a man of ordinary care and prudence would have acted under like circumstances, then he would not be prevented, by such attempt to change his position, from recovering herein, although you may believe that he would not have been injured if he sat still.<sup>13</sup>

**§ 1701. Same—Jumping to avoid collision or other peril**

The court instructs the jury that the law requires of every man that he exercise a reasonable amount of care for his own safety. If you believe the plaintiff has failed to prove by legal evidence that ——— ever saw the car approaching the car on which he was seated from the rear, and if you believe from the evidence that ——— was not in apparent danger of being injured if he had remained seated, but that he jumped directly in front of an approaching car simply because he heard some women holler "Jump!" without stopping to think or to take any care at all for his safety, and that his death was caused by an absolutely unguarded and reckless act of his own, your verdict should be for the defendant.<sup>14</sup>

**§ 1702. Acts in emergencies**

The court instructs the jury that if a person, without fault on her part, is confronted with sudden danger or apparent sudden

<sup>12</sup> Prothero v. Citizens' St. Ry. Co., 33 N. E. 765, 134 Ind. 431.

<sup>13</sup> St. Louis & S. W. Ry. Co. of Texas v. Holmes (Tex. Civ. App.) 49 S. W. 658.

<sup>14</sup> Adamson's Adm'r v. Norfolk & P. Traction Co., 69 S. E. 1055, 111 Va. 556.

danger, the obligation resting upon her to exercise ordinary care for her own safety does not require her to act with the same deliberation and foresight which might be required under ordinary circumstances.<sup>15</sup>

**§ 1703. Acts in emergency created by negligence or wrongful act of carrier**

**§ 1703(1). Arkansas**

You are instructed that, if you find from the evidence in this case that the deceased was a passenger on defendant's train, and that the train was wrecked or derailed, then the mere fact that the deceased through fear or apprehension of danger did an act which was the immediate cause of injury to himself, does not of itself amount to negligence. If the negligence of the defendant put the deceased in peril, and in attempting to escape that peril he did an act, also dangerous, from which injury resulted to him, such act would not necessarily be an act of contributory negligence, such as would prevent a recovery for such injury. The test of contributory negligence under such circumstances is, Was his attempt to escape, if you believe he made an attempt to escape, an unreasonable or rash act, or was it an act that a person of ordinary prudence might do under like existing circumstances, and it is not to be determined by the result of the attempt to escape, or by the result that would have followed had the attempt not been made. If you should find from the evidence that the deceased, by the negligent wrecking of the train, was placed by the defendant in a position of danger while in the car of the defendant, then the deceased would have the right to judge of the danger in remaining in said car and also the dangers in attempting to escape from the circumstances as they appeared to him at the time, and not by the result, and, if he in making such attempt to escape used such care as a prudent man under such circumstances should have used, and in doing so received an injury, your verdict should be for the plaintiff.<sup>16</sup>

You are instructed that as a matter of law, when a passenger, through the negligence of a railroad company, is placed in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained in his seat.<sup>17</sup>

You are instructed that, should you find that the defendant was

<sup>15</sup> *Chicago Union Traction Co. v. Newmiller*, 74 N. E. 410, 215 Ill. 383.

<sup>16</sup> *St. Louis, I. M. & S. R. Co. v. Evans*, 137 S. W. 568, 99 Ark. 69.

<sup>17</sup> *Prescott & N. W. Ry. Co. v. Morris*, 123 S. W. 392, 92 Ark. 365.

guilty of negligence, carelessness, or improper management, and that an injury to the plaintiff was occasioned thereby, you will consider then whether the plaintiff was himself guilty of contributory negligence. If you should find from the evidence that by the negligence of the defendant the plaintiff was put in a position of great peril, and in attempting to escape that peril he did an act also dangerous, from which an injury resulted to him, such act would not necessarily be an act of contributory negligence, such as would prevent him from a recovery for such injury. The test of contributory negligence, under such circumstances, is, was his attempt an unreasonable, precipitate, or rash act, or was it an act which a person of ordinary prudence might do under the like existing circumstances? and it is not to be determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made.<sup>18</sup>

You are instructed that, if you should find from the evidence that the plaintiff was carelessly, negligently, or improperly placed by the defendant in a position of danger while in the car of the defendant, by reason of the defendant running a locomotive and caboose in close proximity to the car in which the plaintiff was, (if he was in such car,) then the plaintiff would have the right to judge of the danger in remaining in such car, as also the danger in attempting to escape, from the circumstances as they appeared to him, and not by the result; and if he, in making such an attempt to escape, used such care as a prudent man, under such circumstances, should have used, and in doing so received an injury, he should recover.<sup>19</sup>

§ 1703(2). California

The jury are instructed that, if you believe from the evidence that on the \_\_\_\_\_ day of \_\_\_\_\_, and while plaintiff was being transported as a passenger on said car of said defendant, as alleged in plaintiff's complaint, by reason of the negligence of the defendant, the controller on said car blew up or caught fire, and that the blowing up or catching on fire of said controller created in the mind of said plaintiff a reasonable apprehension of great peril or injury, and that by reason thereof, and in order to avoid such anticipated peril or injury, plaintiff jumped from said car, while said car was in motion, sustaining the injuries complained of, and that an ordinarily prudent and cautious person, under like conditions and circumstances would have jumped off and from said car, then I instruct you that, under such circumstances, plaintiff was not guilty

<sup>18</sup> St. Louis & S. F. Ry. Co. v. Murray, 18 S. W. 50, 55 Ark. 248, 16 L. R. A. 787, 29 Am. St. Rep. 32.

<sup>19</sup> St. Louis & S. F. Ry. Co. v. Murray, 18 S. W. 50, 55 Ark. 248, 16 L. R. A. 787, 29 Am. St. Rep. 32.

of contributory negligence in jumping off and from said car, even though you also believe from the evidence that, had he remained upon said car, said plaintiff would not have been injured.<sup>20</sup>

**§ 1703(3). Delaware**

You are instructed that a plaintiff will not be held guilty of contributory negligence who in the effort to avoid immediate danger, in the exigency of the moment, suddenly and without time for reflection puts himself in the way of other perils without fault on his part, and particularly so if the defendant has placed him in such position. It is a well-established rule of law that when one is required to act suddenly and in the face of imminent danger, he is not required to exercise the same degree of care as if he had time for deliberation and the full use of his judgment and reasoning faculties. And this is especially true when the peril has been caused by the fault of another. If the plaintiff in this case, while acting in good faith, and as a person of ordinary prudence and discretion would have acted under like conditions, jumped from the car when it was beyond the motorman's control and while moving rapidly downgrade, in an honest effort to escape manifest and immediate danger, which he reasonably believed was imminent, and his injuries resulted from such act, the defendant would be liable, provided the danger from which the plaintiff sought to escape was caused by the negligence of the defendant. If it was not so caused, the plaintiff could not recover.<sup>21</sup>

**§ 1703(4). Iowa**

You are instructed that the fact if it be a fact, that plaintiff did not let go of the car, but clung to the rail and ran along the side of the car trying to get on, after it had started, will not necessarily show that he was guilty of contributory negligence. If, by reason of the starting of the car at the time and in the manner in which it was started, an emergency arose, then, even though plaintiff's action was ill judged, if, under all the facts and circumstances shown by the evidence, he acted as would a man of ordinary prudence in a like situation, and had used ordinary care in his original attempt to get on the car, then he was not guilty of contributory negligence.<sup>22</sup>

**§ 1703(5). Maryland**

You are instructed that, if the jury shall find as matter of fact that the negligence of the defendant placed the deceased in a state

<sup>20</sup> *Waniorek v. United Railroads of San Francisco*, 118 P. 947, 17 Cal. App. 121.

<sup>21</sup> *Eaton v. Wilmington City Ry. Co.*, 75 A. 369, 1 Boyce, 435.

<sup>22</sup> *Burger v. Omaha & C. B. St. Ry. Co.*, 117 N. W. 35, 139 Iowa, 645, 130 Am. St. Rep. 343.



of peril, and he had at that time a reasonable ground for supposing he would be injured by remaining on the train, then the plaintiffs are entitled to recover, although you may find as matter of fact that the jumping of the deceased increased the peril or caused his death, and although you may find that he would probably have sustained little or no injury if he had remained on the car.<sup>23</sup>

§ 1703(6). Michigan

The jury are instructed that, if the plaintiff, on the evening of ———, was carried by the car into the barn, and there assaulted as testified to by her, and on account of that treatment on the evening of ———, seeing the car leaving the main track, and again turning to go into the barn, she had reasonable cause to fear danger to herself, or a repetition of such treatment, and controlled by such fear, to save herself, she attempted to get off the car while in motion, using such reasonable care and caution as she was able to use under the circumstances, and was then injured, the defendant is liable for the injury. If, as I said, before, she used that reasonable caution at this time and place, as testified to by her, and she used that reasonable caution which a prudent person would use under the circumstances, fearing a repetition of the assault that was committed on ———, then, gentlemen of the jury, of course that will remove the bar which otherwise would arise on account of what would be contributory negligence. She had a right to do it, and it was her duty to do it, if those things were so. If the defendant, by its wrongful act, put the plaintiff in a position where she had reasonable cause to apprehend danger to herself, she had the right to take such steps to avoid said danger as, in her judgment, formed from the exigency of the moment, was best, and, if injured, defendant was responsible for the injury.<sup>24</sup>

§ 1703(7). South Carolina

You are instructed that a plaintiff may maintain an action for injuries caused by the negligence of a carrier, even though he was guilty of negligence himself, if such negligence was caused by sudden peril and terror in the situation wherein he has been placed by defendant's negligence.<sup>25</sup>

§ 1704. Same—Attempt to escape from falling elevator

The court instructs the jury that if you find and believe from the evidence that the elevator started downward by reason of the hydraulic machine being defective in condition, and out of order and

<sup>23</sup> Western Maryland R. Co. v. State, 53 A. 969, 95 Md. 637.

<sup>24</sup> Ashton v. Detroit City Ry. Co., 44 N. W. 141, 78 Mich. 587.

<sup>25</sup> Doolittle v. Southern Ry. Co., 40 S. E. 133, 62 S. C. 130.



that it was so known to the defendant, or by the exercise of ordinary care would have been so known at the time of and prior to the injury, long enough to repair it, if you find such condition and knowledge from the evidence; and if the jury further find and believe from the evidence that plaintiff exercised ordinary care for her own safety while approaching, entering, and while on said elevator, and that, after said elevator had started to descend and by reason of the descent thereof, plaintiff was seized with terror and alarm for her own safety, and that the plaintiff had reasonable cause to apprehend peril and danger to herself, and that the appearance of danger was imminent, leaving no time for her to deliberate, then the court instructs the jury that her attempt to escape from said elevator resulting in her injuries is not contributory negligence on the part of plaintiff, such as will prevent her from recovering from her injuries, if the attempt was one such as a person acting with ordinary care and prudence, might under the circumstances make.<sup>26</sup>

**§ 1705. Care required from mail clerk on mail car**

You are instructed that it was plaintiff's duty to exercise the same degree of care and prudence for his own safety that a man of ordinary care would exercise under the circumstances. Therefore, if you believe from the evidence that plaintiff was making up the mail at ——— while his mail car was being switched, and that he knew, or in the exercise of ordinary care would have known, that the cars were likely to come together hard, and if a man of ordinary prudence would have ceased his work until after the coupling was made, and plaintiff did not cease his work, and, because of his failure to do so, was injured, find for defendant.<sup>27</sup>

You are instructed that, if the plaintiff was riding in the mail-car composing a part of said train, and in his proper place in said car, then the fact, if such be a fact, that it was a more dangerous place in which to travel than other cars composing said train would in no way affect the right of plaintiff to recover in this cause.<sup>28</sup>

**§ 1706. Care required from children**

**§ 1706(1). Florida**

You are instructed that if you find from the evidence that, at the time the plaintiff was hurt, she was a minor girl child, you may find from the evidence as a matter of fact whether, at the time the

<sup>26</sup> *Cooper v. Century Realty Co.*, 123 S. W. 848, 224 Mo. 709.

<sup>27</sup> *Houston & T. C. R. Co. v. McCullough*, 55 S. W. 392, 22 Tex. Civ. App. 208.

<sup>28</sup> *Gulf, C. & S. F. Ry. Co. v. Wilson*, 15 S. W. 280, 79 Tex. 371, 11 L. R. A. 486, 23 Am. St. Rep. 345.

child was hurt, she was capable of taking reasonable care of herself, or whether she was of such tender age as not to be responsible for her acts or conduct.<sup>29</sup>

The defendant in this action has filed pleas of contributory negligence on the part of the plaintiff. The court instructs you that if you find from the evidence that the plaintiff, at the time of the accident, was a child of tender years, and by reason of her youth she was incapable of taking care of herself, then in that event the court charges you that the said child is not responsible in law for any negligence in her own conduct, if you find from the evidence that there was any negligence or lack of apprehension or reasonable prudence on the part of the plaintiff.<sup>30</sup>

§ 1706(2). Illinois

The court instructs the jury that a boy of ——— years of age is only required to exercise that degree of care and caution which boys of his age, capacity, intelligence, and experience may reasonably be expected to use under like circumstances; and if the jury believe, from the evidence, that the plaintiff was, just before and at the time of receiving his alleged injuries, exercising such care; then the plaintiff was exercising all the care the law required of him.<sup>31</sup>

§ 1706(3). Missouri

You are instructed that if you believe from the evidence that the deceased did not exercise the care and caution which might reasonably be expected from a person of the age, experience, and intelligence that the evidence shows him to have been at the time of the accident complained of, but that he himself, by his own negligent conduct, caused or contributed to cause the injuries which resulted in his death, and that defendant's servants in charge of the car by which he was injured could not, by the exercise of a high degree of care, have avoided the accident after they became aware, or by reasonable care would have become aware, of the danger to which the deceased exposed himself, then you should find a verdict for the defendant.<sup>32</sup>

You are instructed that, in determining whether deceased was guilty of negligence directly contributing to the accident which resulted in his death, you may take into consideration not only his age, but also his previous experience in getting on and off street cars, as the same appear from the evidence, and the confidence re-

<sup>29</sup> Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.

<sup>30</sup> Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.

<sup>31</sup> Peterson v. Chicago Consol.

Traction Co., 83 N. E. 159, 231 Ill. 324.

<sup>32</sup> Sly v. Union Depot Ry. Co., 36 S. W. 235, 134 Mo. 681.

posed in him by his parents as to his ability to take care of himself; and you are instructed that it was the duty of the deceased to exercise the care and caution which might be expected from a person of his age, discretion, and experience, as the same is shown by the evidence.<sup>33</sup>

**§ 1707. Effect of intoxication and care required from intoxicated passengers**

**§ 1707(1). United States**

The jury are instructed that if, from the evidence, you should find that the plaintiff was intoxicated at the time of the injury, this, of itself, does not constitute a defense to the plaintiff's right of recovery, unless you should further find that such intoxication was the proximate cause of the injury suffered by the plaintiff. If his intoxicated condition was the proximate cause of the injury, then he could not recover. The fact of plaintiff's intoxication, if you should find that he was intoxicated at the time of the injury, is, in itself, as a matter of law, not such negligence as would bar a recovery. The mere fact of intoxication will not establish want of ordinary care; and if it was not the immediate cause, or did not contribute to the injury, it is of no importance; and you should disregard all such testimony, in case you should find that it did not contribute to, and was not the proximate or immediate cause of, the injury.<sup>34</sup>

**§ 1707(2). Arkansas**

The court instructs the jury that, if you should find from a preponderance of the evidence that the plaintiff was intoxicated at the time of the injury complained of, such intoxication, if any, does not, of itself, constitute a defense to plaintiff's right of recovery; and such intoxication, is not in itself evidence of contributory negligence, and is merely a circumstance to be considered by you in determining whether such intoxication contributed to the injury complained of. If it did not contribute to such injury, then such intoxication would be no defense to plaintiff's cause of action, and you should discard and disregard all testimony in regard to such intoxication in case you find that it did not contribute to plaintiff's injury.<sup>35</sup>

**§ 1707(3). Colorado**

The court instructs the jury that intoxication on the part of the plaintiff, if the jury believe the plaintiff was intoxicated, is not, as a general rule, in itself, as a matter of law, such negligence, or evi-

<sup>33</sup> *Sly v. Union Depot Ry. Co.*, 36 S. W. 235, 134 Mo. 681.

<sup>34</sup> *Trumbull v. Erickson* (C. C. A. Colo.) 97 F. 891, 38 C. C. A. 536.

<sup>35</sup> *Kansas City Southern Ry. Co. v. Davis*, 103 S. W. 603, 83 Ark. 217.

dence of such negligence, as will bar his recovery in this action. The law refuses to impute negligence as of course to a plaintiff from the bare fact that at the moment of suffering the injury he was intoxicated. Intoxication is one thing, and negligence sufficient to bar an accident for damages quite another thing. Intoxicated persons are not removed from all protection of law. If the plaintiff used that degree of care incumbent upon him to use, under the circumstances of this case, as explained to you in a previous instruction, then his intoxication, if you believe from the evidence he was intoxicated, had nothing to do with the accident. When contributory negligence is one of the issues, as in this case, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk.<sup>36</sup>

**§ 1707(4). Indiana**

The court instructs the jury that some evidence has been introduced concerning the plaintiff's condition as to sobriety at the time of his injury. The fact of his intoxication at the time of his injury, if it is a fact, would not of itself prevent his recovery, but that evidence is before you as bearing upon the question whether he exercised the care and caution required of an ordinarily prudent person in like circumstances and in full possession of his faculties and as described in the foregoing instructions. If you find that he was so under the influence of liquor at the time as to render it dangerous, by reason thereof, for him to attempt to board said car, and that he was injured by reason thereof, he could not recover.<sup>37</sup>

**§ 1707(5). Kentucky**

The court instructs the jury that if they believe from the evidence that at the time plaintiff was injured he was intoxicated, and by reason of such condition he failed to exercise such care for his safety as might be ordinarily expected of a sober person of ordinary prudence situated as plaintiff was at the time of the injury, and but for such failure plaintiff would not have been injured, or if they believe from the evidence that an ordinarily prudent and sober person would not have been injured under similar circumstances, they should find for the defendant.<sup>38</sup>

**§ 1707(6). Texas**

You are charged that if you believe from the evidence that at the time of the accident plaintiff was under the influence of liq-

<sup>36</sup> *Denver Tramway Co. v. Reid*, 35 P. 269, 4 Colo. App. 53.

<sup>37</sup> *Mishler v. Chicago, S. B. & N. I. Ry. Co.*, 122 N. E. 657, 188 Ind. 189.

<sup>38</sup> *Louisville & N. R. Co. v. Payne*, 104 S. W. 752.

nor to such an extent as to prevent him from exercising ordinary care and caution for the protection of his person, although he might not have been entirely under its influence, and that such condition of plaintiff caused or contributed to cause him to receive the injuries of which he complains, it will be your duty to return a verdict for the defendant.<sup>39</sup>

### § 1708. Effect of contributory negligence

#### § 1708(1). Alabama

The court charges the jury that, if they believe from the evidence that the plaintiff was guilty of negligence which proximately contributed, even in the slightest degree, to his injury, they must return a verdict for the defendant.<sup>40</sup>

#### § 1708(2). Arkansas

You are instructed that, if you find and believe from the evidence that the plaintiff in this case failed to exercise reasonable and ordinary care for his own safety, and such failure on his part in any degree contributed to his injuries, he cannot recover.<sup>41</sup>

#### § 1708(3). Colorado

You are instructed that the rule of law is that, where both parties are at fault, neither can recover, and you are instructed that, if the plaintiff might, in the exercise of ordinary care, have avoided the accident to herself, you must find for the defendant, even though you should find that the defendant was guilty of the act of negligence complained of.<sup>42</sup>

Upon the question of contributory negligence you are instructed that, should you find from the evidence that the plaintiff, by her own act, contributed to the injuries which she sustained, if any, by the omission to do something necessary for her to do for her own safety, or by the commission of some act without which the injury, if any, would not have been sustained, then in such case your verdict should be for the defendant.<sup>43</sup>

The court instructs you that it was the duty of the plaintiff to use ordinary care, as hereinbefore defined, as to her own protection in alighting from defendant's car, and, if she was guilty of negligence contributing to the injuries of which she complains, then she cannot recover. That is to say, if the defendant, by its servants, was guilty of negligence, and the plaintiff was also guilty of negli-

<sup>39</sup> St. Louis Southwestern Ry. Co. of Texas v. Christian (Civ. App.) 169 S. W. 1102.

<sup>40</sup> Birmingham Ry., Light & Power Co. v. Bynum, 36 So. 736, 139 Ala. 389.

<sup>41</sup> St. Louis & S. F. R. Co. v. Grider, 161 S. W. 1032, 110 Ark. 437.

<sup>42</sup> Colorado Springs & I. Ry. Co. v. Allen, 135 P. 790, 55 Colo. 391.

<sup>43</sup> Colorado Springs & I. Ry. Co. v. Allen, 135 P. 790, 55 Colo. 391.

gence contributing to her injuries, then the plaintiff cannot recover in this action.<sup>44</sup>

§ 1708(4). **Delaware**

You are instructed that, if the plaintiff's injuries were caused by the plaintiff's own negligence, or want of ordinary care, that contributed to or entered into the accident and was operating at the time, she would not be entitled to recover even though the defendant was also negligent, because the law will not permit a person to recover damages from another if such person's own negligence caused the injury. Where there is mutual negligence—that is, where the negligence of each party is operative at the time of the accident—no action can be sustained.<sup>45</sup>

You are instructed that if you are satisfied from the evidence, that the plaintiff was negligent herself, and that such negligence contributed to or entered into the accident, and was operating at the time, then the plaintiff cannot recover. In such case the plaintiff would be guilty of contributory negligence and where there is contributory negligence the law will not attempt to measure the proportion of blame or negligence to be attributed to either party.<sup>46</sup>

§ 1708(5). **Florida**

You are instructed that the law of ———, in relation to the liability of railroad companies in certain cases, provides "that no person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the plaintiff may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of the default attributable to him." That is to say, if you find from the evidence that the plaintiff in this case was damaged by the running of the locomotives, cars, or other machinery of the defendant, and that the said company has not exercised all ordinary and reasonable care and diligence, you must find for the plaintiff, notwithstanding the fact you may also find that the plaintiff and the defendant's agents are both at fault. In such case that plaintiff was at fault would not defeat a recovery by the plaintiff, and would only go in diminution of the damages sustained by the plaintiff.<sup>47</sup>

<sup>44</sup> *Denver Tramway Co. v. Owens*, 36 P. 848, 20 Colo. 107.

<sup>45</sup> *Clayton v. Philadelphia, B. & W. R. Co.* (Super.) 106 A. 577, 7 Boyce, 343.

<sup>46</sup> *Girardo v. Wilmington & Philadelphia Traction Co.*, 90 A. 476, 5 Boyce, 25.

<sup>47</sup> *Atlantic Coast Line R. Co. v. Crosby*, 43 So. 318, 53 Fla. 400.



**§ 1708(6). Illinois**

The jury are instructed that, if you shall believe from the evidence that the plaintiff was guilty of any want of reasonable care while a passenger upon defendant's cars, and that such his want of care concurred with the negligence of the defendant in producing the injury complained of, then the plaintiff cannot recover.<sup>48</sup>

The jury are instructed that, if you believe from the evidence that at the time of the injury to plaintiff the employees of defendant were exercising the highest degree of practicable care in the operation and management of the car in question, or that plaintiff at the time of the accident was not exercising ordinary care and prudence for her own safety, and that such want of care on her part proximately contributed to her injury, the verdict should be not guilty.<sup>49</sup>

**§ 1708(7). Kansas**

You are instructed that, if the deceased was guilty of contributory negligence in this case, the plaintiff cannot recover.<sup>50</sup>

**§ 1708(8). Kentucky**

The court instructs the jury that it was the duty of the plaintiff to exercise for his own protection such care as ordinarily prudent persons ordinarily exercise under the same or similar circumstances, and, if the jury believe from the evidence that plaintiff on the occasion in question failed to exercise such care, and such failure on his part contributed to the injuries he received, and but for such failure on his part he would not have been injured, they will find for the defendant.<sup>51</sup>

You are instructed that it was the duty of the plaintiff, before he entered upon the passway between the said two trains, to exercise ordinary care for his own safety, and to stop and look and listen to ascertain whether he could cross the track without injury from the said trains; and, if he failed to discharge either of these duties, and by reason of such failure he helped to cause or bring about the injuries of which he complains, and he would not have been injured but for his contributory negligence in that respect, then the law is for the defendant, and so you should find, even though you may believe from the evidence that the defendant was negligent in failing to give notice of the fact that the train was about to be backed to close the passageway, if such is the fact, unless you shall further believe from the evidence that when the plaintiff came in peril from the train, the employes of the defendant

<sup>48</sup> Galena, etc., R. Co. v. Fay, 16 Ill. 558, 63 Am. Dec. 323.

<sup>49</sup> Chicago City Ry. Co. v. Flynn, 131 Ill. App. 502.

<sup>50</sup> Saunders v. Atchison, T. & S. F. Ry. Co., 148 P. 657, 95 Kan. 537.

<sup>51</sup> South Covington & C. St. Ry. Co. v. Markel, 182 S. W. 850, 168 Ky. 625.



in charge of the train could, by the exercise of ordinary care, have discovered his peril, and by ordinary care have prevented his injury.<sup>52</sup>

The court instructs the jury that it was the duty of the plaintiff to exercise reasonable care to protect himself while a passenger on defendant's train, and although the jury may believe from the evidence that the defendant was negligent, as in instruction No. ———, yet, if they shall further believe from the evidence that the plaintiff was himself negligent, and that the injury, if any, to him, would not have occurred but for such negligence on his part, the law is for the defendant, and the jury will so find.<sup>53</sup>

§ 1708(9). *Missouri*

You are instructed that, notwithstanding you may believe that defendant did not use that degree of care which the law required of said defendant as set forth in other instructions, still the court declares to you that such lack of care on defendant's part could not and did not relieve plaintiff of the duty to use ordinary care for his own safety, and if he failed to do so, and such failure on his part directly contributed to his injury, he cannot recover, no matter how negligent defendant may have been.<sup>54</sup>

§ 1708(10). *Texas*

The jury are instructed that the plaintiff cannot recover, notwithstanding there may have been negligence on the part of the defendant or its agents which contributed to the accident, if he, by the want of ordinary care and by his own voluntary acts, so far himself contributed to the accident that, but for this fact, it would not have happened.<sup>55</sup>

§ 1708(11). *Virginia*

You are instructed that the plaintiff herself must not have been guilty of negligence in bringing about her own injury. If the negligence of the plaintiff contributed as an efficient cause to her own injury, she cannot recover no matter how guilty of negligence the agents of the railroad company may have been.<sup>56</sup>

The court instructs the jury that if you believe from the evidence that the plaintiff's intestate and defendant were both guilty of negligence, and that the negligence of both caused the death of the plaintiff's intestate, then your verdict must be for the defendant, even though you may believe from the evidence that the de-

<sup>52</sup> *Louisville & N. R. Co. v. Smith*, 122 S. W. 806, 135 Ky. 462.

<sup>53</sup> *Chesapeake & O. Ry. Co. v. Jordan*, 76 S. W. 145.

<sup>54</sup> *Wellmeyer v. St. Louis Transit Co.*, 95 S. W. 925, 198 Mo. 527.

<sup>55</sup> *Houston & T. C. Ry. Co. v. Gorbett*, 49 Tex. 573.

<sup>56</sup> *Walters v. Norfolk & W. Ry. Co.*, 94 S. E. 182, 122 Va. 149.

gree of negligence of the defendant was greater than that of the plaintiff.<sup>57</sup>

**§ 1709. Effect of negligence of passengers as dependent on whether proximate contributing cause of injuries received**

**§ 1709(1). Arkansas**

The jury are instructed that, if you believe from the evidence that the plaintiff was injured by reason of the negligence of the defendant company, a recovery cannot be defeated on the ground of contributory negligence, unless it appears from the evidence that the plaintiff himself failed in the exercise of ordinary prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault. Contributory negligence will not be presumed, but must be proven by a preponderance of the evidence.<sup>58</sup>

**§ 1709(2). Colorado**

You are instructed that, although the plaintiff may have been guilty of misconduct or failure to exercise ordinary care and prudence which may have contributed remotely to his injury, yet, if the agents of the defendant company were guilty of mismanagement or negligence in the management of said car, which was the immediate cause of the injury to the plaintiff, and, with the exercise of extraordinary care by such agents said injury might have been prevented, the defendant is liable in this suit.<sup>59</sup>

The jury are instructed that, if the injury complained of was done to the plaintiff by the electricity used by the defendant for motive power or in any other wise, or by any other means, on account of the failure of the defendant to use extraordinary care about the operation of its road and cars, then the defendant company is liable in this suit, unless the plaintiff had failed to use ordinary care and prudence in preparing to leave said car and alighting therefrom; and, even if he failed to use such ordinary care and prudence, the defendant company is still liable if this failure to use ordinary care and prudence on the part of the plaintiff was the remote, and the negligence of the defendant company was the immediate, cause of said injury.<sup>60</sup>

**§ 1709(3). Missouri**

The jury are instructed that, although plaintiff may have failed to exercise ordinary care and prudence while a passenger on de-

<sup>57</sup> Adamson's Adm'r v. Norfolk & P. Traction Co., 69 S. E. 1055, 111 Va. 556.

<sup>58</sup> Kansas City Southern Ry. Co. v. Davis, 103 S. W. 603, 83 Ark. 217.

<sup>59</sup> Denver Tramway Co. v. Reid, 35 P. 269, 4 Colo. App. 53.

<sup>60</sup> Denver Tramway Co. v. Reid, 35 P. 269, 4 Colo. App. 53.

fendant's car, which may have contributed remotely to the injury complained of, yet if the employees of defendant were guilty of negligence which was the direct and immediate cause of the injury to plaintiff, and might have prevented it by the exercise of prudence and care, the defendant is liable.<sup>61</sup>

The jury are instructed that, before you can find the plaintiff guilty of contributory negligence, defendant must prove by a fair preponderance of the evidence that the plaintiff committed some act or acts which a person of ordinary reason, intelligence, and prudence under like circumstances would not have committed, and must further prove by a fair preponderance of the evidence that such act or acts, so committed by plaintiff contributed directly, immediately and proximately to his injuries.<sup>62</sup>

§ 1709(4). Illinois

The jury are instructed that, although you may believe that the plaintiff got off from the car at the north side of ——— street, when the usual place for alighting was on the south side of ——— street, that fact alone would not justify you in finding her guilty of such negligence as would bar a recovery in the case, unless you believe and find that it was the proximate cause of the injury.<sup>63</sup>

§ 1709(5). Kansas

You are instructed that, to constitute negligence on the part of deceased, it must not only appear that the said deceased failed to use reasonable prudence in the use of his senses, but that such failure contributed directly to the injury received, and hence, though you should find that said deceased did not exercise reasonable diligence at the time and place in question, yet, before you can find him guilty of contributory negligence, it must further appear from the preponderance of the evidence that such negligence, if any, contributed directly to the injuries received.<sup>64</sup>

§ 1709(6). Maryland

The jury are instructed that, in order to defeat a recovery on the ground of contributory negligence on plaintiff's part, the defendant must satisfy the jury by preponderating evidence of two facts: First, that the plaintiff was negligent; and, secondly, that such negligence directly contributed to the injury.<sup>65</sup>

§ 1709(7). South Carolina

You are instructed that, even if a passenger be guilty of negligence in placing himself in a dangerous position, it will not bar his

<sup>61</sup> Barton v. St. Louis, etc., R. Co., 52 Mo. 253, 14 Am. Rep. 418.

<sup>62</sup> Burbridge v. Kansas City Cable R. Co., 36 Mo. App. 669.

<sup>63</sup> North Chicago St. R. Co. v. Eldridge, 38 N. E. 246, 151 Ill. 542.

<sup>64</sup> Saunders v. Atchison, T. & S. F. Ry. Co., 148 P. 657, 95 Kan. 537.

<sup>65</sup> Philadelphia, Wilmington & B. R. Co. v. Anderson, 72 Md. 519, 20 A. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483.

right to recover damages, if the injury was caused directly and proximately by the negligence of the carrier. If both are guilty, the negligence of the passenger will not bar his right to recover, if he is guilty, unless his negligence is the proximate cause of the injury. Then he cannot recover.<sup>66</sup>

You are instructed that if, on the other hand, a passenger is injured, and, even though he be guilty of negligence, if his negligence is not the proximate cause of the injury, the company cannot escape liability. He cannot be deprived of the right to claim damages because of negligence, unless his negligence, if he should be negligent, operating with the negligence of the company, if there should be such, becomes the proximate cause of the injury.<sup>67</sup>

§ 1709(8). Texas

The court charges the jury that the defendant is responsible to plaintiff for any injury he may have received, if its negligence or the negligence of its agents or servants was the primary and proximate cause of his injury, although there may have been also negligence on the part of plaintiff, unless it appears that by the use of ordinary diligence and care, under the circumstances, as a reasonable and prudent man, plaintiff would have avoided the consequences of the negligence of defendant or its agents. In other words, in order that the negligence of the plaintiff, if he was negligent, shall preclude recovery by him, it must have been of such a character that without it the injury sued for would not have occurred.<sup>68</sup>

You are instructed that, if you believe that plaintiff was injured while a passenger on defendant's car, and that he failed to use ordinary care and prudence while a passenger on said car, in having his arm protruding outside the car, but that such negligence was slight, and contributed only remotely to the injury complained of, and you believe that the defendant's agents or employes left a car on the switch near the main track of said defendant, where the train on which the plaintiff was had to pass, and that said car, or some object thereon, came in contact with plaintiff's arm, and caused the injury complained of, and you believe that leaving said car in said position was an act of negligence on the part of defendant which was the direct and immediate cause of the injury, and that the defendant might have prevented it by the exercise of prudence and care, then defendant is liable, and you will find a verdict in favor of plaintiff for such actual damages as you believe he has sustained.<sup>69</sup>

<sup>66</sup> Doolittle v. Southern Ry. Co., 40 S. E. 133, 62 S. C. 130.

<sup>67</sup> Doolittle v. Southern Ry. Co., 40 S. E. 133, 62 S. C. 130.

<sup>68</sup> Gulf, C. & S. F. Ry. Co. v. Dan-shank, 25 S. W. 295, 6 Tex. Civ. App. 385.

<sup>69</sup> Gulf, C. & S. F. Ry. Co. v. Dan-

The jury are instructed that the defendant in this case is responsible to the plaintiff for any injury he may have received, if its negligence, or the negligence of its agents or servants, was the primary and proximate cause of the injury, although there may have been negligence also on the part of the plaintiff, unless it appears that under the circumstances he could, by the exercise of ordinary care, have avoided the consequences of the negligence of the defendant or its agents.<sup>70</sup>

**§ 1710. Doctrine of last clear chance or discovered peril**

**§ 1710(1). California**

The court instructs the jury that no more in law than in morals can one wrong be justified by another. A person is bound to conduct himself with reasonable care and prudence toward even a wrongdoer, and if he can so conduct himself, and does not, he is liable, if injury is sustained by the other. Even if there was negligence on the part of the plaintiff in some degree, yet if at the time when the injury was committed it might have been avoided by the defendant by the exercise of reasonable care and prudence, and if the defendant was aware of that fact, then the defendant is liable to the plaintiff for injuries so committed.<sup>71</sup>

**§ 1710(2). Missouri**

The court instructs the jury that, even though you should believe from the evidence that plaintiff attempted to board defendant's car while same was in motion, yet, if you further find from the evidence that in attempting to board the said car plaintiff caught hold of the handhold of said car and was jerked off her feet by said car, and that while so hanging she was dragged for about one-half of a block, and received injuries complained of in her petition, and that the conductor in charge of said car knew that she was hanging to said handhold, and was being dragged by said car and by the exercise of ordinary diligence on his part, could have caused said car to be stopped in time to have avoided injury to plaintiff, but that defendant's said conductor negligently and carelessly failed to cause said car to stop after he had discovered plaintiff's position, and negligently and carelessly permitted said car to drag plaintiff a long distance over the street, and that she thereby sustained the injuries complained of, then you should find for plaintiff.<sup>72</sup>

shank, 25 S. W. 295, 6 Tex. Civ. App. 385.

<sup>70</sup> Houston & T. C. Ry. Co. v. Gorbett, 49 Tex. 573.

<sup>71</sup> Nilson v. Oakland Traction Co., 101 P. 413, 10 Cal. App. 103.

<sup>72</sup> Foland v. Southwestern Missouri Electric Ry. Co., 95 S. W. 958,

## § 1710(3). Virginia

The court instructs the jury that wherever you are instructed that you may find for the defendant, should it be proven that the plaintiff was guilty of contributory negligence, those instructions are subject to this qualification: That even though you may believe from the evidence that the plaintiff was guilty of contributory negligence, yet this will not prevent the plaintiff from recovering in this case, if the jury shall further believe from the evidence that the motorman or conductor in charge of the defendant's car saw, or by the exercise of reasonable care and caution in keeping a lookout could have seen, that the plaintiff was in danger of being struck by the rear end of said car, should said car continue around the curve at ——— and ——— streets, and that said motorman and conductor could have stopped said car by the use of ordinary care and caution in time to have prevented the rear end of said car from striking the plaintiff, but failed to do so, and in such case the jury should find for the plaintiff.<sup>73</sup>

The court instructs the jury that if they believe from the evidence in this cause that the plaintiff was guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse it.<sup>74</sup>

**§ 1711. Effect of negligence of passenger as dependent on whether it amounts to criminal negligence**

The jury are instructed that the term "criminal negligence," as it is used in the statute above quoted, is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard by plaintiff of his own safety, and amount to a willful indifference to the injury liable to follow.<sup>75</sup>

The jury are instructed that, should you find that plaintiff did not have sufficient time to alight from the said train, as above explained, and that he was guilty of gross or criminal negligence in alighting while the train was in motion, you will find for defendant.<sup>76</sup>

119 Mo. App. 284. The objection to this instruction was that neither the petition nor the evidence supported it.

<sup>73</sup> Virginia Trust Co. v. Raymond, 91 S. E. 618, 120 Va. 674.

<sup>74</sup> Danville Street-Car Co. v. Watkins, 34 S. E. 884, 97 Va. 713.

<sup>75</sup> Omaha, etc., R. Co. v. Chollette, 49 N. W. 1114, 33 Neb. 143.

<sup>76</sup> Omaha, etc., R. Co. v. Chollette, 49 N. W. 1114, 33 Neb. 143.



#### 14. *Pleading and Proof*

##### § 1712. Confining plaintiff to cause of injury alleged in pleading

###### § 1712(1). Alabama

The jury are instructed that, while it is not negligence as a matter of law for a passenger to alight from a slowly moving street car, yet I charge you that, if you are reasonably satisfied from the evidence that plaintiff alighted from said car while it was in motion between stations, and that at said time the said car was being carefully and properly operated, and that her said so alighting from said car while in motion was the proximate cause of her injury, then you must find for the defendant.<sup>77</sup>

###### § 1712(2). Colorado

You are instructed that the specific act of negligence alleged is that the defendant carelessly and negligently caused said car to suddenly and violently start and jerk forward while said plaintiff was on the step thereof, and in considering the negligence of the defendant company you will devote your attention to a consideration of that specific act of negligence and no other; and you are further instructed that unless you believe from a preponderance or greater weight of the evidence that the defendant caused said car, while it was standing still and while plaintiff was upon the running board thereof and in the act of alighting therefrom, to violently start and jerk forward, thereby throwing the plaintiff to the ground, your verdict must be for the defendant.<sup>78</sup>

###### § 1712(3). Delaware

You are instructed that the plaintiff in this case charges in her declaration that while the car was either stopped or much reduced in speed preparatory to stopping and while she was preparing to alight therefrom the car suddenly started forward at an increased rate of speed whereby the plaintiff was thrown or jolted from the car. That is the allegation upon which the plaintiff bases her claim and relies for recovery and that is the act of negligence charged against the defendant company. In order for her to recover she must have satisfied you, by the preponderance of the evidence produced, that her injuries were caused by such sudden starting of the car. If the car was not suddenly started as charged, she cannot recover. This is necessarily so, as we have said there arises no presumption of liability on the part of the defendant from the mere fact that the plaintiff was injured.<sup>79</sup>

<sup>77</sup> *Tannehill v. Birmingham Ry., Light & Power Co.*, 58 South. 198, 177 Ala. 297. Plaintiff in this case alleged that she was injured by the sudden starting of the car while she

was attempting to alight, after the car had stopped.

<sup>78</sup> *Colorado Springs & I. Ry. Co. v. Marr*, 141 P. 142, 26 Colo. App. 48.

<sup>79</sup> *Girardo v. Wilmington & Phila-*



You are instructed that, the plaintiff having by his declaration charged that his injuries were caused solely by the sudden starting of the car, he is confined to that act of alleged negligence, and he cannot recover unless he has proved by a preponderance of the evidence that such injuries were caused by the negligent starting of the car while the plaintiff was in the act of boarding it.<sup>80</sup>

You are instructed that the plaintiff in his declaration has alleged as the negligence of the defendant company upon which he bases his action and relies for recovery, that the company suddenly started up the car when he was preparing to alight, to do which he alleges that he arose from his seat and stepped upon the running board of the car. In order for him to recover, therefore, he must have satisfied you by the preponderance of the evidence that his injuries were caused by such sudden starting up of the car when he was preparing to alight therefrom. The preponderance of evidence depends not necessarily upon the number of witnesses but upon the weight of the testimony.<sup>81</sup>

#### § 1712(4). Illinois

The court instructs the jury that although they may believe, from the evidence, that the defendant's servants started and moved the train here in question before the gates were closed, and although you may believe such action was negligent on the part of the defendant, yet that fact, if you find it to be a fact, must not be taken into your consideration in determining the liability of the defendant in this case, as the plaintiff has made no allegation of, and has not complained of, such negligence in her declaration.<sup>82</sup>

#### § 1712(5). Michigan

You are instructed that the right of the plaintiff to recover in this case is planted solely upon the claim that, while he was in the act of boarding the car, and before he had been given an opportunity to complete that act, he was, through the negligent starting forward of the car, precipitated to the pavement.

If it be your view from the evidence that the plaintiff had succeeded in his effort to board the car, and, having done so, stood engaged in conversation, and thereafter was precipitated to the pavement, in that event you may not award plaintiff a verdict, because the declaration filed in this cause which is the statement of the plaintiff's claim would not warrant you in returning any verdict upon any such theory as that.<sup>83</sup>

delphia Traction Co., 90 A. 476, 5 Boyce, 25.

<sup>80</sup> *File v. Wilmington City Ry. Co.*, 80 A. 623, 7 Pennewill, 463.

<sup>81</sup> *Freeman v. Wilmington & Phila-*

*delphia Traction Co.*, 80 A. 1001, 3 Boyce, 107.

<sup>82</sup> *Lake St. Elevated R. Co. v. Shaw*, 67 N. E. 374, 203 Ill. 39.

<sup>83</sup> *Formiller v. Detroit United Ry.*, 130 N. W. 347, 164 Mich. 653.

§ 1712(6). **Missouri**

The court instructs the jury that if you find and believe from the evidence that, at the time plaintiff attempted to board the car mentioned in the evidence, said car had started and was in motion, then plaintiff cannot recover, and your verdict must be for defendant.<sup>84</sup>

The court instructs the jury that, if they find the fact to be that plaintiff's injuries were caused by his jumping from the caboose car to avoid an apprehended collision, and that said injuries were not caused by the force of the collision between the caboose car and the switching train, as alleged in the declaration of the plaintiff, then they will find for the defendant.<sup>85</sup>

You are instructed that before, in any event, or under any circumstances, the plaintiff can recover, the jury must find, from the greater weight of all the evidence introduced before you, that Mrs. T.'s foot caught in between the wheel box and the side of the car, and, while fastened there, she fell to the ground, with her foot so fastened. If you do not find the facts this way, plaintiff has no case, and cannot recover, no matter how you may think the accident occurred, and no matter how badly Mrs. T. was hurt; and in determining this question the burden of proof is upon the plaintiff to prove those facts by the greater weight of all the evidence in the case. You should consider all the evidence introduced, both by plaintiff and the defendant; and, unless the greater weight is with the plaintiff on that proposition, your verdict should be for the defendant. This question should be fairly and impartially tried and determined alone upon the testimony offered before you.<sup>86</sup>

You are instructed that, if the plaintiff undertook to alight from defendant's car while it was moving, then defendant could not have been guilty of any negligence, as charged, and your verdict must be for defendant.<sup>87</sup>

§ 1712(7). **Nebraska**

The jury are instructed that, before the plaintiff would be entitled to recover against the defendant she must establish by preponderance of the evidence that, while she was in the act of alighting from the car, it then standing still, the car was suddenly started forward, proximately being the cause of her being thrown to the pavement. Should she establish such fact by preponderance of the

<sup>84</sup> *Northam v. United Rys. Co. of St. Louis*, 176 S. W. 227. The complaint alleged that as plaintiff was getting on the car it was started with great violence throwing him down.

<sup>85</sup> *Chitty v. St. Louis, I. M. & S. Ry. Co.*, 49 S. W. 868, 148 Mo. 64.

<sup>86</sup> *Thompson v. Metropolitan St. Ry. Co.*, 36 S. W. 625, 135 Mo. 217.

<sup>87</sup> *Jackson v. Grand Ave. Ry. Co.*, 24 S. W. 192, 118 Mo. 199.

evidence, you will find for plaintiff. But should she fail to establish such fact, to such degree, then you will find against her.<sup>88</sup>

§ 1712(8). *Texas*

You are instructed that the burden of proof is on the plaintiff to show by a preponderance of the evidence that the wreck in question was caused by one or more of the acts of negligence complained of by plaintiff in his petition, and, unless he has done so, you will return a verdict for the defendant. And even though you may believe from the evidence that the defendant was guilty of negligence in some other respect than that alleged by the plaintiff, and that such negligence caused the injuries complained of, you should find for the defendant.<sup>89</sup>

The court instructs the jury that, unless you find from the evidence that the plaintiff's wife was injured by falling while attempting to alight from said train and that such fall was caused by the negligence of the defendant's employes in charge of said train, you will find for defendant. If her injury, if she was injured, was produced by any other cause than by falling while attempting to get off said train, you will find for defendant.<sup>90</sup>

## 15. *Evidence*

### § 1713. *Presumptions and burden of proof*

§ 1713(1). *Arkansas*

You are instructed that the burden is upon the plaintiff in this case to prove all of the material allegations in her complaint, and before she can recover she must prove these by a preponderance of the evidence, that is, a greater weight of the evidence, and, unless she has done so, you must find for the defendant.<sup>91</sup>

The jury are instructed that the burden is upon the plaintiff to show by a preponderance of evidence the truth of the allegations in his complaint. The main issues for your consideration are—First, did the plaintiff receive an injury? Second, was such injury occasioned or caused by the negligence, carelessness, or improper management of the defendant? Third, did the plaintiff by his own negligence contribute to the injury? Each of these propositions you are to determine from the evidence.<sup>92</sup>

<sup>88</sup> *Flood v. Omaha C. B. St. Ry. Co.*, 152 N. W. 293, 98 Neb. 124.

<sup>89</sup> *International & G. N. Ry. Co. v. Bartek* (Civ. App.) 177 S. W. 137.

<sup>90</sup> *St. Louis Southwestern Ry. Co. of Texas v. Addis* (Civ. App.) 142 S. W. 955.

<sup>91</sup> *Huckaby v. St. Louis, I. M. & S. Ry. Co.*, 177 S. W. 923, 119 Ark. 179.

<sup>92</sup> *St. Louis & S. F. Ry. Co. v. Murray*, 18 S. W. 50, 55 Ark. 248, 16 L. R. A. 787, 29 Am. St. Rep. 32.

§ 1713(2). **Colorado**

The court instructs the jury that the burden is on the plaintiff to establish his case by a preponderance of the evidence, and, if he has done so, your verdict should be for the plaintiff; otherwise, your verdict should be for the defendant.<sup>93</sup>

§ 1713(3). **Missouri**

You are instructed that what the court says in the instructions read by plaintiff's counsel as to the burden being on defendant does not mean that you are confined to the testimony offered by defendant in determining whether the burden has been established. You are to consider all the facts and circumstances in evidence, whether developed in the examination of plaintiff's or defendant's witnesses, and, if you find therefrom that there was no negligence of the character submitted, then the burden has been sustained by the defendant, and it is entitled to the verdict, even though you find that plaintiff was a passenger, and was injured without fault on his part.<sup>94</sup>

§ 1714. **Burden of proof as to existence of relation of carrier and passenger**§ 1714(1). **Illinois**

The jury are instructed that the plaintiff has alleged in his declaration that at the time and place in question he was a passenger on the car of defendant. This is a material allegation of such declaration, and the burden of proof is upon the plaintiff, and he must prove, said allegation by a preponderance or greater weight of the evidence before he can recover in this case. If you believe from the evidence, under the instructions of the court, that the plaintiff has failed to so prove that at the time and place in question the plaintiff was a passenger on said car, then plaintiff cannot recover, and you should find defendant not guilty.<sup>95</sup>

§ 1714(2). **Indiana**

You are instructed that, in order to entitle the plaintiff to recover in this action, it must appear by a fair preponderance of the evidence that he was at the time of the injury, if any, a passenger on defendant's train of cars, and not a trespasser. If he was a trespasser, he cannot recover, and you should find for the defendant.<sup>96</sup>

§ 1715. **Presumptions and burden of proof as to negligence**§ 1715(1). **California**

You are instructed that contributory negligence on the part of a passenger cannot be presumed from the mere fact of an injury,

<sup>93</sup> See *Denver Co. v. Morgan*, 185 P. 339, 66 Colo. 565.

<sup>94</sup> *Feary v. Metropolitan St. Ry. Co.*, 62 S. W. 452, 162 Mo. 75.

<sup>95</sup> *Kulpinsky v. Sampsell*, 145 Ill. App. 242.

<sup>96</sup> *Pfaffenback v. Lake Shore & M. S. Ry. Co.*, 41 N. E. 530, 142 Ind. 246.

but must be proved. On the other hand, the proof of an injury to a passenger on the bus or vehicle of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care or foresight could not prevent, or by the contributory negligence of the passenger. In the answer filed by the defendant it has claimed that the injuries, if any, sustained by the plaintiff on ———, referred to in plaintiff's complaint were sustained through the negligence of the operatives of the municipal street car. I charge you that this defense is an affirmative defense, and under the law of this state the burden of proving such defense is upon the defendant; and I instruct you in this connection that if you find from the evidence that the operatives of the municipal street car were negligent, and that the operatives of the motor bus were also negligent, then your verdict must be in favor of the plaintiff and against the defendant. In this connection you are instructed that throughout the plaintiff must prove his case by a preponderance of evidence. In no case is the defendant required to offset the testimony or presumption favoring the plaintiff by a preponderance of testimony. Such burden is at all times upon the plaintiff, and the plaintiff alone. Even though the defendant in this case was acting in a negligent manner, nevertheless, if that negligence was not either the sole or a contributing cause to the accident, you should find in favor of the defendant.<sup>97</sup>

I instruct you that the law of this state requires a carrier of passengers for reward to use the utmost care and diligence for their safe carriage, and if you find from the evidence submitted in this case that the plaintiff was a passenger upon one of the defendant's cars, and that before she had a reasonable opportunity to reach a place of safety upon alighting from said car she was struck by the car from which she had alighted, then the burden is cast upon the defendant to prove that the injury was occasioned by an inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff.<sup>98</sup>

You are instructed that the carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negli-

<sup>97</sup> Learned v. Peninsula Rapid Transit Co., 193 P. 591.

<sup>98</sup> Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2.

gence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part.<sup>99</sup>

You are instructed that no presumption of negligence on the part of defendant's employes arises from the fact that the plaintiff was injured by alighting from the car of the defendant, if you find that she did so alight, voluntarily, while the car was in motion.<sup>1</sup>

The jury are instructed that in this case the plaintiff claims to have received personal injuries through the negligence of the railroad company defendant. The plaintiff assigns the defendant's negligence as the cause of his alleged injuries. The law requires that he prove such negligence. As the plaintiff, he has the affirmative of that issue. Unless the plaintiff makes this proof, and shows negligence on the part of defendant, by a preponderance of the whole evidence, he cannot recover herein, and your verdict must be for the defendant.<sup>2</sup>

**§ 1715(2). Delaware**

You are instructed that, if you believe from the evidence that the plaintiff's husband was a postal clerk, mail clerk, or route agent, lawfully upon a train operated by the defendant as alleged, and while being carried thereon was killed by reason of a collision of the train with a locomotive engine, placed upon the track of the defendant at the direction of its agents and servants, or permitted by its agents and servants to remain upon its track in the way of the train, and while he was himself using all reasonable care and caution to avoid injury, as charged in the declaration, then these facts make for the plaintiff a prima facie case of neglect against the defendant, and the burden is then on the defendant to prove that it, by its agents and servants, did use all reasonable and practicable care and precaution to avoid the collision and prevent the injury.<sup>3</sup>

You are instructed that this action is based upon the negligence of the defendant company, and to enable the plaintiff to recover at all she must show to your satisfaction by a preponderance of the evidence that the negligence which caused the accident was the particular negligence described in the declaration in her case—that is, from the moving of the car forward or backward while she was in the act of alighting from the car—and that the negligence which caused the accident, as she alleges, was the negligence of the defendant company. This is necessarily so, because there arises no presumption of liability on the part of the defendant from

<sup>99</sup> *Cody v. Market St. Ry. Co.*, 82 P. 666, 148 Cal. 90.

<sup>1</sup> *Joyce v. Los Angeles Ry. Co.*, 82 P. 204, 147 Cal. 274.

<sup>2</sup> *Patterson v. San Francisco & S. M. Electric Ry. Co.*, 81 P. 531, 147 Cal. 178.

<sup>3</sup> *Wood v. Philadelphia, B. & W. R. Co.*, 76 A. 613, 1 Boyce, 336.



the mere fact that the plaintiff was injured or that the accident happened. She cannot recover unless it has been proved to your satisfaction, by a preponderance of the evidence, that the injury to the plaintiff was caused by the negligence of the defendant company; and such negligence is not to be presumed, but must be proved, and the burden of that proof is upon the plaintiff.<sup>4</sup>

**§ 1715(3). Iowa**

You are instructed that, while the burden of proof is upon the plaintiff to show the negligence of defendant, yet, if you find from the evidence introduced upon the trial that plaintiff was not guilty of contributory negligence, as explained in these instructions, and that plaintiff was thrown from the car substantially as claimed by him, and that such accident would not have happened under ordinary circumstances, had the defendant, its officers and employes, exercised the utmost care and foresight, as explained in paragraph ——— hereof, a presumption of negligence against the defendant is raised, and the burden is then cast on the defendant to rebut this presumption. To this end, the defendant must prove that, as to the matter which the circumstances indicate were the cause of said accident, its officers and employes exercised that high degree of care which the law requires of them.<sup>5</sup>

**§ 1715(4). Kansas**

You are instructed that the burden of proof is upon plaintiff to show, by a preponderance of evidence, that the injuries he received and for which he asks damages, were caused by the negligent acts or omissions of the defendant or its employes in the manner described in his petition in this case.<sup>6</sup>

**§ 1715(5). Missouri**

The court instructs the jury that the burden of proof is on the plaintiff to prove to your satisfaction by the preponderance of the credible testimony that defendant was guilty of negligence as submitted to you in these instructions, and this burden of proof continues and abides with the plaintiff throughout the entire trial; and, unless you believe and find from the evidence in this case that the plaintiff has proven by a preponderance of the credible testimony to your reasonable satisfaction that the defendant was guilty of negligence as defined in these instructions, and that such negligence was the proximate cause of the injuries complained of, then

<sup>4</sup> *Reiss v. Wilmington City Ry. Co.* (Super.) 67 A. 153.

<sup>5</sup> *Fitch v. Mason City & C. L. Traction Co.*, 100 N. W. 618, 124 Iowa, 665.

<sup>6</sup> *O'Keefe v. Kansas City Western Ry. Co.*, 144 P. 214, 93 Kan. 262. In this case there was no accident to the car on which plaintiff was riding.



your verdict must be for the defendant. By "preponderance of the evidence" is meant the greater weight of credible testimony.<sup>7</sup>

The court instructs the jury that the charge of negligence made against the defendant in the plaintiff's petition is that the motor-man of defendant's car slowed down the said car to a stopping point, inducing plaintiff to believe that said car had stopped to receive him as a passenger, and that while plaintiff was in the act of boarding said car the same was suddenly, and in violation of the ordinances of the city of ———, started, throwing plaintiff to the ground and injuring him. With respect to the foregoing charge of negligence you are instructed that the burden is upon the plaintiff throughout the whole case of establishing to your satisfaction, by the preponderance or greater weight of testimony, that the defendant's car did slow down, either for the purpose of receiving plaintiff as a passenger, or to so slow a speed as to cause the plaintiff to believe that it was slowing down for the purpose of receiving him as a passenger, and that the same was so suddenly started while plaintiff was in the act of boarding the same as to cause him to be injured; and unless the plaintiff has so proven he is not entitled to recover, and your verdict must be for defendant.<sup>8</sup>

You are instructed that the actionable negligence charged in plaintiff's petition is that the conductor of defendant's car, upon which plaintiff was a passenger, caused the car to stop on the south side of ——— avenue, on ———, for the purpose of permitting plaintiff to alight therefrom, and that while plaintiff was in the act of alighting the defendant carelessly and negligently suddenly started said car, whereby plaintiff was thrown to the street and injured. The burden of proof as to the act of negligence charged as above rests upon the plaintiff throughout the case, and, before you are entitled to return a verdict in favor of plaintiff, you must find by the preponderance or greater weight of the evidence that the plaintiff's injuries were caused by the act of negligence on the part of defendant, as above stated, and unless you so find your verdict must be for the defendant.<sup>9</sup>

You are instructed that defendant is not required to prove what caused the train to get beyond the control of the trainmen; and even if the jury cannot find from the evidence the exact cause, or if such cause is unknown and has not been shown, still if, after considering all the testimony in the case, not only that offered by defendant, but also that offered by plaintiff, you find that there

<sup>7</sup> Gardner v. Metropolitan St. Ry. Co., 122 S. W. 1068, 223 Mo. 389. 18 Ann. Cas. 1166. In this case the complaint charged a specific negligent act.

<sup>8</sup> Maguire v. St. Louis Transit Co., 78 S. W. 838, 103 Mo. App. 459.

<sup>9</sup> Peck v. St. Louis Transit Co., 77 S. W. 736, 178 Mo. 617.

was not any negligence on the part of defendant of the character submitted to your consideration, then the defendant must have the verdict, even though plaintiff was its passenger, and received his injury without any fault upon his part.<sup>10</sup>

§ 1715(6). Texas

You are instructed that the burden is upon the plaintiff to make out her case by a preponderance of the evidence, and, if she has not done so, you will find for the defendant. If you believe from the evidence that defendant's employes in charge of said train exercised that high degree of care for the personal safety of plaintiff in alighting from said train which very cautious and prudent persons would have exercised under the same circumstances, then you will find that they were not guilty of negligence; and, if you so find, you will return a verdict in favor of defendant.<sup>11</sup>

§ 1715(7). Utah

You are instructed that no presumption of negligence arises from the fact alone that there was a thin layer of ice on the threshold or sill of defendant's car, but it is incumbent upon the plaintiff to prove by a preponderance of the evidence that the defendant knew, or in the exercise of reasonable care could have known, of its presence there.<sup>12</sup>

§ 1715(8). Virginia

You are instructed that the burden of proof is on the plaintiff to show by a preponderance of affirmative testimony that the act of the baggagemaster was an efficient cause in bringing about the injury to plaintiff, and also to show that such act was negligence; that is, that the said agent of the company failed to exercise the precautions, which a man of ordinary prudence would have exercised under like circumstances and conditions. If the plaintiff has not established this by a preponderance of affirmative testimony, you must find a verdict for the defendant.<sup>13</sup>

§ 1716. Rule of *res ipsa loquitur*

Inference from breaking down of stage coach, see, ante, § 1535(2).

§ 1716(1). Arkansas

The court instructs the jury that, if they find from a preponderance of the evidence that the plaintiff was injured, and that such injury was caused by the running of defendant's train, then you

<sup>10</sup> Feary v. Metropolitan St. Ry. Co., 62 S. W. 452, 162 Mo. 75.

<sup>11</sup> Missouri, K. & T. Ry. Co. of Texas v. White, 55 S. W. 593, 22 Tex. Civ. App. 424.

<sup>12</sup> Connell v. Oregon Short Line R. Co., 168 P. 337, 51 Utah, 26.

<sup>13</sup> Walters v. Norfolk & W. Ry. Co., 94 S. E. 182, 122 Va. 149.

are instructed that this is prima facie evidence of negligence upon the part of the defendant.<sup>14</sup>

**§ 1716(2). California**

You are instructed that, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in its business there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on its part.<sup>15</sup>

You are instructed that contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by contributory negligence of the plaintiff, unless the proof on the part of the plaintiff tends to show that the injury was occasioned by the contributory negligence of the passenger or by inevitable casualty, or by some other cause which human care and foresight could not prevent.<sup>16</sup>

You are instructed that the burden of proof is upon the plaintiff to show that the injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in its business. If this be shown by a fair preponderance of all the evidence, then there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence upon his part.<sup>17</sup>

**§ 1716(3). Delaware**

We want to caution you that because an accident happens to a passenger alighting from a street car, no presumption arises that the company operating the car is liable for the injury sustained. In order to make the company liable it must be shown by sworn testimony that the company was derelict in its duty or negligent in its management.<sup>18</sup>

**§ 1716(4). District of Columbia**

The jury are instructed as a matter of law that in the case at bar no presumption of negligence on the part of the defendant arises from the happening to the plaintiff of the accident in ques-

<sup>14</sup> *Kansas City Southern Ry. Co. v. Davis*, 103 S. W. 603, 83 Ark. 217.

<sup>15</sup> *Froeming v. Stockton Electric R. Co.*, 153 P. 712, 171 Cal. 401, Ann. Cas. 1918B, 408.

<sup>16</sup> *Kline v. Santa Barbara Consol. Ry. Co.*, 90 P. 125, 150 Cal. 741.

<sup>17</sup> *French v. Pacific Electric Ry. Co.*, 82 P. 395, 1 Cal. App. 401.

<sup>18</sup> *Girardo v. Wilmington & Philadelphia Traction Co.*, 90 A. 476, 5 Boyce, 25.

tion; the burden of proof is on the plaintiff to prove such negligence by a preponderance of the evidence.\*

**§ 1716(5). Florida**

The court instructs the jury that, if you find from the evidence that the plaintiff was damaged, as alleged in the declaration, by the movement of the car of the defendant, then the defendant is liable for such damage, unless the defendant shall make it appear from the evidence that its agents have exercised all ordinary and reasonable care and diligence; the presumption being against the defendant.<sup>19</sup>

**§ 1716(6). Georgia**

You are instructed that the effect of the plea is to put the burden of proof on the plaintiff, the party bringing the suit, to show to your satisfaction, by a legal preponderance of the evidence in the case, that the allegations he makes are true. In this connection you are instructed that, if you believe the plaintiff was a passenger of the defendant, then the law would raise a presumption against the defendant company that it was negligent, and the burden would be on the defendant to rebut that presumption by showing it was not negligent, or that the plaintiff, by the exercise of ordinary care on his part, could have avoided the consequences to himself of the defendant's negligence, if that appears.<sup>20</sup>

You are instructed that the burden is on the plaintiff to establish the truth of the allegations in the declaration by a preponderance of the testimony; that is to say, in a case of this character, it is incumbent upon the plaintiff to establish the fact that he was a passenger upon the car and was injured, and when he has established that by a preponderance of the evidence, or made it appear by any admissions in the pleadings satisfactory to you, as to the fact that he was a passenger and was injured, or established it by evidence to a reasonable and moral certainty, then the law shifts the burden, and it is incumbent upon the defendant to establish, by a preponderance of the evidence, one of two facts—either that it was without negligence, or that the plaintiff could have avoided the consequence of the negligence by the exercise of ordinary care.<sup>21</sup>

**§ 1716(7). Kentucky**

The court instructs the jury that if, while the plaintiff was being carried as a passenger on defendant's train, an employé of defend-

\* *Sullivan v. Capital Traction Co.*, 34 App. D. C. 358. In this case the causes of the accident were entirely within the knowledge of the plaintiff and they affirmatively appeared in his declaration.

<sup>19</sup> *Louisville & N. R. Co. v. Croxton*, 58 So. 369, 63 Fla. 223.

<sup>20</sup> *Freeman v. Collins Park & B. Ry. Co.*, 43 S. E. 410, 117 Ga. 78.

<sup>21</sup> *Macon Consol. St. R. Co. v. Barnes*, 38 S. E. 756, 113 Ga. 212.

ant, while engaged in performing his train duties, struck plaintiff on the elbow with a footboard, thereby inflicting any injury on him, they should find for him in damages.<sup>22</sup>

§ 1716(8). Missouri

You are instructed that you cannot find the issues in this case for the plaintiff merely because he was injured, if you believe from the evidence he was injured; but, before the plaintiff is entitled to recover, he must prove to your satisfaction, by the preponderance or greater weight of the evidence, that his injury, if any, was caused by the negligence of the defendants in failing to maintain said incline or wagon approach to the road crossing over defendants' track in a reasonably safe condition; and, if he has not so shown, then your verdict must be for the defendants.<sup>23</sup>

The court hereby instructs you that the ground of plaintiffs' suit against the defendant is an alleged negligence on defendant's part, and that such negligence cannot be presumed, but must be established by plaintiffs to your satisfaction by proof. Therefore, although you find that ——— was injured while endeavoring to get on one of defendant's railway trains, yet that fact alone does not entitle plaintiffs to recover in the present suit, but, before plaintiffs can recover any damages in this suit, they are bound to prove to your satisfaction that the injury complained of was occasioned by the negligence of defendant's employés; and, unless plaintiffs have so proven, your verdict should be for the defendant.<sup>24</sup>

The jury are instructed that, if they believe from the evidence that on ——— the defendants were engaged in the business of transporting passengers from the railroad depot in ——— to any and all points of said city, and that on said day the plaintiff was received by them, or their agents at said depot, to be carried on one of the hacks of defendants, and that while being so transported on said hack plaintiff was injured by reason of the breaking of an axle on said hack, then the burden of proof rests upon defendants to prove to the satisfaction of the jury that said breakdown was caused by inevitable accident, and not from any defect, imperfection in the hack, overloading, or careless driving, and that by the exercise of the utmost human foresight, knowledge, skill, and care such injury could not have been prevented by defendants, their agents or servants, and unless the jury so believe they will find for the plaintiff.<sup>25</sup>

<sup>22</sup> Louisville & N. R. Co. v. Steenberger, 69 S. W. 1094.

<sup>23</sup> Gurtman v. Lusk, 208 S. W. 61.

<sup>24</sup> Sly v. Union Depot Ry. Co., 36 S. W. 235, 134 Mo. 681.

<sup>25</sup> Lemon v. Chanslor, 68 Mo. 340. 30 Am. Rep. 799.

§ 1716(9). *Nebraska*

You are instructed that, if you find from the evidence that the plaintiff, while a passenger on one of defendant's trains, was injured through an accident not contributed to by the gross negligence of the plaintiff, then, in the absence of any further showing, defendant is liable for the damages sustained by the plaintiff because of such injuries. By "gross negligence," as used in the foregoing instruction, is meant such negligence on the part of a passenger as would amount to a disregard of his or her own safety when in the presence of danger, and which would amount to willful indifference to the injury liable to follow or result from such carelessness or negligence.<sup>26</sup>

§ 1716(10). *South Carolina*

You are instructed that, where a passenger is injured on a railroad by the railroad company, there is from that fact-alone prima facie evidence of neglect in the management of the road, which evidence defendants are bound to rebut, or they would be liable in damages for the injury.<sup>27</sup>

You are instructed that when a passenger is injured on a railroad, there is from that fact alone prima facie evidence of neglect in the management of the road, which evidence the railroad company is bound to rebut.<sup>28</sup>

§ 1716(11). *Virginia*

The court instructs the jury that if they believe the plaintiff's intestate was a passenger on the elevator, that his injury was caused by apparatus wholly under the control of the defendant and furnished and applied by it, or by some defect in machinery or appliances, and the accident was of such a character as does not ordinarily occur if due care is used on the part of the owner of the elevator or its employes in charge thereof, then there is a prima facie presumption of law that his death was caused by the negligence of the defendant, which presumption holds until the defendant has introduced evidence satisfactory to the jury tending to show that the defendant and its employé operating the elevator used the highest degree of care known to human prudence and foresight in the construction, repair and maintenance of its elevator and appliances, and in the running and management of said elevator at the time of the injury.<sup>29</sup>

The court instructs the jury that, in order for the plaintiff to re-

<sup>26</sup> *Missouri Pac. Ry. Co. v. Baier*, 55 N. W. 913, 37 Neb. 235.

<sup>27</sup> *Doolittle v. Southern Ry. Co.*, 40 S. E. 133, 62 S. C. 130.

<sup>28</sup> *Steele v. Southern Ry. Co.*, 33 S. E. 509, 55 S. C. 389, 74 Am. St. Rep. 756.

<sup>29</sup> *Murphy's Hotel, Inc., v. Cuddy's Adm'r*, 97 S. E. 794, 124 Va. 207.



cover, he must show that the personal injury received was the result of some act of negligence on the part of the railway company or its servants. The mere fact of an injury is not enough, without proof of negligence on the part of the defendant; and the burden of proof to establish such negligence is upon the plaintiff. But the jury should consider the whole evidence in the case on both sides in reaching a conclusion as to the fact of negligence.<sup>80</sup>

The jury are instructed that, when injury or damage happens to a passenger (on a railroad) by a collision, or by any other accident occurring on the road, the prima facie presumption is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.<sup>81</sup>

#### § 1717. Presumption from fact of collision

##### § 1717(1). Arkansas

The court instructs the jury that in this case, if you find by a preponderance of the evidence that plaintiff was really, though not technically, a passenger upon the train of the defendant, and, while such passenger, was injured without fault on his part, and when he had not assumed the risk, by reason of the car in which he was riding colliding with other cars upon defendant's track, this is prima facie proof of negligence on the part of the defendant, and would justify a recovery upon the part of the plaintiff, unless the defendant shows by a preponderance of the evidence that said injury occurred without negligence on its part.<sup>82</sup>

##### § 1717(2). California

You are instructed that a carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. If you find that ——— was a passenger on said southerly bound ——— street car, with which said easterly bound ——— street car collided on said ——— and while such passenger, said easterly bound ——— street car collided with said southerly bound ——— street car, upon which he was a passenger, then and there, without fault on his part, inflicting injuries upon him from which he subsequently died, then the presumption of negligence arises,

<sup>80</sup> Reynolds v. Richmond & M. Ry. Co., 23 S. E. 770, 92 Va. 400.

<sup>81</sup> Shenandoah Val. R. Co. v. Moose, 8 S. E. 796, 83 Va. 827.

<sup>82</sup> St. Louis & S. F. R. Co. v. Coy, 168 S. W. 1106, 113 Ark. 265.



which throws upon the defendant the burden of showing that the injury was sustained without any negligence on its part, and in the absence of such evidence, your verdict must be in favor of plaintiff for such sum as under all the circumstances of the case as proven may be just.<sup>33</sup>

The jury are instructed that in this case all that is necessary for plaintiff to prove in the first instance is that she was a passenger in defendant's car, that said car came into collision with one of defendant's trains while they were being run by defendant, and that the injuries of plaintiff resulted by reason thereof. This establishes a prima facie case against the defendant. The burden of proof is then thrown upon defendant, and, if defendant has failed in this, they should find for plaintiff.<sup>34</sup>

§ 1717(3). Missouri

The court instructs the jury that, if you believe and find from the evidence that the plaintiff was a passenger upon the street car of defendant at the time she claims to have been injured, then, having received plaintiff upon board of such street car, the due obligation of the defendant to plaintiff was to use the highest degree of care practicable among prudent, skillful and experienced men in that same kind of business, to carry her safely, and a failure of the defendant (if you believe there was such a failure) to use such highest degree of care would constitute negligence on its part; and defendant would be responsible for all injuries resulting to plaintiff, if any, from such negligence, if any. And if you believe from the evidence that there was a collision between two street cars of defendant on one of which plaintiff was a passenger (if you believe she was a passenger thereon), the presumption is that it was occasioned by the negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided.<sup>35</sup>

The court instructs the jury that, if you believe from the evidence that the plaintiff was a passenger upon a train of defendant at the time she claims to have been injured, then having received plaintiff upon board of such train, the due obligation of the defend-

<sup>33</sup> *Bond v. United Railroads of San Francisco*, 140 P. 982, 24 Cal. App. 157.

<sup>34</sup> *Green v. Pacific Lumber Co.*, 62 P. 747, 130 Cal. 435.

<sup>35</sup> *Erdmann v. United Rys. Co. of St. Louis*, 155 S. W. 1081, 173 Mo.

App. 98. It was objected that this instruction should have referred to the "negligence of the agents, servants, and employees of defendant in charge of said street car," as stated in the petition, instead of merely referring to negligence of defendant.

ant to plaintiff was to use the highest degree of care practicable among prudent, skillful, and experienced men in that same kind of business, to carry her safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part, and defendant would be responsible for all injuries resulting to plaintiff, if any, from such negligence, if any. And if you believe from the evidence that there was a collision between two trains of defendant, on one of which plaintiff was a passenger (if you believe she was a passenger thereon), the presumption is that it was occasioned by some negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided.<sup>36</sup>

The jury are instructed by the court that if the jury believe from the evidence that plaintiff was a passenger lawfully on board of the defendant's street car at the time of the collision appearing in evidence, and received injuries therein, then the burden of proof is shifted upon the defendant to show to the satisfaction of the jury that said collision was caused through no negligence or carelessness of defendant's agents, and unless it is so shown the jury should find a verdict for plaintiff.<sup>37</sup>

**§ 1717(4). Washington**

You are instructed that, if you should find that the motorman of either car failed to exercise the judgment, care, caution, and skill which was necessary under all the existing circumstances, and that they, or either of them, failed to exercise the care, judgment, caution, and skill usually and customarily attendant in like conditions and circumstances, then the defendant has failed to overcome the imputation of negligence in operating said cars arising in case of such collision, and you should find for the plaintiff, and give her such damages as you find she has sustained, if all the other elements of her cause of action have been proved to your satisfaction.<sup>38</sup>

**§ 1718. Presumption from derailment**

**§ 1718(1). Alabama**

The jury are instructed that, if you are reasonably satisfied from the evidence that the plaintiff in some point in ——— received and paid for a ticket as a passenger on the defendant's railroad to

<sup>36</sup> Price v. Metropolitan St. Ry. Co., 119 S. W. 932, 220 Mo. 435, 132 Am. St. Rep. 588. No specific negligence was pleaded.

<sup>37</sup> Robinson v. St. Louis & S. Ry. Co., 77 S. W. 493, 103 Mo. App. 110.

<sup>38</sup> Connell v. Seattle, R. & S. Ry. Co., 92 P. 377, 47 Wash. 510.

———, and was such passenger on defendant's train, and while on the route to ——— the train of cars, or some of the cars thereof, ran off the track, and plaintiff was injured thereby, then the plaintiff makes out a prima facie case for recovery, and he is entitled to recover, unless the defendant reasonably overcomes this prima facie right of recovery by the evidence in the case.<sup>39</sup>

**§ 1718(2). Arkansas**

You are instructed that, if you believe from the evidence that plaintiff was injured while a passenger on the train of defendant, and that his injuries were caused by the derailment of cars in the train resulting from the defective condition of the track, or defective equipments, or negligent operation or handling of the train, he would be entitled to recover in this action such sum as will compensate him for loss of time, expenses, and for the pain and suffering sustained by the plaintiff, as shown by the proof; unless you further find that plaintiff was guilty of contributory negligence.<sup>40</sup>

**§ 1718(3). California**

You are instructed that the plaintiff was a passenger of the defendant, and that the car in which he was riding was derailed or overturned without his fault, is all that the plaintiff need establish in the first instance in order to recover for such injuries as may have been proximately caused him thereby. When the plaintiff has done this, the legal presumption arises that the derailment or overturning of the car occurred through the negligence of the defendant, and the burden of proving that there has been no negligence is cast upon the defendant.<sup>41</sup>

**§ 1718(4). Delaware**

We may say to you, gentlemen, that there arises a presumption of negligence in this case from the fact that the car in which the plaintiff was a passenger left, or ran off, the tracks of the defendant's railway; and if you are satisfied from the testimony that the injuries of which the plaintiff complains were caused thereby, and that such presumption has not been rebutted, the defendant would be liable for such damages as you believe would reasonably compensate him, for his injuries resulting from the accident.<sup>42</sup>

**§ 1718(5). Indiana**

The jury are instructed that, if you find from the evidence that the plaintiff's decedent, ———, was a postal agent in charge of the United States mails, being carried by the defendant on its

<sup>39</sup> *Montgomery & E. Ry. Co. v. Mallette*, 9 So. 363, 92 Ala. 209.

<sup>40</sup> *Arkansas Midland R. Co. v. Rambo*, 117 S. W. 784, 90 Ark. 108.

<sup>41</sup> *Bonneau v. North Shore R. Co.*, 93 P. 106, 152 Cal. 406, 125 Am. St. Rep. 68.

<sup>42</sup> *Braunstein v. People's Ry. Co.*, 78 A. 609, 2 Boyce, 55.

railroad, and that the car in which said ——— and said mail were being carried ran off the railway track, and thereby killed said ———, without any fault on his part, such facts would make a prima facie case of negligence, and would entitle the plaintiff to a verdict, unless you find that the defendant, and those from whom it procured its cars, had used due care in constructing its cars, and had from time to time carefully inspected said cars to see if they remained in proper order, and had failed to find any defects in the same which contributed to said injury.<sup>43</sup>

§ 1718(6). Missouri

The court instructs the jury that, if ——— was a passenger upon defendant's train on the ——— day of ———, at the time it is claimed he was injured, then, having received him on board such train, the defendant was under obligation to him to use the highest degree of care practicable among prudent, skillful, and experienced men engaged in the same kind and character of business in which defendant was engaged to carry him safely, and a failure of defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part; and, if you believe from the evidence that the train upon which deceased was riding was wrecked, the presumption is that such wreck was occasioned by some negligence of the defendant, and the burden of proof is cast upon defendant to rebut this presumption of negligence and establish the fact that there was no negligence on its part, and that the injuries to ———, if any, were occasioned by inevitable accident or by some cause which such highest degree of care would not have avoided.<sup>44</sup>

The jury are instructed that, if they find and believe from the evidence that while the plaintiff was a passenger upon said car, and before she reached her destination, to wit, at or near ——— and ——— streets, said car left the track and became derailed and struck a post, and that thereby plaintiff was caused to be thrown from her seat in said car and to sustain the injuries mentioned in the evidence, she is entitled to recover, unless the defendant shows by a greater weight of evidence that it could not have prevented such derailment by the exercise of the high degree of care of a very careful railroad employé under the same or similar circumstances in maintaining its tracks in safe condition and in the management and control of said car and if the defendant has not so shown, the verdict should be for the plaintiff.<sup>45</sup>

<sup>43</sup> Ohio & M. Ry. Co. v. Volght, 23 N. E. 774, 122 Ind. 288.

<sup>44</sup> Powell v. Union Pac. R. Co., 164 S. W. 628, 255 Mo. 420.

<sup>45</sup> O'Gara v. St. Louis Transit Co., 103 S. W. 54, 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850.

The jury are instructed that if you believe, and find from the evidence, that on or about ———, defendant was operating a street railway, and engaged in the business of carrying passengers thereon for hire, that plaintiff was a passenger, having taken passage upon one of defendant's cars on said road, and that while he was so a passenger, being carried thereon upon defendant's road, the said car was thrown from or left the track upon which it was running, and suddenly stopped, at or near the intersection of ——— and ——— streets, in ———, and that plaintiff was then himself exercising ordinary care, and that he was by such stopping and derailment of the car thrown from said car and injured thereby, then the law presumes that such injury to plaintiff was caused by defendant's negligence, and such facts, if proved by a preponderance of the evidence, make out a presumptive case for the plaintiff, and you should find a verdict for the plaintiff, unless you further believe from the evidence that, notwithstanding this presumption, the defendant at the time of the happening of the injury in fact had then fully performed, or was then fully performing, its duty as defined and stated in other instructions herein towards plaintiff as such passenger, or that such injury to plaintiff, if any, did not occur because of any failure of the defendant in such respect.<sup>46</sup>

The court instructs the jury that if they believe from the evidence that the plaintiff was a postal agent in the employment of the United States, and that at the time of the accident, while in the discharge of his duties as such postal agent, he was being transported on defendant's passenger train in a postal or mail car, with the knowledge and consent of defendant, and that such train was derailed, overturned, and thrown down an embankment, and that the plaintiff thereby received injuries to his head, body, or ankle, then it devolves upon the defendant to prove to the satisfaction of the jury that such derailment and overturning of said train was not caused by any fault, negligence, or carelessness on its part in running said train, and in providing and maintaining a reasonably safe track and roadbed over which to run the same; and, unless it is so shown, the verdict should be for the plaintiff.<sup>47</sup>

The court instructs the jury that if they believe from the evidence that on or about the ——— day of ———, the defendant was engaged in the business of transporting passengers in the state of ———, and that on said day the plaintiff was received by it, to be carried as a passenger on one of its said cars, and that while being so transported on said car she was injured by reason of said car leaving the track and falling down an embankment of

<sup>46</sup> Logan v. Metropolitan St. Ry. Co., 82 S. W. 126, 183 Mo. 582.

<sup>47</sup> Smiley v. St. Louis & H. Ry. Co., 61 S. W. 667, 160 Mo. 629.

defendant's railroad, then the burden rests upon the defendant to prove to the satisfaction of the jury that said derailment was caused by inevitable accident, and not from any defect or imperfection in said car or the engine by which it was drawn, or the machinery by which it was operated, or in the road-bed, track, or ties of the defendant's road, which could have been prevented by the exercise of the utmost human skill, diligence, and foresight, and to prove that the injury could not have been prevented by the exercise of the utmost human skill, diligence, and foresight; and unless the jury so believe they will find for the plaintiffs. By the utmost human skill, diligence, and foresight is meant such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances.<sup>48</sup>

**§ 1719. Same—Rebuttal of presumption**

**§ 1719(1). Alabama**

The jury are instructed that, in order to avoid the liability growing out of a prima facie case made out by plaintiff, the defendant must reasonably satisfy the jury that it exercised that degree of care which the law requires of it in order to avoid and prevent the happening of accidents.<sup>49</sup>

**§ 1719(2). Arkansas**

You are instructed that, if you find that, although the car was derailed, yet the preponderance of the evidence shows that at the time and place of the derailment both car and the track were in good order and condition, and without defects or imperfections, and the car was not being operated in a negligent manner, then the presumption of negligence against the defendant which arises from the derailment of the car would be overcome, and it would be your duty to find for the defendant. It does not devolve upon the defendant to show the cause of the derailment, or to explain it, further than to show that it was not guilty of negligence which caused the derailment, and that it exercised the highest degree of care for its passengers consistent with the practical conduct of its business.<sup>50</sup>

**§ 1719(3). California**

The court instructs the jury that the fact that the train did so overturn is all that plaintiff need establish in order to recover for such injuries as he may have sustained, unless his want of ordinary

<sup>48</sup> *Furnish v. Missouri Pac. Ry. Co.*, 13 S. W. 1044, 102 Mo. 438, 22 Am. St. Rep. 781. In this case the court suggests that nicety of expression would lead to the substitution

of "prima facie evidence" for "burden of proof."

<sup>49</sup> *Montgomery & E. Ry. Co. v. Mallette*, 9 So. 363, 92 Ala. 209.

<sup>50</sup> *Sloan v. Little Rock Ry. & Electric Co.*, 117 S. W. 551, 89 Ark. 574.



care contributed to such overturning or to his injury. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty or of some cause which human care and foresight could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless, except upon the most satisfactory proofs. In doing this the defendant must necessarily explain how the overturning occurred, and, if it fails to do this, the presumption of negligence remains.<sup>51</sup>

**§ 1719(4). Delaware**

You are instructed that, while the negligence of the defendant is presumed from the fact that the car ran off the tracks, such presumption may be rebutted by proof that there was no negligence on the part of the defendant that caused the accident. It is for you to say from the evidence whether such presumption of negligence has been rebutted or not. If you believe it is shown by the evidence that the running of the car from the tracks was not caused in any way, or to any extent, by negligence, or want of care, on the part of the defendant, then the presumption of negligence would be rebutted. In other words, if you are satisfied that the defendant used due care and diligence, under all the circumstances, in the making and maintenance of its road and tracks, in the maintenance, equipment and operation of its cars, and in every other matter or thing that it was reasonably necessary for it to do for the safety of the passengers, the defendant would not be liable and the plaintiff cannot recover.<sup>52</sup>

**§ 1719(5). Virginia**

The court instructs the jury that, in considering the question of negligence in this case, if they believe from the evidence in the case that the plaintiff was a passenger on the defendant's train and received the injuries complained of in the wreck of said train, then at the beginning of the trial, and before any evidence was introduced upon the subject of negligence, there was a presumption of the law in favor of the plaintiff that the accident was caused by the negligence of the defendant; but there has been evidence introduced on both sides in the trial of this case, and, if the jury believe from the whole evidence that it exercised the highest degree of care that prudence and foresight would show to it was necessary in the selection, repair, and use of its machinery and cars, and in the construction and repair of the track where the derailment of said train occurred, and in the running and management of said

<sup>51</sup> *Bonneau v. North Shore R. Co.*,  
93 P. 106, 152 Cal. 406, 125 Am. St.  
Rep. 68.

<sup>52</sup> *Braunstein v. People's Ry. Co.*,  
78 A. 609, 2 Boyce, 55.



train at the time of the accident, the jury shall find for the defendant.<sup>53</sup>

**§ 1720. Presumption from overturning of automobile**

The court instructs the jury that the uncontradicted evidence shows that the plaintiff was a passenger for hire on an automobile operated by an employé of the defendant, and that while ascending a hill the automobile suddenly went backward some distance down the hill and turned on its side, thereby injuring the plaintiff. These circumstances raise the presumption that the accident occurred through negligence on the part of the defendant, and the burden is thereby cast upon the defendant to show the absence of such negligence on the part of the defendant and its driver, or that such negligence did not proximately cause the accident. Your verdict, therefore, should be for the plaintiff, unless you find from the evidence that the defendant and its driver were not negligent, or, if they were negligent, that their negligence did not proximately cause the accident, in which event your verdict should be for the defendant.<sup>54</sup>

**§ 1721. Presumption from sudden stops or jerks or jars**

**§ 1721(1). California**

You are instructed that contributory negligence on the part of the plaintiff cannot be presumed from the mere fact of injury but must be proved. On the other hand, proof of the injury, coupled with proof that it proceeded from a sudden, unusual or violent jerking, or swinging, or swaying of the car, while the plaintiff was preparing to alight, casts upon the defendant, the burden of proving that the injury, was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff.<sup>55</sup>

**§ 1721(2). Indiana**

You are instructed that, while the plaintiff here has the burden of proving the negligence charged, and all other material facts which constitute the cause of action alleged in her complaint, yet, if she has proven by a fair preponderance of the evidence that she was a passenger, that she had paid her fare and was admitted as a passenger on defendant's train, and that she was jerked or thrown therefrom and injured as charged in her complaint, without any fault on her part, then I instruct you that such facts would raise a presumption of negligence on the part of the defendant railroad

<sup>53</sup> *Norfolk-Southern R. Co. v. Tomlinson*, 81 S. E. 89, 116 Va. 153.

<sup>54</sup> *Seeing Denver Co. v. Morgan*, 185 P. 339, 66 Colo. 565.

<sup>55</sup> *Rystinki v. Central California Traction Co.*, 165 P. 952, 175 Cal. 336.

company, and would place upon said defendant the burden of proving, in order to rebut the presumption of negligence, that the injury could not have been avoided by the exercise of the highest practical care and diligence, and in the absence of such proof on the part of said defendant, such presumption of negligence would prevail.<sup>56</sup>

§ 1721(3). **Missouri**

You are instructed that if you find that plaintiff was a passenger upon defendant's car, and said car was permitted to come "to an unusually abrupt, violent, and unexpected stop and the plaintiff was injured thereby, then it is presumed, in absence of evidence to the contrary, that said stop was caused or permitted through the negligence of the defendant, and it then devolves upon the defendant to show by a fair preponderance of the evidence that said stop was not caused or permitted through its negligence."<sup>57</sup>

The court instructs the jury that, if they believe from the evidence that, at the time of the event in controversy in this action, the defendant was engaged in the business of operating a street railroad for the transportation of passengers in the city of ———, that at said time the plaintiff was received on one of its cars as a passenger to be transported thereon, and that while in said car for said purpose he was injured by a sudden and violent starting of the car, then the burden of proof rests upon the defendant to prove to the satisfaction of the jury that said injury was caused by something not under the control of defendant, and not from the use of unsuitable or skittish horses, or careless or unskillful driving or management of said car, and that by the exercise of the utmost human foresight, knowledge, skill, and care such injury could not have been prevented by defendant, its agents or servants, and, unless the jury so believe, they will find for the plaintiff.<sup>58</sup>

The court instructs the jury that, if they believe from the evidence that the plaintiff was a passenger on one of defendant's cars, and, while exercising reasonable care and diligence with respect to his own safety, the car started with a sudden and violent jerk, causing the injury now being inquired into, then the burden is thrown upon the defendant to show to the satisfaction of the jury that the horses hitched to the car were suitable for the service in question, or that the accident was not due to the horses, and that the servant of defendant managing the car exercised the utmost care, skill, and foresight in the management of the same, or that

<sup>56</sup> *Indianapolis Southern R. Co. v. Emmerson*, 98 N. E. 895, 52 Ind. App. 403.

<sup>57</sup> *Briscoe v. Metropolitan St. Ry. Co.*, 120 S. W. 1162, 222 Mo. 104.

<sup>58</sup> *Dougherty v. Missouri R. Co.*, 8 S. W. 900, 97 Mo. 647.

the accident occurred by reason of some cause not under the control of defendant, or its servants and employes, and, unless the defendant has so satisfied the jury, their verdict should be for the plaintiff.<sup>59</sup>

§ 1721(4). Texas

You are instructed that the mere jarring and jolting of a train upon which a person is a passenger is not enough to warrant a finding against the railway company operating such train. And before you find for the plaintiff in this suit, although you may believe there was jarring and jolting of the train upon which plaintiff was a passenger, you must believe that such jarring and jolting caused the injury to plaintiff complained of in plaintiff's petition, and, unless you so believe, you will find for the defendant.<sup>60</sup>

§ 1722. Presumption from explosion on car or locomotive

§ 1722(1). California

I instruct you, as matter of law, that any presumption of defective condition, arising from any flashing, smoking, or report of any machinery or appliances of defendant in this case, need not be overcome by the railroad company by any preponderance of the evidence. If the railroad company introduces sufficient evidence simply to balance such a presumption, without overcoming it by a preponderance of evidence, the presumption is overcome.<sup>61</sup>

The jury are instructed that, if you believe from the evidence that an explosion of defendants' boiler took place at their depot on the ——— day of ———, while the said plaintiff was standing on the platform of defendants, in the depot where passengers usually went in getting on and off the cars, and that the plaintiff, while in that position, was then intending to take passage on said cars, and about to step into the baggage car, where he had often and usually ridden, that there was no regulation of defendants against his going in the baggage car, and the plaintiff, while in this position, was, without his fault, injured by an explosion of defendants' boiler, then the plaintiff has made out a prima facie case, and is entitled to recover, unless the defendants have shown that the explosion of the boiler was the result of inevitable casualty, or from some cause which attentive care could not prevent.<sup>62</sup>

<sup>59</sup> Dougherty v. Missouri R. Co., 8 S. W. 900, 97 Mo. 647.

<sup>60</sup> Runnels v. Houston, E. & W. T. Ry. Co. (Civ. App.) 50 S. W. 172.

<sup>61</sup> Patterson v. San Francisco & S. M. Electric Ry. Co., 81 P. 531, 147 Cal. 178.

<sup>62</sup> Yeomans v. Contra Costa Steam Nav. Co., 44 Cal. 71.

## § 1722(2). Illinois

The court instructs the jury that if you believe and find from the evidence that the plaintiff was a passenger on one of defendant's cars, and while such passenger, and while she was in the exercise of ordinary care for her own safety, an explosion occurred on said car, by reason of which a panic was caused among the passengers in said car, in consequence of which the plaintiff, without fault on her part, was pushed from said car and thereby injured, then the plaintiff has made out a prima facie case of negligence against the defendant, and this places upon the defendant the burden of rebutting that presumption by proving that the explosion could not have been prevented by all that human care, vigilance, and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road.<sup>63</sup>

## § 1723. Burden of showing contributory negligence or lack of it

## § 1723(1). United States

The jury are instructed that the burden of proving contributory negligence rests on the defendant, and it will not avail the defendant, unless it has been established by a preponderance of the evidence.<sup>64</sup>

## § 1723(2). Arkansas

The court instructs the jury that the burden of proof of contributory negligence is upon defendant, who must establish the same by a preponderance of the evidence, unless the same sufficiently appears from proof on part of the plaintiff.<sup>65</sup>

## § 1723(3). California

You are instructed that contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved, and the burden of proving contributory negligence on the part of the injured person is cast upon the defendant.<sup>66</sup>

You are instructed that, to entitle plaintiff to recover in this case, it is sufficient to show that ——— was a passenger on said southerly bound ——— street car at the time of the collision, that the collision occurred, and that said ——— was killed as a result of injuries received in said collision. The law does not impose upon the plaintiff the duty of showing that ——— was free from fault, or did not contribute by his own negligence to the injuries which resulted in his death.<sup>67</sup>

<sup>63</sup> Chicago Union Traction Co. v. Newmiller, 74 N. E. 410, 215 Ill. 383.

<sup>64</sup> Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898.

<sup>65</sup> St. Louis & S. F. R. Co. v. Grider, 161 S. W. 1032, 110 Ark. 437.

<sup>66</sup> Froeming v. Stockton Electric R. Co., 153 P. 712, 171 Cal. 401, Ann. Cas. 1918B, 408.

<sup>67</sup> Bond v. United Railroads of San Francisco, 140 P. 982, 24 Cal. App. 157.

§ 1723(4). **Colorado**

You are instructed, as to the contributory negligence alleged by the defendant against the plaintiff, the like burden of proof is upon the defendant, and it must show, by a preponderance or greater weight of the evidence, affirmatively unless it appears from the testimony of the plaintiff herself or her witnesses, that the plaintiff so contributed to the injuries sustained, if any, by her own act, to entitle the defendant to a verdict at your hands, and that such contributory negligence was the direct and proximate cause of the injury.<sup>68</sup>

The jury are instructed that the presumption is that the plaintiff used ordinary care and prudence at the time of the alleged injury, and it is incumbent upon the defendant to prove that the plaintiff did not use such ordinary care and prudence, and to prove that the want of such ordinary care and prudence on the part of the plaintiff was the immediate, and not the remote, cause of the injury complained of.<sup>69</sup>

§ 1723(5). **Delaware**

You are instructed that, even if you shall be satisfied from the evidence that the defendant was guilty of negligence as charged, the plaintiff cannot recover in this action if he himself was guilty of negligence which contributed to the accident in which he was injured. Such contributory negligence of the plaintiff, however is not to be presumed, and the burden of proving it is upon the defendant unless it otherwise appears from the evidence in the case.<sup>70</sup>

§ 1723(6). **Illinois**

The jury are instructed that the law requires of a passenger upon a railroad the exercise of ordinary care and caution by him to avoid injury from the accidents to which that mode of travel exposes him, and before he can recover damages against the railroad company for an injury received while so traveling he must show, by evidence, not only negligence or improper conduct on the part of the company, or its agents or employes, but also that he himself was guilty of no want of ordinary care to avoid the injury from such negligence or improper conduct.<sup>71</sup>

§ 1723(7). **South Carolina**

I charge you that, where contributory negligence is set up, the defendant who sets up contributory negligence must satisfy

<sup>68</sup> Colorado Springs & Interurban Ry. Co. v. Allen, 135 Pac. 790, 55 Colo. 391.

<sup>69</sup> Denver Tramway Co. v. Reid, 35 P. 269, 4 Colo. App. 53.

<sup>70</sup> Fille v. Wilmington City Ry. Co., 80 A. 623, 7 Pennewill, 463.

<sup>71</sup> Illinois Central R. Co. v. Simmons, 38 Ill. 242.

the jury of that contributory negligence by the preponderance of the evidence.<sup>72</sup>

**§ 1723(8). Virginia**

You are instructed that the burden of proving the contributory negligence of the plaintiff is on the defendant, unless such contributory negligence appears from the evidence introduced on the part of the plaintiff himself, in which case the burden is on him to show that he was not guilty of contributory negligence.<sup>73</sup>

**§ 1723(9). Washington**

The jury are instructed that the burden of proof, with respect to the affirmative defense of the defendant that plaintiff was himself negligent in alighting from the car, and that such injuries as he sustained were due to that negligence contributing to his injuries, is upon the defendant to show such contributory negligence.<sup>74</sup>

**§ 1724. Presumption with respect to contributory negligence where passenger killed**

You are instructed that a common carrier of passengers is liable for injuries to the latter only in case of the carrier's negligence, and not when the passenger could have escaped the injury by the use of such care on his part as a reasonably careful man would take of himself under like circumstances. When, however, the injury to the passenger results in his death, and therefore he can give no testimony of his conduct on the occasion of the injury, the law presumes, in the absence of direct testimony or rebutting circumstances, that he exercised reasonable and ordinary care, and that if negligence, in fact, existed on his part, it must be shown by positive evidence, or from the attending circumstances of the accident.<sup>75</sup>

**§ 1725. Burden of proof as to lack of negligence of children**

You are instructed that, in this case the plaintiff is required to prove by a preponderance of the evidence that he was not a person of sufficient intelligence to understand the nature or danger of his acts or conduct before he can be excused from the consequences of such acts.<sup>76</sup>

<sup>72</sup> Williams v. Atlantic Coast Line R. Co., 83 S. E. 604, 99 S. C. 397.

<sup>73</sup> Walters v. Norfolk, etc., Ry. Co., 94 S. E. 182, 122 Va. 149.

<sup>74</sup> Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595.

<sup>75</sup> Wood v. Philadelphia, B. & W. R. Co. (Del.) 76 A. 613, 1 Boyce, 336.

<sup>76</sup> Walling v. Trinity & Brazos Valley Ry. Co., 106 S. W. 417, 48 Tex. Civ. App. 35. The petition alleged that plaintiff was a youth of tender years, being about fifteen years old.

**§ 1726. Burden of proof as to proximate cause****§ 1726(1). Virginia**

The court instructs the jury that the basis of an action of this kind is negligence, which negligence cannot be presumed from the mere fact that the plaintiff's intestate was run over by a car of the defendant. Before the plaintiff can recover in this case, he must prove by a preponderance of the evidence, not only that the defendant was negligent, but that it was negligent as charged in the declaration, and that the negligence charged was the proximate cause of the death of the plaintiff's intestate. If, after hearing all the evidence, you believe it is just as probable that the accident happened in some other manner and from some other cause as from that charged in the declaration, your verdict must be for the defendant.<sup>77</sup>

**§ 1726(2). Washington**

You are instructed that the burden is upon the plaintiff, not only to show by a fair preponderance of the evidence that he was thrown from the car, substantially as charged in his complaint, but that the injuries he claims to be suffering from, and for which he seeks to recover damages in this case, were due to his fall at the time of his getting off the car, and if he fails to satisfy your minds that the injuries of which he complains are the result of this accident, then your verdict should be for the defendant, for he can recover only for the injuries which are the proximate result of his fall from the car, if you find that he did fall and receive injuries. In the trial of this case the burden is upon the plaintiff to satisfy you, ladies and gentlemen of the jury, by a fair preponderance of all the evidence in the case, that he received the injuries of which he complains, and that such injuries were due to the negligence of the persons in charge of the car at the time, and in the manner alleged in his complaint.<sup>78</sup>

**§ 1727. Matters considered on issue of contributory negligence**

The jury are instructed that, in considering the question of negligence, it is competent for the jury, in connection with the other facts and circumstances of the case, to infer the absence of fault on the part of the deceased, from the general and known disposition of men to take care of themselves, and to keep out of the way of difficulty and danger.<sup>79</sup>

<sup>77</sup> Adamson's Adm'r v. Norfolk & P. Traction Co., 69 S. E. 1055, 111 Va. 556.

<sup>78</sup> Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595.

<sup>79</sup> Baltimore & O. R. Co. v. State, 60 Md. 449.



**§ 1728. Limiting effect of evidence**

You are instructed that, if you should find that the defendant, after ———, elevated the surface of the ground at the point where the plaintiff alleges that he alighted, you would not therefrom be authorized to find that the defendant was negligent as to the safety of the alighting place at the time of the occurrence.<sup>80</sup>

**§ 1729. Questions for jury**

The jury are instructed that the question involved herein, as alleged in the plaintiff's declaration, of negligence on the part of defendant, if any, and the exercise of reasonable care on the part of plaintiff, if any, are what are known as questions of fact, which it is the duty and province of the jury to determine under the law and the evidence in the case.<sup>81</sup>

**§ 1730. Sufficiency of evidence****§ 1730(1). Alabama**

The jury are instructed that, if the jury are reasonably satisfied from the evidence that the plaintiff was injured in the manner and form alleged in the complaint, as a proximate consequence of defendant's negligence as alleged therein, and that she was not guilty of contributory negligence, then you must find a verdict for the plaintiff.<sup>82</sup>

**§ 1730(2). Illinois**

The jury are instructed that, if you believe from the evidence that the plaintiff has proved the allegations contained in one or more counts of the declaration by a preponderance of the evidence, and if the jury believe from the evidence that the plaintiff was injured as therein alleged, and if the jury believe from the evidence that the plaintiff at the time of such injury was in the exercise of reasonable care for his own safety, and if you further believe from the evidence that such injury, if proved, was caused by or through the negligence of defendant, as alleged in such count or counts of the declaration, then plaintiff is entitled to recover such damages as you believe from the evidence will compensate him for the injuries sustained.<sup>83</sup>

**§ 1730(3). Indiana**

You are instructed that, if the burden is upon either party to show any particular fact called for in any question, such fact should be established by a fair preponderance of the evidence to warrant you in so answering the question as to show the fact established.

<sup>80</sup> *Central of Georgia Ry. Co. v. Brown*, 74 S. E. 839, 138 Ga. 107.

<sup>81</sup> *Pease v. Chicago, etc., Traction Co.*, 158 Ill. App. 446.

<sup>82</sup> *Birmingham Ry., Light & Power Co. v. Barrett*, 60 So. 262, 179 Ala. 274.

<sup>83</sup> *Pease v. Chicago, etc., Traction Co.*, 158 Ill. App. 446.

If there is no preponderance of evidence on any question—that is to say, if the evidence tending to prove the fact in question is only balanced by the evidence to the contrary—then such fact would not be proven, and your answer should be in the negative.<sup>84</sup>

**§ 1731. Same—Proximate cause of injury**

You are instructed that, if you believe from the evidence that the plaintiff, about the date alleged in plaintiff's petition, suffered an injury and miscarriage, and there is a doubt in your mind as to what caused that injury or miscarriage, before you can find for the plaintiff you should be satisfied that it has been shown by a preponderance of the evidence adduced before you that the jolting and jarring of the train (if there was any) on which plaintiff was a passenger was the direct and proximate cause of such injury, and that no other cause was, and that plaintiff received the injury as plaintiff alleges in his petition, and, unless you so believe, you will find for the defendant.<sup>85</sup>

**E. WILLFUL WRONGS TO PASSENGERS BY SERVANTS OF CARRIER**

**§ 1732. Abusive language**

**§ 1732(1). Alabama**

The court charges you, gentlemen of the jury, that there is no justification shown by the evidence in this case for the use of any abusive language by the conductor towards the plaintiff.<sup>86</sup>

**§ 1732(2). Texas**

You are instructed that, if you further believe from the evidence that such language or threats to and concerning the plaintiff caused him shame, humiliation, or distress of mind, or physical suffering and if you further believe from the evidence that such words and language, if any, used to and concerning plaintiff was of a nature reasonably calculated under the circumstances to produce shame, humiliation, and distress of mind, or physical suffering, then you will find for plaintiff.<sup>87</sup>

**§ 1733. Liability of carrier for assault on passenger**

**§ 1733(1). Alabama**

The court charges you that the assault with a pistol on plaintiff by the conductor, which the undisputed evidence in this case, if you believe it, shows was committed, cannot be justified so as to

<sup>84</sup> Indianapolis St. Ry. Co. v. Brown, 69 N. E. 407, 32 Ind. App. 130.

<sup>85</sup> Runnels v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.) 50 S. W. 172.

<sup>86</sup> Birmingham Ry., Light & Power Co. v. Coleman, 61 So. 890, 181 Ala. 478.

<sup>87</sup> Texas & P. Ry. Co. v. Keller (Civ. App.) 176 S. W. 62.

relieve defendant from liability to its passenger therefor, unless you find: First, that the conductor was free from fault in bringing on the difficulty, if there was a difficulty; second, that it appeared to the conductor reasonably, and not merely fancifully, that it was reasonably necessary to assault plaintiff in order to protect his own charges, or the person of another passenger, and that the means adopted by the conductor were in kind and degree no more than was reasonable for such protection; and the court charges the jury that the burden of proving its plea of justification is on the defendant.<sup>88</sup>

The court charges the jury that if they find from the evidence to their reasonable satisfaction that the conductor assaulted and struck plaintiff while plaintiff was still on the car, or on the steps of the car, and that thereafter the conductor followed plaintiff and assaulted and beat him, the defendant is liable in this action, if they further find that the conductor, in first assaulting plaintiff, was not doing so in response to an assault committed on him by plaintiff.<sup>89</sup>

§ 1733(2). Iowa

The jury are instructed that the defendant claims that under the rule governing the operation of its trains passengers were not allowed to ride upon the platform, and that, if the act of the conductor were simply an effort on his part to get the plaintiff inside in order to get him a seat, or in order to get him off the platform, and if in so doing he used no more force than was necessary for such purpose, then the defendant would not be liable.<sup>90</sup>

§ 1733(3). Maryland

You are instructed that, if the jury believe from the evidence that the plaintiff on the ——— day of ———, was a passenger of the defendant and on one of the approaches to its station at ———, and that said approach was in the occupancy and control of said defendant, with the intention of taking passage on one of its trains to ———, then he was entitled to protection by the defendant from insult, injury, and abuse; and if the jury find that the plaintiff, while a passenger as aforesaid, without any reasonable provocation, was assaulted and imprisoned by one of the defendant's officers, agents, or employes, in charge of its said station and approaches as aforesaid, while acting within the scope of his employment, then the plaintiff is entitled to recover.<sup>91</sup>

You are instructed that, if the jury believe from the evidence

<sup>88</sup> Birmingham Ry., Light & Power Co. v. Coleman, 61 So. 890, 181 Ala. 478.

<sup>89</sup> Alabama City, G. & A. Ry. Co. v. Sampley, 58 So. 974, 4 Ala. App. 464.

<sup>90</sup> Phelps v. Chicago, R. I. & P. Ry. Co., 143 N. W. 853, 162 Iowa, 123.

<sup>91</sup> Philadelphia, B. & W. R. Co. v. Crawford, 77 A. 278, 112 Md. 508.

that the plaintiff on the ——— day of ———, in the year ———, was on one of the approaches to the station of the defendant at ———, and that said approach was in the occupancy and under the control of the defendant, with the intention of taking passage on one of its trains, he was then a passenger of the defendant and it was bound to exercise all reasonable care to protect him from personal insult, injury, and abuse; and if they shall find that the plaintiff while he was on said approach to the defendant's station for the purpose aforesaid was without any reasonable cause assaulted by one of the defendant's officers, agents, or employes while acting within the scope of his employment, then the plaintiff is entitled to recover.<sup>92</sup>

§ 1733(4). *Mississippi*

The court instructs the jury that the railroad company in this case is not liable further and other than a private citizen would be in a like case of its agents and servants, and that the same rule would apply to a suit as between two individuals as applies in the present suit.<sup>93</sup>

§ 1733(5). *Missouri*

The court instructs the jury that the defendant owed to plaintiff while he was a passenger the duty to use the highest degree of care reasonably practicable to protect him from assault or violence, if any, and not to assault or strike him through its conductor in charge of said car; if, therefore, you believe and find from the evidence, that on the ——— day of ———, plaintiff was a passenger upon the car of the defendant in question, and that while he was on said car, or was in the act of alighting from said car, or before he had alighted therefrom in safety, as explained in another instruction, he was struck and assaulted by the conductor in charge of said car without sufficient cause therefor, as explained in the other instructions given, and thereby bodily injuries were inflicted upon him, then your verdict should be for the plaintiff.<sup>94</sup>

§ 1733(6). *Virginia*

The court instructs the jury that those in charge of a passenger train have the right to preserve order, remove disorderly passengers to such safe and convenient places as will prevent annoyance to passengers or trainmen, and even to stop the train and eject such disorderly persons therefrom; but in exercising such right those having charge of such train have only the right to employ such

<sup>92</sup> Philadelphia, B. & W. R. Co. v. Crawford, 77 A. 278, 112 Md. 508.

<sup>93</sup> Yazoo & M. V. R. Co. v. Shelby, 48 So. 403, 95 Miss. 155.

<sup>94</sup> Neuer v. Metropolitan St. Ry. Co., 127 S. W. 669, 143 Mo. App. 402.

force as may be necessary to accomplish these ends and to overcome any resistance which may be made by such disorderly passengers. They have no right to commit unnecessary violence on an offending passenger, and if they do so their principal must answer in damages.<sup>95</sup>

The court further instructs the jury that if they believe from the evidence that Brakeman ———, acting under the authority of Conductor ———, carried the plaintiff into the smoking compartment because of turbulent conduct, and that while in said smoking compartment the said brakeman violently assaulted said ——— and broke his jawbone and choked him without any further misconduct on the part of said ———, or without his doing anything which the brakeman could reasonably have construed into an effort or intent to draw a weapon or make an attack on himself, they must find for the plaintiff, and assess his damages at such figures as will compensate him for his physical and mental sufferings and physical injuries occasioned by such assault, not exceeding the amount of \$———, claimed in the declaration.<sup>96</sup>

#### § 1734. Same—Scope of employment

##### § 1734(1). Maryland

You are instructed that, if the jury find from the evidence that B. on the night of ———, was an officer, agent, or employé of the defendant company and in charge of the station, grounds, and approaches in the control and occupancy of said defendant at ———, and shall further find that the plaintiff at the time of his arrest, as testified to in this case, was on ground and approaches to said station that were in the control and occupancy of said defendant, and was a passenger of said defendant and behaving all the while in an orderly and proper manner, then it is for the jury to decide from all the facts and circumstances in the case whether or not when the plaintiff was so arrested, as testified to in this case, the said B. in making said arrest was acting as an officer, agent, or employé of the defendant, and if they shall find that said B. in making said arrest of the plaintiff was acting as an officer, agent or employé of said defendant within the scope of his employment, then the verdict of the jury shall be for the plaintiff.<sup>97</sup>

The court instructs the jury that if they find from the evidence that at the time the witness B. first undertook to arrest the plaintiff he was in the public highway, and that the actual arrest was made by said B. on the grounds in the use and occupancy of the defend-

<sup>95</sup> Norfolk & W. Ry. Co. v. Brame, 63 S. E. 1018, 109 Va. 422.

<sup>96</sup> Norfolk & W. Ry. Co. v. Brame, 63 S. E. 1018, 109 Va. 422.

<sup>97</sup> Philadelphia, B. & W. R. Co. v. Crawford, 77 A. 278, 112 Md. 508.

ant, in the course of the pursuit of the plaintiff by said B. begun on said public highway not in the course of the performance of his duties as an employé of the defendant (if the jury so find), then their verdict should be for the defendant.<sup>98</sup>

§ 1734(2). Mississippi

The court instructs the jury that they cannot find against the railroad company in this case unless they believe from the evidence that the conductor was engaged in and about the business of the railroad company and acting within the scope of his authority at the time he struck the plaintiff.<sup>99</sup>

The court instructs the jury that, in determining whether the act in question in any case was done within the scope of employment, the question to be considered is whether the act was done as a means or for the purpose of performing the work of the master, and the court instructs the jury that in such case the inquiry is whether the act in question in any case was done, so far as time is concerned, while the servant was engaged in the master's business, and as to the mode or manner of doing it, the question is not whether in doing the act he used the appliances of the master, but whether from the nature of the act itself it was actually done, or was an act done in the master's business or wholly disconnected therefrom, and the court instructs the jury that, if they believe the said servant was acting as an individual and on his own account when he struck the plaintiff, then and in that event they will find for the defendant.<sup>1</sup>

The court instructs the jury that if they believe from the evidence that the blow given the plaintiff in this case grew out of a private difficulty between the plaintiff and the conductor, and that at the time the said conductor struck the plaintiff he was acting as an individual in resenting an insulting remark made to him or in protecting himself from an attack of the said plaintiff, then and in that event they will find for the defendant.<sup>2</sup>

The court instructs the jury that if they believe from the evidence that the conductor in this case was acting for his own personal purposes, independent and separate from the duty he owed to the defendant company, then and in that event the company is not liable, and they will find for the defendant.<sup>3</sup>

<sup>98</sup> Philadelphia, B. & W. R. Co. v. Crawford, 77 A. 278, 112 Md. 508.

<sup>99</sup> Yazoo & M. V. R. Co. v. Shelby, 48 So. 403, 95 Miss. 155.

<sup>1</sup> Yazoo & M. V. R. Co. v. Shelby, 48 So. 403, 95 Miss. 155.

<sup>2</sup> Yazoo & M. V. R. Co. v. Shelby, 48 So. 403, 95 Miss. 155.

<sup>3</sup> Yazoo & M. V. R. Co. v. Shelby, 48 So. 403, 95 Miss. 155.

**§ 1735. Effect of abusive or insulting words as justifying assault on passenger**

**§ 1735(1). Alabama**

I charge you, gentlemen of the jury, that abusive language or opprobrious epithets alone never justify the commission of an assault by a conductor in charge of a train upon a passenger.<sup>4</sup>

**§ 1735(2). Virginia**

The court further instructs the jury that mere insulting words and epithets from an intoxicated passenger will not justify an assault by those in charge of a train, and will not release the carrier from liability for such assault; but insulting words and epithets which provoke an assault must be taken into consideration in mitigation of damages.<sup>5</sup>

**§ 1736. Right of employees to restrain or remove unruly or disorderly passengers**

The jury are instructed, that it is the duty of the ——— Railway Company, and of the conductors and brakemen on its passenger trains, to use every reasonable means in their power for the comfort and peace of the orderly and well-behaved passengers on such trains, and to prevent profanity and vulgarity in their presence by drunken or disorderly persons, and that in the performance of such duties they not only have the right, but it is their duty, to use all reasonable means and necessary force to remove from a car in which there are orderly, peaceable, and well-behaved passengers, and especially ladies, any passenger who is drunk and acting in a disorderly, profane, or vulgar manner.<sup>6</sup>

The court instructs the jury that if they believe from the evidence that the plaintiff was upon defendant's train in a drunken condition, that he acted in a disorderly, vulgar, and profane manner, cursed the conductor and the brakeman, and entered into a car where a lady and several well-behaved passengers were traveling, and, while in such car, engaged in cursing and profanity, or talked in a loud and boisterous manner, it was the duty of the conductor and brakeman to remove him from the car, and it was their right to use all the force reasonably necessary therefor; that if they believe the conductor and brakeman did remove him by force from the body of the car into the smoking compartment, but used no more force than was reasonably necessary, the defendant company is not liable in damages for such removal. And if they believe that after he was so removed he did anything which reason-

<sup>4</sup> Birmingham Ry., Light & Power Co. v. Mullen, 35 So. 701, 138 Ala. 614.

<sup>5</sup> Norfolk & W. Ry. Co. v. Brame, 63 S. E. 1018, 109 Va. 422.

<sup>6</sup> Norfolk & W. Ry. Co. v. Brame, 63 S. E. 1018, 109 Va. 422.



ably caused the brakeman to believe that the plaintiff then and there intended to make an attack upon him with a weapon, or with his fists, the brakeman had the right to do what seemed reasonably to be necessary to protect himself against such apparently threatened attack, whether the same was real or not, provided he believed it was real, and for any injury done the plaintiff by the brakeman in using reasonable means to defend himself the defendant is not liable, and if the jury believe that only such means were used, and believe the other matters as supposed in this instruction, they should find for the defendant.<sup>7</sup>

### § 1737. Justification of assault on theory of self-defense

#### § 1737(1). Mississippi

The court instructs the jury that the railroad employes, as well as other men, whether engaged in their duties as employes of the company or otherwise, have the same right that other citizens of the community have to resent an unprovoked insult, and to exercise the right of self-defense.<sup>8</sup>

The court instructs the jury that if they believe from the evidence that the conductor struck the plaintiff because of insulting words used to the said conductor by the said plaintiff, or to protect himself from an attack on him by the said plaintiff, then in that event the defendant is not liable to respond in damages, and they will find for the defendant.<sup>9</sup>

#### § 1737(2). Missouri

You are instructed that, if you find that the defendant's conductor in charge of the car had demanded of the plaintiff's husband that he pay his fare and that he refused so to do, and that a scuffle and fight ensued, which was brought on by the plaintiff's husband or voluntarily entered into by plaintiff's husband, and that during such scuffle or fight he was thrown, pushed, or fell from said car and was thereby injured, then this defendant is not liable for the acts of the conductor, and your verdict will be for the defendant. In order to voluntarily enter into a scuffle, one must do so for the purpose of offensive attack. One who engages in a scuffle for the purpose of defending himself cannot be said to do so voluntarily.<sup>10</sup>

The court instructs the jury that if they believe that the plaintiff assaulted the conductor, and was using a crowbar in a threaten-

<sup>7</sup> Norfolk & W. Ry. Co. v. Brame, 63 S. E. 1018, 109 Va. 422.

<sup>8</sup> Yazoo & M. V. R. Co. v. Shelby, 48 So. 403, 95 Miss. 155.

<sup>9</sup> Yazoo & M. V. R. Co. v. Shelby, 48 So. 403, 95 Miss. 155.

<sup>10</sup> Garrett v. St. Louis Transit Co., 118 S. W. 68, 219 Mo. 65, 16 Ann. Cas. 678.

ing manner, then the conductor had the right to defend himself, and to use such force as was necessary to repel such assault.<sup>11</sup>

§ 1737(3). Texas

You are instructed that, if you find from the evidence that the defendant's said brakeman did, at the time and place alleged by the plaintiff, make an assault on the person of plaintiff, but further find from the evidence that, at the time such brakeman did so, the plaintiff was making or was about to make an assault upon the said brakeman, which had not been provoked by the wrongful conduct, if any, of said brakeman, and which, viewed from the standpoint of such brakeman and no other, reasonably caused him to believe he was in danger of suffering death or bodily injury at the hands of the plaintiff, and the brakeman made the assault, if any, upon the plaintiff for the purpose of defending himself from what reasonably appeared to him to be danger of death or bodily injury at the hands of the plaintiff, and such brakeman used no more force than to him at the time appeared reasonably necessary to his defense, then and in the event you so find you will return a verdict for the defendant.<sup>12</sup>

You are instructed that, if you believe from the evidence that defendant's porter was assaulted by the plaintiff with an open knife in his hand, and that the defendant's porter, in defense of himself and his person, struck the plaintiff with his fist, and that said porter did not use any more force or resistance than was necessary to repel plaintiff's assault, if any, and you believe that, which you may find he did, was necessary to repel said assault, if any, and that a person of ordinary prudence in the exercise of the care mentioned in the court's charge would have done as did defendant's porter in repelling the said assault, if any, you will find for defendant.<sup>13</sup>

§ 1737(4). Virginia

The jury are instructed that a brakeman or conductor on a railroad train has the same right to protect himself against an assault, or an actual or threatened injury, that any other person has, and that where a brakeman or conductor injures a person in an effort to protect himself, under such circumstances that such person could not recover damages of him, the railroad company is not liable to such persons for the acts of the conductor or brakeman.<sup>14</sup>

<sup>11</sup> Ickenroth v. St. Louis Transit Co., 77 S. W. 162, 102 Mo. App. 597.

<sup>12</sup> St. Louis Southwestern Ry. Co. of Texas v. Huddleston (Civ. App.) 178 S. W. 704.

<sup>13</sup> International & G. N. R. Co. v. Washington, 117 S. W. 992, 54 Tex. Civ. App. 166.

<sup>14</sup> Norfolk & W. Ry. Co. v. Brame, 63 S. E. 1018, 109 Va. 422.

**§ 1738. Mutual agreement to fight**

The jury are instructed that, should you find from the evidence that plaintiff was assaulted by a servant of defendant, but at the time of such assault the relation of passenger and carrier, as such relation has been above explained to you, did not exist between plaintiff and defendant, the ——— Railroad Company, then in that event said defendant would be in no wise responsible for said assault, and you should find for defendant; also, if you believe from the evidence before you that, at the time assaulted, plaintiff was waiting on the station platform at ——— to have a fight with the said conductor, by mutual agreement previously entered into by him and said conductor, and that the fight between them, at the time and place where the same actually occurred, was the result of such previous mutual agreement to fight at that time and place, the defendant would not be liable, and you should so find.<sup>15</sup>

**§ 1739. Duty of employee to use no more force than necessary in resisting attack by passenger.**

The court instructs the jury that, even though you believe and find from the evidence that it was apparently necessary for the conductor to defend himself, then he was justified in using no more force and violence in so doing than he was justified in reasonably believing was necessary under the apparent circumstances, and if he did use unnecessary and excessive force and violence in so defending himself, under the circumstances, and plaintiff was thereby injured, as submitted in the other instructions, then your verdict should be for the plaintiff.<sup>16</sup>

The court instructs the jury that, even though you should believe and find from the evidence that the plaintiff used such language, as defined in the other instructions, as justified the conductor in ejecting him from the car, and the conductor did undertake to eject him from said car, then the conductor was not justified in using more force and violence, if any, than was reasonably necessary, under the circumstances apparent at the time, to accomplish such ejection.<sup>17</sup>

**§ 1740. Liability for arrest of passenger**

Liability of carrier for causing arrest of riotous passenger, see post, § 2431.

**§ 1740(1). United States**

You are instructed that, if you believe from the evidence that the persons on the train holding transportation refused to show

<sup>15</sup> *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

<sup>16</sup> *Neuer v. Metropolitan St. Ry. Co.*, 127 S. W. 669, 143 Mo. App. 402.

<sup>17</sup> *Neuer v. Metropolitan St. Ry. Co.*, 127 S. W. 669, 143 Mo. App. 402.

same, when demanded by the conductor, and that the other persons on the train did not, as promised, buy tickets at ———, and refused to show their tickets or to pay fare when demanded by the conductor, then you are instructed that from that time they became trespassers, and the defendant had the right to remove them from the train.<sup>18</sup>

§ 1740(2). *Kentucky*

The jury are instructed that M. had no right to arrest plaintiff, and if you believe from the evidence that, on the occasion in question, he was the agent and employé of the defendant, and while acting within the scope of his authority he arrested plaintiff, you will find for plaintiff.<sup>19</sup>

I further instruct you, gentlemen of the jury, that if you believe from the evidence that the plaintiff was arrested by the police officer for disorderly conduct, and such arrest was made by the police officer by reason or as a result of the representations and at the demand of the conductor of the car, and would not have been made by him but for such representations and demand by the conductor, and was not made by the police officer in the line of his duty and upon the information which he had other than the information and the demand of the conductor, and if you further believe from the evidence that there was no reasonable ground for the officer to believe at the time that the plaintiff was guilty of disorderly conduct or violation of the law, then the law of the case is for the plaintiff as to the false arrest, and you should so find.<sup>20</sup>

§ 1741. *Damages*

§ 1741(1). *Arkansas*

You are instructed that, if you find for the plaintiff, you will assess his damages in any sum, not exceeding \$———, as you may believe from the evidence will compensate him for the physical pain and mental anguish and humiliation you may believe from the evidence he has suffered.<sup>21</sup>

§ 1741(2). *Maryland*

The jury are instructed that, if they shall find for the plaintiff, then in assessing the damages they are to take into consideration the nature of the force applied to the plaintiff, his sense of indignity and humiliation, and award him such sum as under all the

<sup>18</sup> *Texas & P. Ry. Co. v. Diefenbach* (C. C. A. Tex.) 167 F. 39, 92 C. A. 501.

<sup>19</sup> *Louisville & N. R. Co. v. Byrley*, 153 S. W. 36, 152 Ky. 85, Ann. Cas. 1915B, 240.

<sup>20</sup> *Louisville Ry. Co. v. Kupper*, 118 S. W. 266.

<sup>21</sup> *St. Louis Southwestern Ry. Co. v. Myzell*, 112 S. W. 203, 87 Ark. 123.

circumstances of the case they may deem a fair and reasonable compensation therefor.<sup>22</sup>

**§ 1742. Same—Mitigation because of insulting words of passenger**

You are instructed that a passenger owes to the servants of his carrier a duty of proper conduct, and if he insults a servant of his carrier while in the proper and lawful discharge of his duties, in such manner as that an assault by such servant may reasonably be expected to follow, and the servant insulted, under the immediate influence of passion excited by such insults, assaults the passenger, such insults may be considered, not in justification of such assault, but in mitigation of damages which may be awarded for such assault. The provocation, however, which may be considered in mitigation of damages, should be so recent as to induce the belief that the violence complained of was committed under the immediate influence of the passion thus excited. The mitigating effects of insulting words would be lost if there had been time for cool reflection, and, if the insulting words by the passenger which caused the assault were themselves provoked by insulting words or disrespectful treatment to him from the servant committing the assault, then the principle of mitigation does not apply.<sup>23</sup>

You are instructed that, if you find that the defendant's servant, the conductor, assaulted the plaintiff while he was a passenger of the defendant, as the relation of carrier and passenger has been above explained, but that such assault was because of insulting words previously used by the plaintiff to the conductor, then you should consider, in the light of all the circumstances in evidence, whether the insulting words by plaintiff to such conductor were, or not, themselves provoked by previous insulting words or disrespectful treatment by said conductor to plaintiff, and also whether the assault was committed under the immediate influence of passion engendered by the insulting words which caused it, or was the outcome of cool deliberation; and should you find that, without provocation, plaintiff applied to the defendant's conductor, while in the lawful discharge of his duties as such, insulting words, such as might reasonably be expected to provoke an assault, and that the assault herein complained of was made under the immediate influence of passion engendered by such insulting words, then you may consider such insulting words to the conductor in mitigation of damages, and because of them decrease, by such amount as you may deem just, the sum which you would otherwise award him as

<sup>22</sup> Philadelphia, B. & W. R. Co. v. Crawford, 77 A. 278, 112 Md. 508.

<sup>23</sup> Houston & T. C. R. Co. v. Batchler, 83 S. W. 902, 37 Tex. Civ. App. 116.

damages. On the other hand, if you find that the insulting words by plaintiff to said conductor were themselves provoked by previous insulting words or disrespectful treatment by said conductor to plaintiff, or if the assault was not committed under the immediate influence of passion engendered by the insulting words, which caused it, but that after such words were spoken there had been time for cool reflection by said conductor, and that the said assault was the result of cool deliberation on the part of said conductor, then in either of such events the mitigating effects of such insulting words would be lost, and you should not decrease plaintiff's damage, if any, to any extent, because of them.<sup>24</sup>

### § 1743. Exemplary damages

The court instructs the jury that in assessing the plaintiff's damages, if they find for him, they are not limited to the physical injury inflicted, or humiliation or disgrace caused plaintiff, if any, by the said act of the said conductor, but, in addition thereto, if they find the assault of plaintiff by said conductor was malicious (and by the term "malicious" is not meant spite or ill will, but the intentional doing of a wrongful act without just cause or excuse), they may allow such further damages, known in law as "exemplary," as will be a punishment to defendant and a wholesome warning to others.<sup>25</sup>

### § 1744. Damages for wrongful arrest

You are instructed that, if you find for plaintiff under either instruction No. ——— or instruction No. ———, you will award him such sum in damages as you may believe from the evidence will properly compensate him for any mortification or humiliation of feeling he may have endured as the direct and proximate result of such arrest, if any; and if you find for plaintiff under instruction No. ———, and not under instruction No. ———, and further believe from the evidence that ——— was abusive or insulting to plaintiff, then you may or may not, in your discretion, in addition to compensatory damages, allow plaintiff such further sum by way of punitive damages as you may believe from the evidence is right and proper; your finding in all, however, not to exceed the sum of \$———, the amount claimed in the petition.<sup>26</sup>

<sup>24</sup> *Houston & T. C. R. Co. v. Batchler*, 83 S. W. 902, 37 Tex. Civ. App. 116.

<sup>25</sup> *McNamara v. St. Louis Transit*

*Co.*, 81 S. W. 880. 182 Mo. 676, 66 L. R. A. 486.

<sup>26</sup> *Louisville & N. R. Co. v. Byrley*, 153 S. W. 36, 152 Ky. 35, Ann. Cas. 1915B, 240.

## F. SLEEPING CAR COMPANIES

## § 1745. Duty to guard person and property of passenger

## § 1745(1). United States

Now, I may say to you, gentlemen, that the duty of the \_\_\_\_\_ Company towards the sleeping occupants of its cars consists in taking due care on its part to prevent injuries which, in the ordinary experience of travelers are liable to happen, and which, therefore, the company is bound to guard against. As we stated here in the argument on these law points, if a man should take a pistol and shoot another person in the car, we would at once see that the company is not bound to foresee the likelihood of any such thing as that, and they are not, therefore, bound to protect against it. I only instance that as indicating the things which a sleeping car company is not bound to anticipate, and, therefore, is not bound to guard against. It is only bound to exercise care against those things, which, in the ordinary course of travel, as things happen on trains situated such as this, might happen to a person who is sleeping on one of its cars. It will therefore be for you to determine, gentlemen, whether, under all the circumstances of this case, the proofs of the case, the character of the train, stopping at stations along the road, the rear car door being unsecured, and access to the sleeping persons being simply through curtains—no doors to protect them—whether the injury that happened to plaintiff was one which the company, exercising due care and due precautions and due observation of care on its part, had reason to and was bound to anticipate might happen, and which it was bound to protect him against. If you find that that was so, that this was a danger of that character, and that the \_\_\_\_\_ Company, either through the failure to have a proper fastening on the door or through the inattention of the porter, if there was inattention, or from his lack of care in any respect in that way—if the \_\_\_\_\_ Company was guilty of a lack of care in any of those respects, and the result of it was the injury to the plaintiff, then he is entitled to recover in this case. If this accident was one which was so unusual in its character that the \_\_\_\_\_ Company had no reason to anticipate it, then the plaintiff would not be entitled to recover, because the \_\_\_\_\_ Company would not be bound to protect against injuries of that character.<sup>27</sup>

<sup>27</sup> Hill v. Pullman Co. (C. C. Pa.) 188 F. 497.



§ 1745(2). *Alabama*

You are instructed that it is the duty of a sleeping car company to exercise reasonable diligence in looking after the person and property of passengers on its car while they are asleep.<sup>28</sup>

## § 1746. For what property company may be held responsible

The jury is instructed that if they believe from the evidence that the diamond ring alleged to have been lost or stolen was not in a condition that it could be worn for the use, convenience, or ornament of plaintiff on said trip, they cannot find against defendant on account of its loss.<sup>29</sup>

The court charges the jury that unless the ring alleged to have been lost by plaintiff was in such condition that it could be of service to plaintiff for his personal use, comfort, convenience or ornament on said trip, they cannot find against defendant for its loss under the evidence in this case.<sup>30</sup>

## G. LIABILITY FOR BAGGAGE OR EFFECTS

## § 1747. What constitutes baggage

You are instructed that baggage is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the purposes of the journey.<sup>31</sup>

## § 1748. Duty to check baggage on payment of fare

I charge you, as a matter of law, if the plaintiff in this case went to the agent of the defendant company at ———, and called for a ticket to ———, and said agent sold plaintiff a ticket to ———, and the plaintiff here paid for that ticket what the agent of the defendant company charged him therefor—then, I charge you, as a matter of law, that it was the duty of the agent of the defendant company to check the baggage of the plaintiff—upon the payment of the excess fare—to the point to which he had purchased his ticket. And if there was no excess baggage, it was the duty of the agent of defendant company to check that baggage to the point to which he sold the ticket.<sup>32</sup>

<sup>28</sup> Pullman Palace Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

<sup>29</sup> Pullman Palace Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

<sup>30</sup> Pullman Palace Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53.

<sup>31</sup> Little Rock & H. S. W. Ry. Co. v. Record, 85 S. W. 421, 74 Ark. 125, 109 Am. St. Rep. 67.

<sup>32</sup> Sullivan v. Southern Ry., 54 S. E. 586, 74 S. C. 377.

## § 1749. Liability, in general, for failure to deliver

## § 1749(1). Missouri

The court instructs the jury that if you believe from the evidence in this case that plaintiff and his wife became passengers for hire on one of defendant's trains on or about the \_\_\_\_\_ day of \_\_\_\_\_, and that defendant agreed unconditionally to transport plaintiff and his wife from \_\_\_\_\_, to the city of \_\_\_\_\_ and return, and you further believe from the evidence in the case that plaintiff took along baggage for himself and wife for said trip, that said baggage was accepted for carriage by defendant to be carried by it in a baggage car from \_\_\_\_\_ to the city of \_\_\_\_\_ and return, and that the time for delivering said baggage at \_\_\_\_\_, in accordance with the terms of the agreement to carry plaintiff and his wife, has expired, and that defendant has failed and refused to deliver said baggage to plaintiff at \_\_\_\_\_, then the verdict in this case will be for plaintiff, unless you find the facts to be true stated in instruction No. \_\_\_\_\_.<sup>33</sup>

The court instructs the jury that if you believe from the evidence that plaintiff and his wife became passengers for hire on one of defendant's trains, to be carried to the city of \_\_\_\_\_ and return, then you are instructed that it was the duty of defendant to accept the baggage of plaintiff and his wife and carry same safely from \_\_\_\_\_ to \_\_\_\_\_ and return, and furnish such persons and cars as became necessary to carry said baggage safely, unless you believe the facts stated in instruction No. \_\_\_\_\_.<sup>34</sup>

## § 1749(2). South Carolina

The jury are instructed that, when once a carrier receives either baggage or goods for transportation, he becomes, as it were, an insurer, and can only excuse himself from liability by showing that the loss arose from the act of God or the public enemy.<sup>35</sup>

## § 1750. When liability of carrier commences

## § 1750(1). Arkansas

You are instructed that if you believe from the testimony that the plaintiff presented to the baggagemaster of the defendant railway company two boxes containing his goods and chattels for transportation and informed him of their contents, and that the defendant railway company accepted the same as baggage and gave its checks for their transportation, then defendant railway company is responsible for them as baggage.<sup>36</sup>

<sup>33</sup> Burnes v. Chicago, R. I. & P. Ry. Co., 150 S. W. 1100, 167 Mo. App. 62.

<sup>34</sup> Burnes v. Chicago, R. I. & P. Ry. Co., 150 S. W. 1100, 167 Mo. App. 62.

<sup>35</sup> Adger v. Blue Ridge Ry. Co., 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

<sup>36</sup> St. Louis, I. M. & S. Ry. Co. v. Josephs, 162 S. W. 40, 110 Ark. 632.

**§ 1750(2). South Carolina**

The jury are further instructed that the liability of a common carrier attaches as soon as baggage or goods are received to be transported on any part of the road. If, therefore, the jury find from the evidence that the plaintiff delivered her trunk to the defendant as a common carrier, and received a check therefor, the liability of the defendant as a common carrier commenced as soon as such delivery was made.<sup>37</sup>

The jury are further instructed that the purchase of a ticket by a person entitled to travel between two stations creates the relation of carrier and passenger.<sup>38</sup>

**§ 1751. Necessity that owner of baggage should be passenger**

The jury are further instructed that, in declaring for lost baggage, it is not indispensable that it should be alleged that the owner was a passenger on the road with the baggage. The obligation of the public carrier to carry safely and deliver the trunk at its destination was the same whether the plaintiff was a passenger or not. It is therefore not material, in order to fix the liability on the carrier, to allege that the plaintiff was a passenger, and that the trunk was taken as part of her baggage. If, therefore, the jury find from the evidence, of which they are the sole judges, that the plaintiff did not get on the train with the baggage, and was not a passenger on the train from ——— to ———, this does not relieve the common carrier when liable for the delivery of the trunk.<sup>39</sup>

The jury are further instructed that, if the carrier accepts baggage for transportation, knowing that the owner was not and did not intend to become a passenger, it would accept it to be carried as freight, and would be liable for it as a common carrier of goods. If, therefore, the jury find from the evidence, of which they are the sole judge, that at the time the baggage was delivered to the baggage master, the agent of the defendant at ———, the agent knew that the passenger was not and did not intend to become a passenger on defendant's train from ——— to ——— and beyond, that then the railroad company must be considered as having accepted said trunk to be carried as freight, and would be liable for it as a common carrier of goods.<sup>40</sup>

<sup>37</sup> Adger v. Blue Ridge Ry. Co., 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

<sup>38</sup> Adger v. Blue Ridge Ry. Co., 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

<sup>39</sup> Adger v. Blue Ridge Ry. Co., 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

<sup>40</sup> Adger v. Blue Ridge Ry. Co., 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

**§ 1752. Effect of payment of charges in advance where owner does not accompany baggage**

The jury are further instructed that if the passenger did not accompany the baggage, and this was known in advance to the defendant or its agent, then the defendant had the right to claim compensation in advance, or to postpone his claim until delivery, or to rely on his lien or on the personal responsibility of the owner. The actual payment of the freight in the one case, or the actual liability or lien for its payment in the other, constitute the consideration for the undertaking. If, therefore, the jury find from the evidence that the plaintiff delivered her trunk to the defendant, paying certain compensation in advance, and that the common carrier received it under the liability of a common carrier to transport and safely deliver it in the city of ———, accepting the compensation given as satisfactory, or, if not, relying on his lien upon the trunk or the personal responsibility of the owner for further and additional compensation, then the defendant is bound for the safe delivery of the trunk as a common carrier of goods.<sup>41</sup>

**§ 1753. Liability for merchandise in trunk—Notice to carrier**

You are instructed that, if a passenger ships merchandise in his trunk, without notice to the railroad company or knowledge on its part of the contents of the trunk, the company is not responsible for its loss. It is the duty of the passenger to give the carrier notice that his trunk contains merchandise, or things which cannot be included as baggage, unless the carrier has knowledge that the contents of a trunk are not baggage but merchandise. For the purpose of showing that the defendant had notice, you have heard the testimony of the plaintiff as to his conversation with the baggageman at ———, when he checked the baggage. You have also heard the testimony of the baggageman in regard to what took place, and it is for you to say whether the baggageman was notified or had sufficient knowledge from the facts surrounding the case that the contents of this telescope was merchandise or not. The notice to the railroad or its agent need not be an express notice if the agent or the company had sufficient notice or knowledge of the facts to put a person on inquiry it is equivalent to notice. If you find, by a fair preponderance of the evidence, that the plaintiff was a passenger as claimed, and that he informed the defendant's agent, the baggageman at ———, when he checked the baggage and telescope, that they contained samples or merchandise, and that they had notice in any way, and that the goods in question while in transit were lost

<sup>41</sup> *Adger v. Blue Ridge Ry. Co.*, 50 S. E. 788, 71 S. O. 213, 110 Am. St. Rep. 568.

by the defendant's negligence, such information is sufficient notice to render the defendant liable for such negligent loss; but if, on the other hand, you do not find, by a fair preponderance of the evidence, that the plaintiff informed the baggageman, the agent at ———, when he checked the baggage, or that he and the company did not know the character of the baggage, that the telescope in question contained samples or merchandise, I say, if you do not find that to be the fact, that would be the end of the case, and your verdict would have to be no cause of action.<sup>42</sup>

You are instructed that the passenger cannot require the railroad company to carry as baggage to be checked on his ticket articles of merchandise which the passenger carries to sell or exhibit as samples. The articles of women's wearing apparel which the plaintiff claims to have lost were not such articles as he was entitled to have checked as his personal baggage; and unless, as I have said, you find that the agent of the defendant who received such articles at ——— as plaintiff's baggage was notified, or the company had knowledge, that the satchel or telescope which the plaintiff claims to have lost contained articles of merchandise not intended for the personal use of the plaintiff on his journey, your verdict must be for the defendant.<sup>43</sup>

#### § 1754. Liability for loss of baggage on connecting line

##### § 1754(1). Arkansas

The jury are instructed that the first question for the jury to determine is, what was the contract between the plaintiff and the defendant? Did the defendant agree to carry the plaintiff and his baggage all the way from ——— to ———, in the ———, or did it act only as agent for the other connecting lines? If you find that the contract was to carry plaintiff and his baggage only to some other connecting carrier, and the evidence shows that the baggage of such passenger was delivered to some other connecting line mentioned in the ticket, and was not lost on the line of the road of the defendant, then your verdict should be for the defendant. But if you find that the contract between the plaintiff and the defendant was to carry the plaintiff and his baggage all the way from ——— to ———, and that the baggage was lost, your verdict should be for the plaintiff, although the evidence should show that the baggage was lost either on the defendant's road, or on one of the connecting lines.<sup>44</sup>

<sup>42</sup> *Dahrooge v. Pere Marquette R. Co.*, 108 N. W. 283, 144 Mich. 544.

<sup>43</sup> *Dahrooge v. Pere Marquette R. Co.*, 108 N. W. 283, 144 Mich. 544.

<sup>44</sup> *Little Rock & H. S. W. Ry. Co. v. Record*, 85 S. W. 421, 74 Ark. 125, 109 Am. St. Rep. 67.

## § 1754(2). South Carolina

The jury are further instructed that, under the law of this state, in case of loss or damage to any article or articles delivered to any railroad company for transportation, the initial corporation first receiving the same shall in every case be liable, but may discharge itself from such liability by the production of a receipt in writing for the said articles from the corporation to whom it was its duty to deliver the said article or articles in the regular course of transportation. If, therefore, the jury find from the evidence that the plaintiff delivered her trunk to the defendant for the purpose of transportation to the city of ———, and that the defendant was the initial corporation or the corporation first receiving the trunk, then the defendant is liable, unless it discharged itself from such liability by the production of a receipt in writing for the said trunk from the corporation to whom it was its duty to deliver it.<sup>45</sup>

## § 1755. Authority of agent to receive baggage and to check over connecting road

The jury are further instructed that the law makes it the duty of common carriers to have an agent at every regular station to receive and take charge of baggage or freight. Such agent or baggage master so placed at the station by the railroad company is held out to the public by it as having authority to make arrangements as to what sort of baggage shall be carried by the railroad company, and as to the shipment of baggage or freight; the railroad company having given him the direction and control and the management of the articles of freight, he is, in the eye of the law, so far as the outside public is concerned, authorized and clothed with the authority to make contracts for the transportation of freight or baggage, and to bind the company in that respect. If, therefore, the jury find from the evidence, of which they are the sole judges, that the plaintiff delivered her trunk to the baggage master of the defendant at the station of ———, and that he received the same, agreeing to deliver it again to the plaintiff at ———, then the defendant is bound by such acts of its baggage master, and is bound to deliver the trunk, or to account for its loss by reason of the exemptions allowed to common carriers.<sup>46</sup>

The jury are further instructed that it is usually within the apparent scope of the baggage master's employment, when asked by a passenger whether the company takes baggage over a given railroad, to answer the question, and to bind the company by checking it over connecting roads. If, therefore, the jury find from the evi-

<sup>45</sup> Adger v. Blue Ridge Ry. Co., 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

<sup>46</sup> Adger v. Blue Ridge Ry. Co., 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.



dence that the baggage master at ———, the agent of the defendant, in answer to the inquiry of the plaintiff, agreed to accept the baggage and check it to be delivered at ———, such agreement was within the apparent scope of his authority, and the defendant company is bound thereby.<sup>47</sup>

**§ 1756. Effect of assumption of control of baggage by passenger**

The court instructs the jury that one of the defenses of defendant in this case is that plaintiff was in the sole charge of the baggage of himself and wife, or by himself, or through others, employed E. to have charge and control of the baggage of plaintiff and his wife; and you are instructed that before you can find for defendant on this issue defendant must prove to your reasonable satisfaction, by a preponderance of all the evidence in the case, that plaintiff was in the sole charge and control of the baggage of himself and wife, himself, or by E., employed by himself or others, acting for him, by his authority.<sup>48</sup>

**§ 1757. Limitation of liability—Assent of passenger**

**§ 1757(1). Arkansas**

You are instructed that, if you find, from the evidence in this case, that the defendant contracted to transport the plaintiff and his baggage from ——— to ———, and furnished him with a ticket limiting its liability only to its road, by a printed stipulation on the face of such ticket, then such a stipulation would not be availing unless the defendant has shown either that the plaintiff signed such agreement, or knew of such a stipulation.<sup>49</sup>

**§ 1757(2). Minnesota**

The jury are instructed that this check was handed to the plaintiff, but the plaintiff did not accept those conditions, unless her attention was called to the words I have read to you, and she assented to them. In other words, if the plaintiff's attention was not called to what I have read to you, or if she did not look at it, then this condition does not bind her. If you find that her attention was drawn to it, by the agent of the company, or she discovered it herself, and did acquiesce in those terms, then, in that event, you cannot allow a verdict against the ——— in excess of ——— dollars and interest; but if her attention was not called to it, or if she did not see it, and if you find she did not know of it, and did not acquiesce in it in any manner, then she is entitled to the full amount of the baggage lost, with interest.<sup>50</sup>

<sup>47</sup> *Adger v. Blue Ridge Ry. Co.*, 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

<sup>48</sup> *Burnes v. Chicago, R. I. & P. Ry. Co.*, 150 S. W. 1100, 167 Mo. App. 62.

<sup>49</sup> *Little Rock & H. S. W. Ry. Co. v. Record*, 85 S. W. 421, 74 Ark. 125, 109 Am. St. Rep. 67.

<sup>50</sup> *Stine v. Hines* (Minn.) 181 N. W. 321.



**§ 1758. Burden of proof—Showing causes exempting carrier from liability**

The jury are further instructed that, under the law in this state, if they find the defendant company received the trunk in question as a common carrier, and undertook to transport the same, then the question for the jury to solve is not a question of negligence, as in the case of an ordinary bailee, but the sole question is whether the defendant has shown that the damage sustained resulted from any one of the causes which would exempt the carrier from responsibility, to wit. the act of God or the public enemy, or other causes to be hereafter mentioned. The rule is that, in an action against a common carrier, the onus is upon the defendant to show the damage complained of was occasioned by causes which exempt it from responsibility, and that it is not enough for it to prove that it was not guilty of negligence, but it used the utmost care and diligence. If, therefore, the jury find from the evidence, of which they are the sole judges, that the plaintiff delivered a trunk to the defendant as a common carrier, to be transported, and if the defendant so received the same, then the onus is upon the defendant to prove that the loss of the trunk arose from the act of God or the public enemy, or a like cause beyond its control.<sup>51</sup>

**§ 1759. Sufficiency of evidence**

You are instructed that if you believe from the testimony that upon the arrival of the baggage at ———, a station on the line of the defendant railway company, the plaintiff made demand therefor and was refused, and same was destroyed by fire without negligence on the part of the plaintiff, you will find for the plaintiff.<sup>52</sup>

**§ 1760. Damages for loss or injury**

The court instructs the jury that, in determining the value of the goods destroyed, you should not consider their salable market value as second-hand clothing, but base your estimate on their original cost, the character of the materials, the extent to which they had been used, and would probably be suitable for future use by the plaintiff, and all other circumstances which the proof, in your opinion, shows existed at the time of the injury which would affect their value for use by the plaintiff. It is the value of the goods to the plaintiff for her own use at the time they were injured, and not their market value, which the plaintiff is entitled to recover, if you find from the evidence that defendant is liable.<sup>53</sup>

<sup>51</sup> *Adger v. Blue Ridge Ry. Co.*, 50 S. E. 783, 71 S. C. 213, 110 Am. St. Rep. 568.

<sup>52</sup> *St. Louis, I. M. & S. Ry. Co. v. Josephs*, 162 S. W. 40, 110 Ark. 632.

<sup>53</sup> *Kimball v. Goldman*, 174 S. W. 1185, 117 Ark. 446.

**§ 1761. Same—Market value**

You are instructed that the measure of damages is what is the market value of those goods at the time they were lost. You look to the evidence in the case. The court allowed the evidence of what the value was when bought; but that is not the measure of damages. The court only allowed that so as to enable you to see if that would enable you, or, rather, to assist you, in determining what they were worth when they were lost, and in passing upon that you have got to take into consideration how long they were in the possession of the plaintiff, the wear and tear that would come to them, and all the facts and circumstances which surround it, in passing upon the value of those articles. And then, after you do that, try to reach an honest, fair valuation of it, and give to the plaintiff such damages, such valuation to those goods, as you think under the evidence she is entitled to recover.<sup>54</sup>

<sup>54</sup> *Atlanta Baggage & Cab Co. v. Mizo*, 61 S. El. 844, 4 Ga. App. 407.

## CHAPTER LXXXV

## CAUTIONARY INSTRUCTIONS

- § 1762. In general.  
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1769. Necessity that all jurors should concur in verdict.
1770. Duty to consider instructions as a whole.  
1770(1). Indiana.  
1770(2). Iowa.  
1770(3). Missouri.

See, also, Criminal Law, §§ 2005–2017.

## § 1762. In general

## § 1762(1). Arkansas

The jury are instructed that written instructions have been submitted to you covering the theory of the plaintiff, and also the theory of the defendant. If, in considering the case, you adopt the theory of the plaintiff, the plaintiff's instructions should govern you. If you adopt the theory of defendant, then the defendant's instructions should govern you.<sup>1</sup>

## § 1762(2). Iowa

The jury are instructed that you are to look at the evidence in this case in a common-sense light, and to judge it by that experience and observation of human affairs of which you are possessed as individual members of society, and you will endeavor to arrive at the truth as the evidence shows it to be. If the claim made by either party is unusual and unnatural, and out of the ordinary course of affairs, you are not required to take the same for granted upon

<sup>1</sup> Arkansas Lumber & Contractors' Co. v. Benson, 123 S. W. 367, 92 Ark. 392.

slight evidence, nor should you so find, except upon proof of a reliable character and which satisfies the mind.<sup>2</sup>

**§ 1762(3). Missouri**

In instructing you as to the law of this case, I will admonish you that you have an important duty to perform in carefully weighing and considering the evidence and applying the law as it shall be given to you in these instructions. You will fail in your duty if you should not look to all the proof and consider it fully, fairly, and impartially, and with but one purpose, namely to arrive at the truth, and to do equal and impartial justice, looking only to the law and the proof. You should satisfy yourselves, before returning a verdict, that you fully understand the law and the proof upon which you base your verdict, as your oath places upon you the duty of finding and returning a verdict according to the law and the evidence, and that alone. The rights of the parties under the issues made are submitted to you for your honest determination, and you should weigh and consider all the questions submitted without any feeling of prejudice or partiality one way or the other, and with an honest purpose to reach a correct conclusion under the law and the proof. No juror should assent to a verdict that he does not conscientiously believe a correct one, according to the law and the proof. You should discuss among yourselves the matters submitted dispassionately, and with minds open to reason and conviction, after the argument of counsel has been heard, without getting up unreasonable antagonism that might interfere with a just, fair, and proper consideration of the case. If any juror should happen to know any fact bearing upon this case, either directly or indirectly, he should not act upon it nor communicate it to his fellow jurors. The law requires you to discuss and rely alone for your verdict upon the sworn testimony adduced, and under the law as given you in these instructions. The jury should not consider the fact that there is an individual on one side and a corporation on the other. Their rights are equal and the same under the law, and the jury should for the time being ignore any consideration as to who the parties are, and remember that nothing but the law and the proof are to determine the issues involved.<sup>3</sup>

**§ 1763. Province of court and jury**

In criminal cases, see post. § 2006.

**§ 1763(1). Illinois**

The court instructs the jury that in considering this case it is not only your duty to decide the case according to the weight of the

<sup>2</sup> State v. Geddis, 42 Iowa, 264.

<sup>3</sup> Schmitt v. St. Louis Translt Co., 90 S. W. 421, 115 Mo. App. 445.

evidence, but it is also your duty to decide it according to the law as given you by the court, applied to the evidence. While it is true, as a matter of law, that the attorneys for the respective parties may state to you what they believe the law to be, and base arguments thereon, still, under your oaths and under the law, you have no right to consider anything as law except it be given you by the court; and you have no right to take the statement of any attorney as to what the law is, except the court gives you an instruction to the same effect; or, in other words, you should consider only that as law as given you by the court, and decide the case accordingly.<sup>4</sup>

The jury are instructed that neither by these instructions or the special interrogatories, nor by any words uttered or remark made by the court during this trial, does or did the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury; that is to say, they should apply them to the facts as a whole, and not detached or separated, any one instruction from any or either of the others.<sup>5</sup>

The jury are instructed that they should not understand by anything the court has said during the progress of the trial, or by anything contained in these instructions, that the court has any opinion, or has expressed any opinion, concerning the facts in this case.<sup>6</sup>

The jury are instructed that the instructions given to the jury by the court must be accepted by them as the law governing the case. The jury will not be justified in finding a verdict contrary to the law as laid down in the instructions.<sup>7</sup>

§ 1763(2). **Tennessee**

The court instructs the jury that they are the judges of the facts, and the law as it applies to the facts. In making up their verdict they are to consider the law in connection with the facts, but the court is the proper source from which they are to get the law. In other words, they are judges of the law as well as the facts, under the direction of the court.<sup>8</sup>

<sup>4</sup> *Bocke v. City of Chicago*, 70 N. E. 325, 208 Ill. 192.

<sup>5</sup> *North Chicago St. R. Co. v. Kaspers*, 57 N. E. 849, 186 Ill. 246.

<sup>6</sup> *Wesselhoeft v. Schanze*, 153 Ill. App. 443.

<sup>7</sup> *Chicago & E. I. R. R. Co. v. Stonecipher*, 90 Ill. App. 511.

<sup>8</sup> *Ford v. State*, 47 S. W. 703, 101 Tenn. 454.

**§ 1763(3). Texas**

You are instructed that, in passing on the issues submitted to you by the court, you must be governed by the law given in the court's instructions, which you will consider in their entirety, and not in separate and detached parts alone; but you are the exclusive judges of the facts submitted to your determination, and of the weight of the evidence, and of the credibility of the witnesses.<sup>9</sup>

The jury are instructed that the law makes you the exclusive judges of the weight of the testimony, and the credibility of the witnesses. You are sworn to find what are the true facts from the testimony admitted by the court, without being influenced in the least by any feeling of sympathy or prejudice, giving such weight and credit to the testimony of the different witnesses as you may believe the same entitled to; but, after you have so found the facts, then, in determining what your verdict will be upon these facts, you have sworn to be governed by the law as set forth in this charge.<sup>10</sup>

**§ 1764. Duty to weigh all the evidence**

You are instructed that in passing upon the question of the admissibility of any evidence the court has not expressed nor intimated nor intended to express or intimate any opinion as to the weight or credibility of the evidence. The court has simply determined what evidence offered in the case was proper to go before you for your consideration. As to the weight and credit to be given to the evidence that has been introduced, you are the sole and only judges. You are the sole judges of the facts proved in the case, but you are bound by the law as given to you by the court. And in this connection you are instructed that it is of the utmost importance that you carefully weigh all the evidence in the case, so that you may, if it is possible to do so, ascertain the exact truth. The court is powerless to correct any mistake that you might make in your determination of a material fact where the evidence is conflicting, and therefore, if you should make a mistake in such regard, justice may go astray, and the court therefore desires to impress upon your minds the importance of a full, careful, unbiased, unprejudiced, and intelligent consideration of all the evidence, facts, and circumstances in the case.<sup>11</sup>

**§ 1765. Duty to reconcile testimony of witnesses****§ 1765(1). Alabama**

The jury are instructed that it is your duty to look at all the material evidence in the case, in order to determine what is the real

<sup>9</sup> St. Louis, B. & M. Ry. Co. v. Vernon (Civ. App.) 161 S. W. 84.

<sup>10</sup> Smith v. Merchants' & Planters' Nat. Bank (Civ. App.) 40 S. W. 1038.

<sup>11</sup> Chicago, R. I. & P. Ry. Co. v. Penix, 159 P. 1141, 61 Okl. 4.

and true state of facts; and you will weigh all the evidence in the case, so as to reconcile all the evidence, where it may seem to conflict, or apparently conflict, if you can do so. You will not capriciously reject any evidence, but reconcile it all, if you can do so.<sup>12</sup>

§ 1765(2). **Pennsylvania**

You are instructed that it is your duty to reconcile the testimony of witnesses so far as you can; to avoid any imputation of perjury in the testimony of witnesses; to conclude that all witnesses testified honestly, if you can do so. If you cannot, then you must determine which and who are telling the truth.<sup>13</sup>

§ 1765(3). **Washington**

The jury are instructed that it is your duty to harmonize the testimony of all the witnesses, if possible, so as to impute perjury to no witness. If this can be done consistent with the truth, you should do so. But if you find it impossible to harmonize the testimony, and if you find further from the evidence of your senses on the view or from the testimony on the stand that any witness who has testified before you has willfully testified falsely concerning any material fact in the case, you will then have a right to disregard his entire testimony, except in so far as you may find it corroborated by other credible evidence or other facts or circumstances proved upon the trial.<sup>14</sup>

§ 1766. **Duty of jury to be governed solely by the evidence**

In criminal cases, see post, § 2008.

§ 1766(1). **Montana**

The jury are instructed that, in determining any of the questions of fact presented in this case, the jury should be governed solely by the evidence introduced before you. You have no right to indulge in conjectures or speculations not supported by the evidence.<sup>15</sup>

§ 1766(2). **Nebraska**

The jury are instructed that, in coming to any conclusion in this case, you should be governed by the evidence introduced before you, and by that alone, and you should disregard entirely any remarks by counsel not warranted by the evidence, if any such have been made.<sup>16</sup>

<sup>12</sup> Steen v. Sanders, 22 So. 498, 116 Ala. 155.

<sup>13</sup> Reiber v. Butler & P. R. Co., 50 A. 311, 201, Pa. 49.

<sup>14</sup> Seattle & M. R. Co. v. Roeder, 70

P. 498, 30 Wash. 244, 94 Am. St. Rep. 864.

<sup>15</sup> Ramsey v. Burns, 69 P. 711, 27 Mont. 154.

<sup>16</sup> Albright v. Brown, 36 N. W. 297, 23 Neb. 136.



**§ 1767. Duty to avoid sympathy or prejudice**

In criminal cases, see post, § 2009.

**§ 1767(1). Georgia**

The jury are instructed that the obligation rests on you to find a true verdict, according to the opinion you entertain of the evidence produced before you, without favor or affection to either party, and according to the law as given in charge by the court.<sup>17</sup>

**§ 1767(2). Oregon**

I instruct you that it is your duty to follow the law and the instructions given you by the court, and that you must decide this case without any feeling, sympathy, or prejudice for or against the plaintiff or either of the defendants, and decide the case on its merits, the same as you would between two individuals.<sup>18</sup>

**§ 1768. Same—Prejudice against corporations**

The jury are instructed that it is your duty to try this suit as fairly and impartially as though it were a suit between two private persons, and it is your duty to disregard all appeals made by counsel to you solely with a view of exciting your prejudice against the defendant because it is a railroad corporation, if any such appeals have been made.<sup>19</sup>

The jury are instructed that it is your duty to consider the defendant, in all matters pertaining to the trial, as though it were a living person, instead of a railway corporation, and to hear and consider the evidence with the same fairness and impartiality, and arrive at the same verdict, as if the contest were between two private persons.<sup>20</sup>

**§ 1769. Necessity that all jurors should concur in verdict**

In criminal cases, see post, § 2015.

The jury are instructed that, if any one of your number is not reasonably satisfied from the evidence that the plaintiff is entitled to recover, you cannot find a verdict for plaintiff.<sup>21</sup>

**§ 1770. Duty to consider instructions as a whole**

Duty of jury in criminal cases, see post, § 2017.

**§ 1770(1). Florida**

All charges given by the court of its own motion and at the request of the plaintiff and the defendant are to be taken together as the law governing you in this case.<sup>22</sup>

<sup>17</sup> Jackson v. Seaboard Air Line Ry., 78 S. E. 1059, 140 Ga. 277.

<sup>18</sup> Hoag v. Washington-Oregon Corporation, 147 P. 756, 75 Or. 588.

<sup>19</sup> Illinois Central R. Co. v. Haskins, 115 Ill. 300, 2 N. W. 654.

<sup>20</sup> Lecklied v. Chicago City Ry. Co., 172 Ill. App. 557.

<sup>22</sup> Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.

<sup>23</sup> Electric Co. v. Hellenthal, 47 So. 812, 56 Fla. 443.

§ 1770(2). *Indiana*

The jury are instructed that, in construing and deciding this case, you should look to the evidence for the facts and to the instructions of the court for the law and find your verdict accordingly. The court has not attempted to embody all the law in the case in any one instruction; therefore in construing any single instruction, you must consider it in connection with all the other instructions given you, and construe them in harmony with each other.<sup>24</sup>

§ 1770(3). *Iowa*

The jury are instructed that you are to try the questions in the case submitted to you upon the testimony introduced upon the trial and upon the law as given you by the court in these instructions. The court, however, has not attempted to embody all the law applicable to this case in any one of these instructions, but, in considering any one instruction, you must construe it in the light of, and in harmony with, every other instruction given, and, so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial.<sup>25</sup>

§ 1770(4). *Missouri*

The jury are instructed that the instructions of the court are all to be taken and read together, and the law therein laid down applied by the jury to the facts of the case, accordingly as the jury may believe and find the facts to be under the evidence before them.<sup>26</sup>

<sup>24</sup> *Thompson v. Miller*, 107 N. E. 74, 182 Ind. 545.

<sup>25</sup> *Lampman v. Bruning*, 94 N. W. 562, 120 Iowa, 167.

<sup>26</sup> *Dougherty v. Missouri R. Co.*, 8 S. W. 900, 97 Mo. 647.

## CHAPTER LXXXVI

## CHAMPERTY AND MAINTENANCE

§ 1771. Effect of deed of land in adverse possession of a third person.

1771(1). Alabama.

1771(2). Kentucky.

1772. Sale of personalty in adverse possession of another.

§ 1771. Effect of deed of land in adverse possession of a third person

§ 1771(1). Alabama

The court charges the jury that if they believe from the evidence that the defendant was in the actual possession of a part of the land described in the complaint throughout the year ———, and that he was then tending all the land described in the complaint under a bond for title describing the same executed to him by N., and that prior to said year he had paid said N. the entire amount of the purchase money on the land described in the said bond for title, then the deed from N. to the plaintiff, dated in November of said year, is void as against the defendant, and the plaintiff cannot recover upon the title attempted to be conveyed by that deed.<sup>1</sup>

§ 1771(2). Kentucky

The court instructs the jury that, if you believe from the evidence that at the time ——— made, executed, and delivered to the plaintiff, ———, the deed, dated ———, defendant was in the actual adverse possession of the land in controversy, claiming same to a well-defined or well-marked boundary, then the said deed was champertous and void, and you will find for the defendant, unless you believe as in instruction No. ———.<sup>2</sup>

§ 1772. Sale of personalty in adverse possession of another

The court charges the jury that if you are reasonably satisfied from the evidence that, at the time the property in question in this case was taken by defendant O., plaintiff was in possession of the property, claiming it as hers, and that defendant J. had bought said property from defendant O. while it was so in plaintiff's possession and claimed by her, and O. took the property from plaintiff's possession in pursuance of said sale by him to said J., and it was delivered by him to said J. in pursuance of such sale, then the sale to J. was champertous and void, and J. got no title to the property, and your verdict should be for the plaintiff.<sup>3</sup>

<sup>1</sup> Alabama State Land Co. v. Matthews, 53 So. 174, 168 Ala. 200.

<sup>2</sup> Le Moyne v. Neal, 164 S. W. 964, 158 Ky. 316.

<sup>3</sup> Posey v. Gamble, 41 So. 416, 148 Ala. 660.

## CHAPTER LXXXVII

## CHATTEL MORTGAGES

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See, also, Mortgages.

§ 1773. What constitutes

You are instructed that, if you find from the evidence that plaintiff advanced to the defendant money to pay for making and hauling bolts, and to secure the same took a bill of sale from the defendant covering certain bolts, then the bill of sale is in law a

mortgage; and, if you find from the evidence that the defendant has shipped to the plaintiff all of the bolts in the form of heading, so included in said bills of sale, then your verdict should be for the defendant.<sup>1</sup>

#### § 1774. Description of parties

You are instructed that before the plaintiff can recover in this case he must prove that defendant received notice, or was placed in possession of such facts as, if followed up, would lead to notice, of the existence of plaintiff's mortgage before the giving of the mortgage by ——— to defendant.<sup>2</sup>

I charge you, gentlemen of the jury, that unless defendant had actual knowledge of plaintiff's mortgage, or had such information that would put a reasonably prudent business man on inquiry, so that, by making inquiry and the exercise of reasonable diligence, he might have become aware of the existence of plaintiff's mortgage, prior to the taking of the mortgage by defendant from ———, then the plaintiff cannot recover, and your verdict will be for the defendant.<sup>3</sup>

#### § 1775. Sufficiency of description of property to constitute notice to third persons

##### § 1775(1). Illinois

You are instructed that a person claiming property under a chattel mortgage must see to it that the property is correctly and truly described, so that others may not be deceived. The mortgage must speak for itself, and it is for the jury to determine whether the property therein described is the same property replevied in this suit, and, if it is not, then plaintiff cannot recover.<sup>4</sup>

##### § 1775(2). Iowa

You are instructed that it is not claimed that defendant had any actual knowledge of the existence of the plaintiffs' mortgage. He is therefore a "subsequent purchaser without notice," within the meaning of section ———, which reads as follows: "No mortgage of personal property where the mortgagor retains actual possession thereof is valid against subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate and filed for record with the recorder of the county where the holder of the property resides." And unless he is charged with record or constructive notice of said

<sup>1</sup> Dunham v. H. D. Williams Cooperage Co., 103 S. W. 386, 83 Ark. 395.

<sup>2</sup> Grimmer v. Nolen, 40 So. 97, 146 Ala. 466. Plaintiff's mortgage was signed by Bird McCinney, whereas

the name of the mortgagor was McKinney.

<sup>3</sup> Grimmer v. Nolen, 40 So. 97, 146 Ala. 466.

<sup>4</sup> Bell v. Prewitt, 62 Ill. 361.

mortgage his purchase would be superior to and free from lien of plaintiffs' mortgage. Constructive or record notice is such notice as is presumed to be imparted by recording with the proper county a properly drawn and properly acknowledged instrument. It is conceded that the mortgagor was a resident of \_\_\_\_\_ county, state of \_\_\_\_\_, and therefore the chattel mortgage in question was recorded in the proper county. It was a properly acknowledged instrument. The remaining question to be determined is whether or not the chattel mortgage was properly drawn. To be properly drawn it must contain a sufficient description of the property intended to be mortgaged. If the description of the property be not sufficient, the recording of the mortgage will not constitute notice. The description contained in the mortgage in question, on the face thereof, appears to be sufficient in law. It is for you to determine whether it is sufficient in fact, from the evidence in the case.<sup>5</sup>

You are instructed that the defendant claims that the description contained in the mortgage is not sufficient in fact. To be sufficient in fact, the description must be such that a third person may take said mortgage, and from the facts therein stated, and inquiries therein suggested, and such only, can identify the property covered by said mortgage with certainty. A description is sufficient which enables a third party, aided by the inquiries which the instrument itself suggests, to identify the property covered by it. If it directs the mind of the inquirer to facts or evidence from which he may ascertain the mortgaged property with certainty, it is sufficient. When a mortgage contains a description, part of which is true and part false and erroneous, that which is false or erroneous may be stricken out as redundant or superfluous, and the description will be sufficient if enough remains to lead a third party, by the inquiries it suggests, to the identification of the property covered by it. You are to take the mortgage in question, and, under the rules above announced, ascertain whether the property described in it, under the evidence before you, can be thus identified. If it can thus be identified, the description is sufficient, and the recording of the chattel mortgage in question constituted constructive notice to the defendant of the existence of said mortgage, and his purchase of the cattle in controversy was subject to the lien thereof. If you find that the description in said mortgage is sufficient under the rules set forth, you will find for the plaintiffs as to such property in controversy as you find covered by said mortgage, unless you should further find the plaintiffs have waived the lien of their

<sup>5</sup> *Livingston v. Stevens*, 94 N. W. 925, 122 Iowa, 62.

mortgage as above indicated. If you find that the property described in the mortgage cannot be identified with certainty under the rules above given, and you find that the description is insufficient, then the recording of the mortgage in question would not constitute notice to defendant of the existence of said mortgage, and his purchase of the cattle in controversy was free from and superior to the claims of the plaintiffs under their mortgage, and you will find for the defendant.<sup>6</sup>

§ 1775(3). **Kansas**

You are instructed that the note and mortgage sued on are valid instruments upon their face, and, as between the mortgagee and a third party, are valid, and impart sufficient notice of the lien on the property therein named, if there is such property in fact, as described therein, corresponding with such description, or, if not fully and truly described, yet if the description is sufficient to furnish such suggestions that one examining the mortgage itself by the suggestions therein given can know and identify the property as the property mortgaged, as more fully explained in instruction No. \_\_\_\_\_ herein.<sup>7</sup>

The jury are instructed that, in order for the description contained in the chattel mortgage to be sufficient to impart notice to purchasers without actual knowledge of the existence of the mortgage or the identity of the property, it should describe the property with reasonable particularity, and must be such that third persons, aided by the inquiries which the mortgage itself suggests, would be able to identify the property as the property described in the mortgage.<sup>8</sup>

§ 1775(4). **Oklahoma**

You are further instructed that the description in a chattel mortgage should be so explicit as to enable third persons, aided by inquiry, which the instrument itself suggests, to identify the property covered thereby, and that said description should be so specific as to give notice of prior lien to such third persons and sufficiently specific to put a reasonably prudent man upon inquiry. A description of personal property mortgaged which describes the property enough to lead to its identification is sufficient.<sup>9</sup>

You are further instructed that the description in a chattel mortgage, to be good, should not only contain a specific description of the property intended to be mortgaged, but should contain either

<sup>6</sup> *Livingston v. Stevens*, 94 N. W. 925, 122 Iowa, 62. The question left to the jury was whether the description covered the property in dispute.

<sup>7</sup> *Drumm-Flato Commission Co. v. Barnard*, 72 P. 257, 66 Kan. 568.

<sup>8</sup> *Drumm-Flato Commission Co. v. Barnard*, 72 P. 257, 66 Kan. 568.

<sup>9</sup> *Gerlach Bank of Woodward v. Herd*, 159 P. 901, 60 Okl. 186.



some hint which would direct the attention of those reading it to some source of information beyond the words of the parties in it or something which will enable third persons to identify the property aided by inquiries which the mortgage indicates and directs, or else it should contain such a specific description as will distinguish the property from other similar articles.<sup>10</sup>

**§ 1776. Same—Necessity of enumeration of items of property covered**

The court instructs the jury that in this case you are instructed that the general description in the mortgage as to the property located or to be located in the ——— was sufficient to cover and include within the terms of the mortgage any and all property of the kind generally described and referred to in said mortgage that was situated or located in said ———, and this irrespective of the fact as to whether or not each item of the property was specifically described in said mortgage.<sup>11</sup>

**§ 1777. Same—Mortgage covering all stock on certain farm**

You are instructed that the plaintiff, in his evidence, claims the cattle and two of the mares—one bay and one gray—by virtue of his alleged chattel mortgage, which was admitted in evidence. If the jury find that at the commencement of this action the plaintiff had a mortgage on which there was an indebtedness due and unpaid, and that the mortgage covered all the stock on a certain farm in ——— county, where the mortgaged property was situated at the time the mortgage was made, and that the cattle replevied herein were on that farm at the time of making plaintiff's mortgage, or were the increase of cattle on that farm, at the time of the making of the plaintiff's mortgage, then you must find for the plaintiff as to the cattle involved in this suit.<sup>12</sup>

**§ 1778. Necessity and sufficiency of delivery of mortgage to creditor—Effect of sending to clerk for registration**

The jury are instructed that, where a mortgage is executed by a debtor to a creditor, and not delivered to him, but sent by the mortgagor to the clerk for registration, and after it is recorded the creditor accepts it, and thereby ratifies it, judgment liens obtained by other creditors after the delivery to the clerk, but before ratification by the creditor, take precedence of the mortgage.<sup>13</sup>

<sup>10</sup> Gerlach Bank of Woodward v. Herd, 159 P. 901, 60 Okl. 186. These instructions are proper for the purpose they are intended to serve, namely, to enable the jury to pass upon the question of whether the property in dispute is covered by the de-

scription of the mortgaged property.

<sup>11</sup> Speer v. Allen (Tex. Civ. App.) 135 S. W. 231.

<sup>12</sup> Angle v. Bilby, 41 N. W. 397, 25 Neb. 595.

<sup>13</sup> Evans v. Coleman, 28 S. E. 645, 101 Ga. 152.

**§ 1779. Proof of record—Effect of certificate of record**

The jury are instructed that, if you believe from the evidence that the memorandum below the certificate of record of the mortgage mentioned in the evidence was in fact a part of the mortgage at the time it was made and before it was left for record, then the certificate of record made by the clerk thereon is conclusive evidence that all which was a part of the mortgage when it was made and left for record was recorded, whether above or below the certificate.<sup>14</sup>

**§ 1780. Effect of record as notice****§ 1780(1). Alabama**

The jury are instructed that, if a mortgage has been recorded in the probate office of the county where the property mortgaged is situated, the law is that, whether or not another person has actual notice of the mortgage, he has constructive notice thereof.<sup>15</sup>

**§ 1780(2). Oklahoma**

You are instructed that after the due filing of a chattel mortgage in the recording office as provided by law, third parties are charged with notice of the contents thereof to the same extent as if they had actual notice, and are charged with notice of anything in the instrument connected with the description of the mortgaged property which suggests inquiry as to the identity of the property intended to be mortgaged, and which inquiry, if pursued, would lead to an identification of the property.<sup>16</sup>

**§ 1781. Priority of agister's lien**

The jury is instructed that, if they believe, from the evidence, that the defendant ——— pastured certain stock during the summer of ———, for ———; and if they further believe, from the evidence, that on or about the ——— day of ———, the said ——— took any or part of the stock under an agreement with said defendant that a portion of the steers should remain in defendant's possession as a pledge or security for the payment of the pasturage for the entire lot of stock, and if they further believe, from the evidence, that the pasturage was, and still is, unpaid, and that the cattle thus pledged are the same as those replevied in this suit, then the law is that defendant had a special property in the cattle pledged until the payment of the account for which they were pledged, and the jury will find for the defendant.<sup>17</sup>

The jury is instructed that if they believe, from the evidence,

<sup>14</sup> Adams v. Pratt, 109 Mass. 59.

<sup>15</sup> Polytinsky v. M. F. Patterson & Son, 57 So. 130, 3 Ala. App. 302.

<sup>16</sup> First Nat. Bank of Cushing v.

Atchison, T. & S. F. Ry. Co., 186 P. 1086, 77 Okl. 93.

<sup>17</sup> Bell v. Prewitt, 62 Ill. 361.

that the defendant pastured certain cattle and other stock for ——— (mortgagor) during the summer of ———, and that on or about ———, the mortgagor took away a portion of the stock, and then agreed that a portion of the cattle should remain in defendant's possession as a pledge or security for the payment of the pasturage on the entire lot of stock, and that if the said pasturage was not paid by the ———, that in that case defendant was to be the owner of the cattle, and they were to be taken from the pasturage; and if they further believe, from the evidence, that the pasturage was not paid, and that the cattle were the same replevied, then the law is that defendant is the owner of the cattle, and the jury will so find, and will find, as a part of their verdict, that the said defendant is the owner of the cattle in controversy.<sup>18</sup>

### § 1782. Waiver of lien

See, also, post, § 1788.

You are instructed that, if you find from the evidence, by the greater weight thereof, that the plaintiffs, at the time of the sale of the cattle in question to T., and of the execution by T. of the purchase-money mortgage in suit, knew that it was the purpose and intent of T. to ship said cattle out to ——— and sell the same, for the purpose of procuring money with which to pay the purchase price thereof, and with such knowledge made such sale to him, and took such mortgage from him in contemplation of the sale of said cattle by said T., then you may infer that the plaintiffs consented to such sale, and by such acts waived the lien of their mortgage; or, if you find from the evidence, by the greater weight thereof, that the plaintiffs, at the time of the sale of said cattle and the execution of said mortgage, orally consented to the sale of said cattle by T., you will find that they waived the lien of their said mortgage.<sup>19</sup>

### § 1783. Right of mortgagee to take possession of property before maturity of debt secured

The jury are instructed that, under a mortgage like the one in evidence before the jury in this case, the mortgagee is entitled to the immediate possession of the property mortgaged, and may take the same and reduce the same into possession at any time before the rights of creditors or third persons attach by purchase or by lien under execution.<sup>20</sup>

<sup>18</sup> Bell v. Prewitt, 62 Ill. 361.

<sup>20</sup> Whisler v. Roberts, 19 Ill. 274.

<sup>19</sup> Livingston v. Stevens, 94 N. W. 925, 122 Iowa, 62.

**§ 1784. Right of mortgagee to possession under insecurity clause****§ 1784(1). Kansas**

The court instructs the jury that, if you find from the evidence that, at the time defendant entered and had the wheat cut, he was acting in the interest of and for and on behalf of the bank, of which he was cashier as well as for himself, and that the bank deemed itself insecure, then his actions were rightful under the chattel mortgage, and the plaintiff cannot recover in this action, and your verdict should be for the defendant. In determining this last question it is wholly immaterial whether the bank had good cause to deem itself insecure or not.<sup>21</sup>

**§ 1784(2). Missouri**

The jury are instructed that the mere fact that the plaintiff or the beneficiaries in the note and deed of trust shown in evidence deemed himself or themselves insecure, or that he or they deemed the payment of the note by defendants as insecure, is not conclusive upon the jury. And it is for the jury to consider all the facts and circumstances shown in evidence, and from them to determine whether plaintiff or said beneficiaries had reasonable grounds for deeming himself or themselves insecure, or for deeming the payment of the note by the defendants as insecure; and by "reasonable grounds" is meant such facts and circumstances as would lead a reasonably prudent man, acting in good faith, to believe himself insecure in the respects above mentioned.<sup>22</sup>

**§ 1784(3). New York**

The jury are instructed that, under the provisions of the mortgage given to defendant that whenever he should deem himself unsafe he could take possession of the mortgaged property and sell it to satisfy the debt secured, if you believe from the evidence that, at the time of taking possession of the property, the defendant in good faith believed himself insecure, then the law is for the defendant.<sup>23</sup>

**§ 1785. Liability of mortgagee for selling mortgaged property before maturity of debt secured**

You are instructed that under the mortgage defendant had the right to take possession of all the property therein described at any time he chose to do so, and no damage could be assessed against him for such taking. He did not, however, have any

<sup>21</sup> *Thorp v. Fleming*, 96 P. 470, 78 Kan. 237, 19 L. R. A. (N. S.) 915, 130 Am. St. Rep. 366.

<sup>22</sup> *Feller v. McKillip*, 81 S. W. 641, 109 Mo. App. 61.

<sup>23</sup> *Crutts v. Daly*, 145 N. Y. S. 850, 84 Misc. Rep. 192; *Allen v. Vose*, 34 Hun, 57.

right to sell said property before the debt secured thereby became due. In other words, while he would have a right, under said mortgage, to take possession of all the property therein described, for the purpose of preserving the same until the debt became due, he would have no right to sell said property unless the debt secured by said mortgage, or some part of it, was due; and, if he did sell said property, or any part of it, before the debt secured thereby became due, or any part thereof, then he is liable to account to the plaintiffs for the fair and reasonable value of the property so sold, without reference to the amount for which the sale was made.<sup>24</sup>

**§ 1786. Measure of liability of mortgagee to mortgagor for conversion**

The jury are instructed that if you believe from the evidence that the defendant, without the consent of the plaintiff, seized and carried away the property mentioned and described in the petition of plaintiff, then you will return a verdict in favor of plaintiff for the reasonable market value of said property at the time of such seizure, if any, together with interest thereon from the date the property was taken from the possession of plaintiff at ——— per cent. per annum.<sup>25</sup>

**§ 1787. Transfer by mortgagor of mortgaged property—Liability of purchaser to mortgagee**

The jury are instructed that, if you believe from the evidence that defendant bought from M. cotton on ———, and that said cotton belonged to M. and was covered by the mortgage mentioned in the evidence and given by M. to plaintiff, and that the said cotton was raised in the county where the said mortgage was recorded, then you should find for the plaintiff for the value of said cotton, not exceeding the amount of the debt secured by the mortgage.<sup>26</sup>

**§ 1788. Same—Effect of consent of mortgagee**

**§ 1788(1). Kansas**

The jury are further instructed that if by the terms of the mortgage the property described therein is left in the possession of the mortgagor, and the mortgagee knowingly consents that the mortgagor may sell said property and receive the proceeds therefor, then the mortgagor becomes the agent of the mortgagee to sell said property, and a person buying the same will acquire the

<sup>24</sup> *Koster v. Seney*, 69 N. W. 868, 100 Iowa, 558.

<sup>25</sup> *Crouch Hardware Co. v. Walker*, 113 S. W. 163, 51 Tex. Civ. App. 571.

<sup>26</sup> *Polytinski v. M. F. Patterson & Son*, 57 So. 130, 3 Ala. App. 302.

said property free and clear of any incumbrance of said mortgage.<sup>27</sup>

**§ 1788(2). South Carolina**

Gentlemen, I charge you that, if the mortgagee consented that the mortgagor ——— dispose of and sell the automobiles covered by this mortgage, and if R. bought the automobile through the mortgagor, or those acting for the mortgagor, then R. gets a good title to the automobile, if you find that the mortgagee consented to the sale of these automobiles, or to the sale of any one of them, because all of them are in the same condition—what applies to one applies to all, because the condition of the mortgage is the same as to all—if the mortgagee consented, either before he took the mortgage or after, that the mortgagor could sell the property, and in the course of business the mortgagor did sell the property, a good and complete title passed to R., and he is entitled to keep the automobile; but the defendant must prove by the preponderance of the evidence, by the greater weight of the evidence, not beyond a reasonable doubt, and not necessarily by the greater number of witnesses, but by the greater weight of the evidence, that the mortgagee did so consent for the mortgagor to sell.<sup>28</sup>

**§ 1789. Payment and tender of mortgage debt—Sufficiency of tender**

You are instructed that, if you find the defendant was converting the property, or had converted the property prior to the bringing of this action, and that suit had been commenced before the alleged tender was made in this case, and you find that the note for which the mortgage was given as a security contained a provision for a stipulated attorney's fee, and that the note was past due, and had been placed in the hands of an attorney for collection, and you find the defendant failed or refused to tender the attorney's fee provided in said note, the tender was insufficient, and you will find the issues for the plaintiff.<sup>29</sup>

**§ 1790. Extinguishment of mortgage by taking new note**

You are instructed that, if you find from the evidence that the plaintiff took from D. a chattel mortgage on the property in question, and if you further find that thereafter, and after the property had been transferred to C., the plaintiff took from C. a mortgage and note under an agreement with C. that it was in payment of and release of the D. mortgage, then the D. mortgage became discharged; and if you further believe and find from the evidence

<sup>27</sup> Drumm-Flato Commission Co. v. Barnard, 72 P. 257, 66 Kan. 568.

<sup>28</sup> Cudd v. Rogers, 98 S. E. 796, 111 S. C. 507.

<sup>29</sup> First Nat. Bank of Stigler v. Howard, 158 P. 927, 59 Okl. 237.

that one ——— purchased the property in question and gave a valuable consideration therefor, before the C. mortgage was filed for record, and that the said purchaser sold the property in question to one ———, and the said ——— sold it to the defendant, your verdict should be in favor of the defendant.<sup>30</sup>

**§ 1791. Release or satisfaction of mortgage—Sufficiency of release**

You are instructed that if you find, from the evidence in this case, that defendants purchased from H. certain cattle which had been mortgaged by said H. to the plaintiff, and on which plaintiff at that time held a mortgage, and that afterwards the defendants paid or caused to be paid to plaintiff a certain amount of money, which it was intended by defendants and plaintiff should be in full payment for a release of the interest that plaintiff had therein, by reason of a chattel mortgage thereon, given by said H. to plaintiff, and that the cattle in controversy are a part or all of said property so intended to be released, then in that case the cattle in controversy would be fully released, although the release in writing failed to describe fully the cattle intended to be released.<sup>31</sup>

**§ 1792. Duty of mortgagee to enter of record partial payment of mortgage debt**

You are instructed that the burden rests on the defendant to show to your reasonable satisfaction by the preponderance of the evidence, that his plea that the mortgage was wholly paid before notice was given is true, and if defendant has failed to discharge that burden, you must find for the plaintiff as to the issues presented by that plea.<sup>32</sup>

The court charges the jury that the law does not require a man to enter upon the record of any mortgage any partial payment until a written notice or request to do so is given the person holding said mortgage.<sup>33</sup>

**§ 1793. Liability to penalty for failure, after payment of mortgage, to satisfy it of record**

You are instructed that this suit is brought for the recovery of a penalty on account of the failure of the defendant to mark the records "Canceled" or "Satisfied." The gist of the action is the failure on the part of the defendant to satisfy the records after notice in writing to satisfy, and the plaintiff does not have to prove that he has sustained any damages.<sup>34</sup>

<sup>30</sup> Western Auction & Storage Co. v. Shore (Mo. App.) 179 S. W. 769.

<sup>31</sup> Drumm-Flato Commission Co. v. Barnard, 72 P. 257, 66 Kan. 568.

<sup>32</sup> Lynn v. Bean, 37 So. 515, 141 Ala. 236.

<sup>33</sup> Hart v. Sharpton, 27 So. 450, 124 Ala. 638.

<sup>34</sup> Hoffman v. Knight, 28 So. 533, 127 Ala. 149.



You are instructed that, if the jury believe from the evidence that the plaintiff had fully paid the mortgages, and had served written notice upon the defendant to mark the records "Satisfied," and that the defendant failed for more than two months to satisfy the records after having received said notice, it is not necessary for the plaintiff to prove that he sustained any damages on account of such failure.<sup>35</sup>

**§ 1794. Notice of foreclosure**

The jury are instructed that a posting of ——— notices for each sale in ——— public places in the town of ———, in ——— county, for ——— days before each sale, giving date, terms, and place of sale, would be a compliance with the conditions of foreclosure provided by the mortgage mentioned in the evidence.<sup>36</sup>

**§ 1795. Burden of proof in action against third person to enforce mortgage**

The jury are further instructed that the burden of proving his case is on the plaintiff, and in order to recover in this suit he must prove, by a preponderance of the evidence, that the defendant wrongfully took the cattle in controversy, or that he wrongfully detained them after demand made by the plaintiff.<sup>37</sup>

**§ 1796. Sufficiency of evidence in action to enforce mortgage—  
Necessity of showing existence of note described in mortgage as secured**

The jury are further instructed that the foundation of the mortgage is the note therein described, that the mortgage is a mere security for the payment of the note, and the plaintiff cannot recover in this suit, unless he has proved the existence of the note described in the mortgage, if any is described; and if the note described in the mortgage has not been introduced in evidence, nor its absence accounted for, and there is no evidence showing the existence of such a note, the plaintiff cannot recover, and the jury will find for the defendant.<sup>38</sup>

**§ 1797. Rights of mortgagor where foreclosure sale irregular**

The jury are instructed that, if you believe from the evidence that the property mentioned in the evidence sold for its value at the purported sale under the mortgage given on said property by defendant and sought to be enforced in this action, you will find the price so brought to be the amount of credit to which defendant is entitled for the property so attempted to be sold.<sup>39</sup>

<sup>35</sup> Hoffman v. Knight, 28 So. 593, 127 Ala. 149.

<sup>36</sup> Speakman v. Vest, 51 S. W. 980, 166 Ala. 235.

<sup>37</sup> Bell v. Prewitt, 62 Ill. 361.

<sup>38</sup> Bell v. Prewitt, 62 Ill. 361.

<sup>39</sup> Speakman v. Vest, 51 So. 980, 166 Ala. 235.

## CHAPTER LXXXVIII

## COLLISION

§ 1798. Care required in mooring vessels to prevent drifting against other vessels.

1799. Liability of steamer with respect to row boats.

§ 1798. Care required in mooring vessels to prevent drifting against other vessels

You are instructed that this is an action based upon alleged negligence of the defendants. The plaintiffs had a fleet of coal flats and boats on the ——— side of the ——— river, and the defendants had a similar fleet of coal flats and boats higher up the river. According to the evidence, there was about one hundred and twenty-five or one hundred and fifty feet between the head of the plaintiffs' fleet and the stern of the defendants' fleet. On Sunday, ———, the river began to rise, and continued to rise on Sunday, Monday, Tuesday, and Wednesday. I believe on Tuesday evening there was a rise in the river of about twenty or twenty-one feet. On Wednesday morning it had risen some six feet or so, and was about twenty-seven feet high. On the morning of Wednesday, the ———, the defendants' fleet broke loose from its mooring, drifted down the river, struck the plaintiffs' fleet, and broke it loose from its moorings; and, according to the evidence, the plaintiffs lost a good portion of their fleet, including coal and other property. If the fleet of the defendants broke loose from the negligence of the defendants, they would be liable to the plaintiffs, and liable to pay to the plaintiffs all the damage that they sustained in consequence of striking their fleet and breaking it loose from its moorings. If there was no negligence on the part of the defendants, of course there is no liability to the plaintiffs. What is negligence? It is doing something which an ordinarily prudent man would not do under the surrounding circumstances, or neglecting to do something which an ordinary prudent man would do under the circumstances. The surrounding circumstances include not only what existed at the time, but the reasonable probabilities of the future. Men are bound to anticipate what may reasonably happen, and provide against that. The defendants were bound to furnish skillful, competent men in charge of their fleet, especially when there was high water and a large fleet. If they failed to furnish skillful experienced men in charge of the fleet, it would be a neglect of their duty; and that in law is negligence. That would be the personal negligence of the defendants,—if they failed to supply

and have on the fleet skillful and competent men in charge of it. But the defendants are liable for the men that were employed, not only the fleet boss, who, according to the evidence, had charge of the fleet; but if the fleet boss, or the men employed on the fleet, were guilty of negligence, in law it is the negligence of the defendants, because they were their servants.<sup>1</sup>

**§ 1799. Liability of steamer with respect to row boats**

The court instructs the jury that it was the duty of the persons in charge of the towboat of the defendant ———, as it passed up the ——— river between ——— and ———, at the time mentioned in the evidence, to have the said boat ——— and its tow under reasonable control and to keep a lookout ahead to avoid collision with persons that were using the river for passage, and to exercise ordinary care to prevent coming into collision with, or injuring, such persons; and, if you shall believe from the evidence that the persons in charge of defendant's said boat negligently failed to perform these duties, or any of them, and that by reason thereof the plaintiff's intestate, ———, while rowing in the rowboat mentioned in the evidence, came in collision with the defendant's tow and as a result thereof was thrown into the river and drowned, then the law is for the plaintiff, and you should find for him such sum in damages as you may believe and find from the evidence will reasonably compensate the estate of the decedent, ———, for the destruction of his power to earn money, not exceeding the sum of \$———, the amount claimed in the petition.<sup>2</sup>

The jury are further instructed that, although they may believe and find from the evidence that upon the occasion in question the decedent, ———, was himself negligent, and that his negligent acts or conduct caused, or contributed to cause or bring about, the accident and his injury, yet, if the jury shall further believe and find from the evidence that the servants or employés of defendant in charge and control of its towboat, ———, upon the occasion in question, after obtaining knowledge of the peril or danger of the decedent from said towboat or its barges, if they did so, could, by the exercise of ordinary care and diligence on their part and with the means at their command, have rescued the decedent or prevented him from drowning, then and in this event it was their duty to do so, and if the jury shall believe and find from the evidence that said servants or employés of defendant negligently failed to exercise such care and diligence after discovering the peril or danger of decedent, and by reason and as the proximate result thereof de-

<sup>1</sup> Gilchrist v. Hartley, 47 A. 972, 198 Pa. 132.

<sup>2</sup> Monongahela River Consol. Coal & Coke Co. v. Lancaster's Adm'r, 183 S. W. 258, 169 Ky. 24.

cedent was drowned, then and in this event the law is for plaintiff, and the jury should so find and fix his damages as indicated in instruction No. \_\_\_\_.<sup>3</sup>

The jury are instructed that unless they shall believe and find from the evidence as indicated in the first or second instructions, then and in this event the law is for defendant, and they should return a verdict for it.<sup>4</sup>

The jury are further instructed that it was the duty of the decedent, \_\_\_\_\_, in using the \_\_\_\_\_ river on the occasion in question as a passway, to exercise such care as may be usually expected of an ordinarily prudent person under like or similar circumstances to those shown to exist in this case by the proof to learn of the coming of the steamer \_\_\_\_\_, and to keep out of its way and avoid injury therefrom, or the boats or barges it was towing; and, if the jury shall believe and find from the evidence that the decedent on the occasion in question failed to exercise such care for his own safety, and but for such failure on his own part, if any there was, he would not have been struck, run over, or injured by said boat or its tow of barges, then and in this event the law is for the defendant, and the jury should find for it, although they may believe from the evidence the defendant was negligent in any or all the respects indicated in instruction No. \_\_\_\_\_, and that such negligent conduct on its part, if any there was, contributed to cause or bring about the injury and death of decedent.<sup>5</sup>

The jury are instructed that the phrase "ordinary care," as used and meant in these instructions and as applied to both the defendant company and the decedent, \_\_\_\_\_, is that degree of care, or such care, as an ordinarily prudent person engaged in like or similar business, occupation, or employment would ordinarily exercise under the same or similar circumstances to those shown to exist in this case by the proof; and the words "negligent" and "negligently," as used and meant in these instructions and as applied both to defendant and the decedent, is the failure to exercise ordinary care as defined in this instruction.<sup>6</sup>

<sup>3</sup> Monongahela River Consol. Coal & Coke Co. v. Lancaster's Adm'r, 183 S. W. 258, 169 Ky. 24.

<sup>4</sup> Monongahela River Consol. Coal & Coke Co. v. Lancaster's Adm'r, 183 S. W. 258, 169 Ky. 24.

<sup>5</sup> Monongahela River Consol. Coal & Coke Co. v. Lancaster's Adm'r, 183 S. W. 258, 169 Ky. 24.

<sup>6</sup> Monongahela River Consol. Coal & Coke Co. v. Lancaster's Adm'r, 183 S. W. 258, 169 Ky. 24.

## CHAPTER LXXXIX

## COMPROMISE AND SETTLEMENT

- § 1800. Consideration.  
     1800(1). Alabama.  
     1800(2). Texas.
1801. Effect of agreement.  
     1801(1). Arkansas.  
     1801(2). Michigan.  
     1801(3). Texas.
1802. Scope of settlement.
1803. Presumption as to scope of settlement.
1804. Setting aside for fraud and concealment.  
     1804(1). Missouri.  
     1804(2). Oregon.
1805. Burden of proof where party seeks to impeach settlement.
1806. Matters considered in determining whether settlement shall stand.
- See, also, Accord and Satisfaction; Payment; Release and Discharge.

## § 1800. Consideration

Compromise of disputed claim as consideration for note, see ante, § 1063.

## § 1800(1). Alabama

The jury are instructed that if you believe, from the evidence in this case, that the claim of ——— against the defendant in this case, and sued on in this case, was absolutely and clearly unsustainable at law or equity, its compromise would constitute no sufficient legal consideration, and any promise of the defendant afterwards made either to ——— or to the plaintiff in this case, made in a spirit of compromise, would be void for want of consideration.<sup>1</sup>

## § 1800(2). Texas

You are instructed that a compromise is an agreement made between two or more parties as a settlement of matters in dispute between them, and in order to make a consideration for a compromise a binding one, there must be some matter of doubt between the parties as to whether a legal obligation exists or not.<sup>2</sup>

## § 1801. Effect of agreement

## § 1801(1). Arkansas

You are instructed that the plaintiff in this case sues the defendant for a certain amount of money he claims that defendant owes him, and defendant denies that he owes plaintiff anything, and sets up by way of a set-off a certain amount he claims that plaintiff owes him. The burden of proof is upon plaintiff to show from the testimony in this whole case that he is entitled to recover in this

<sup>1</sup> Ivy Coal and Coke Co. v. Long,  
36 So. 722, 139 Ala. 535.

<sup>2</sup> Fidelity Trust Co. v. Rector (Civ.  
App.) 190 S. W. 842.

case, and the same is true as to defendant on the set-off pleaded by him. If you believe there was a settlement between plaintiff and defendant, and that all matters affecting the account between them were brought into such settlement, and this settlement was final, and everything agreed to, and no material mistakes were made, and no fraud was practiced by the defendant on the plaintiff, your verdict will be for the defendant in this case.<sup>3</sup>

You are instructed that, if you find from the evidence that the plaintiff and defendant had a settlement of their business transactions in the month of ———, and in which settlement the property and items mentioned in the account sued on herein, were considered and accounted for, then your verdict should be for the defendant, unless you find from a preponderance of the evidence that there was a material mistake made in such settlement to the prejudice of the plaintiff, by the omission of one or more items of their business transactions, or that there was fraud or coercion, or violence, or threats of such, committed by the defendant.<sup>4</sup>

**§ 1801(2). Michigan**

The jury are instructed that, if these two men in ——— made an unfounded claim, and made it knowingly, knowing that they had no color of right to it, but asserted an unjust claim, and induced the parties to compromise, under the circumstances, in order to avoid litigation, it would not be binding on the company; but, if these two men did find fault with the lumber, and had good reason to find fault, if it did not comply with the contract, and they talked about it, and they finally made this offer in good faith, and those parties said, "We will take the money," and took it, they are bound by the contract, because, in that case, there would be a valid dispute between the parties, settled up by agreement. On the other hand, if it were a fraudulent scheme on the part of these parties to beat the defendant out of the money, it would not be binding.<sup>5</sup>

You are instructed that, whether a settlement of a claim is right or wrong, the law holds a party to diligence who proposes to avoid it. If he acquiesces for an unreasonable length of time, he will be bound by it. If he seeks to repudiate it, he must do so at the first opportunity, or account for and excuse the delay. By acquiescence for an unreasonable length of time, without excuse, he affirms the settlement, whether it was originally right or not. In this case those interested in the claim, if any ever existed, waited for more than ——— years after, as the defense claim, it had been adjusted.

<sup>3</sup> Russell v. Stewart, 94 S. W. 47, 78 Ark. 603.

<sup>4</sup> Russell v. Stewart, 94 S. W. 47, 78 Ark. 603.

<sup>5</sup> Nash v. Manistee Lumber Co., 42 N. W. 840, 75 Mich. 346.

This was an unreasonable length of time to wait. If, therefore, such settlement as is claimed was effected of the claim, you will find for the defense.<sup>6</sup>

You are instructed that when a matter is settled by the parties in interest, and there is no unfairness, and all the facts are equally known to both sides, the settlement is final. This principle acquires new force when death has interposed to close a party's lips.<sup>7</sup>

§ 1801(3). Texas

You are instructed that if, from the evidence in this case, you believe and find that on the \_\_\_\_\_ day of \_\_\_\_\_, the plaintiff and the defendant had a full and complete settlement and adjustment of all matters and accounts between them prior to the said \_\_\_\_\_ day of \_\_\_\_\_ then and in that case you will not take into consideration anything that occurred between the plaintiff and the defendant before and prior to the \_\_\_\_\_ day of \_\_\_\_\_; but in this connection you are instructed that the burden is upon the company to show the said settlement by a preponderance of the testimony.<sup>8</sup>

§ 1802. Scope of settlement

You are instructed that the defendant in this case, the estate of \_\_\_\_\_, says that if these two claims were not formally presented and made a part of the plaintiffs' contention in the former suit or proceeding, in fact, by agreement between the parties, the amounts allowed in the two former claims—the one by \_\_\_\_\_, administrator, and the other by the present claimants—were allowed by compromise and agreement between the executors of \_\_\_\_\_ and the administrator and the heirs of \_\_\_\_\_, the plaintiffs in this suit, and that such settlement was to embrace and cover everything and every claim and demand between them and the estate of \_\_\_\_\_. If you find such was the fact, then your verdict will be for the defendant. If you find that both of these claims were not included in any settlement and compromise, but that one or the other was so included and covered by the settlement and compromise, and the other was not, then your verdict could only be for that claim, with interest, which was not included in the compromise and settlement, after first deducting \_\_\_\_\_ per cent. commission. But if you find that neither was included in the settlement and compromise, and had not been before adjudicated in the first proceeding, then the plaintiffs would be entitled to recover the amount of their claim, first deducting the commission of \_\_\_\_\_ per cent. to which \_\_\_\_\_ was entitled, and give interest at \_\_\_\_\_ per cent. from the

<sup>6</sup> Foote v. Foote, 28 N. W. 90, 61 Mich. 181.

<sup>7</sup> Foote v. Foote, 28 N. W. 90, 61 Mich. 181.

<sup>8</sup> Red Mineral Springs Development Co. v. Davis (Civ. App.) 164 S. W. 427.



time he became liable to pay such claim. If the jury find that, at the time the receipt in question was given, the plaintiffs were ignorant of the sale of the timber made by ——— under said power of attorney to ——— on ———, said receipt would not be a bar to the plaintiffs' right to recover in this action for the amount ——— received from ——— for said timber, unless you find that a settlement of the two claims—one by ———, administrator, and the other by plaintiffs in this case—was intended to include all dealings between ——— and the estate of ———, and the dealings between ——— and the plaintiffs in this suit, and that the same was made with the assent and approval of the plaintiffs in this suit.<sup>9</sup>

You are instructed that the law favors the settlement of disputed matters between parties, and approves of compromises of unsettled and disputed claims. When parties enter into a settlement of their matters, the law will presume they consulted their own interests in making the arrangement, and such settlements will be encouraged by the law, and they will not be interfered with where there is no fraud or mistake. If a settlement, by way of a compromise of a disputed claim, is made, it cannot be avoided by either party, on a claim of any fraud about it, unless the party who makes such claim, and seeks to rescind the settlement, returns to the other party what he has received by virtue of it. If he keeps what he receives, he recognizes the settlement, and is bound by it. If the jury find that the receipts were signed at ———, with the understanding that they were not to include the money received for the land sold ———, and that the ——— matter was to be adjusted as agreed by ——— at ——— on ———, and if you find that ——— had agreed with ——— at that time that they would pay this item if they found it to be the fact that ——— had sold the land to T., then the plaintiffs are entitled to recover the amount received for this land, ——— dollars with interest on the same from ———, after first deducting from the ——— dollars the amount of commission at ——— per cent. But if you find that the agreement by ——— was to pay that sum only in the event of not settling the two claims, one by ——— administrator, and the other by the plaintiffs in this case, and if you find that such final settlement was consummated, then the plaintiffs cannot recover in this action. If the jury find that, when the receipts were signed by plaintiffs, they did not know that ——— had sold the land to T., and the timber to ———, and did not compromise and settle the two claims, but signed the said receipt believing that the account rendered to them was a true statement of all the money received by ——— for the sale of lands

<sup>9</sup> Hart v. Gould, 28 N. W. 831, 62 Mich. 262.

and timber under the power of attorney, then the signing of said receipts would have no effect on their right to recover in this action. If the jury find that ———, in his life-time, received \$——— from T., and \$——— from ———, in payment for lands or timber belonging to plaintiffs sold by him; that he never accounted to plaintiffs for the same; and that, in making the settlement and signing the receipts, these items were not known to or taken into account by plaintiffs—then plaintiffs are entitled to recover these items, with interest from the time the money was paid to ———.<sup>10</sup>

### § 1803. Presumption as to scope of settlement

The jury are instructed that if the jury believe, from the evidence, that after the alleged storage the plaintiffs had a full settlement of their accounts against C., and made no charge for storage, the presumption is that they had no just account against C. for storage up to the time of such settlement.<sup>11</sup>

### § 1804. Setting aside for fraud and concealment

Necessity of restoring former status, see ante, § 1802, note 10.

#### § 1804(1). Missouri

The court instructs the jury that, even if they find from the evidence that a settlement was made between plaintiff and defendant when it paid plaintiffs the sum of \$———, yet if the jury further believe from the evidence that prior to such payment the defendant admitted that said sum was due plaintiffs, and that defendant's president in substance told one of plaintiffs that it would suit him just as well for plaintiffs to sue defendant because it would have to borrow the money to pay with, and that if it was sued that would put off the final payment two or three years, and that by that time defendant might have sold its property and have money to pay plaintiffs off with, or defendant might be busted and a judgment would not hurt it, and if the jury further believe from the evidence that thereupon plaintiffs made investigations as to the financial condition of defendant, and ascertained facts sufficient to justify an ordinarily prudent person in believing that there was a reasonable prospect of defendant becoming insolvent, and that plaintiffs were induced by the foregoing facts, if you so find the facts to be, to sign the receipt read in evidence, then said settlement is not binding on plaintiffs, and the jury must not find against plaintiffs on account thereof.<sup>12</sup>

The court instructs the jury that, even if they believe from the evidence that there was a settlement of plaintiffs' claim between

<sup>10</sup> Hart v. Gould, 28 N. W. 831, 62 Mich. 262.

<sup>11</sup> Cole v. Tyng, 24 Ill. 99, 76 Am. Dec. 735.

<sup>12</sup> Scott v. Parkview Realty & Improvement Co., 164 S. W. 532, 255 Mo. 76.

plaintiffs and defendant, yet if the jury further believe from the evidence that in discussions preliminary to said settlement the defendant's president told one of plaintiffs that it would suit him just as well for plaintiffs to sue defendant, because it would have to borrow the money to pay with, and that if it was sued that would put off the final payment two or three years, and that by that time defendant might have sold its property and have money to pay plaintiffs off with, or defendant might be busted and a judgment would not hurt it, and if the jury further believe from the evidence that defendant's capital stock had been paid up with property put in at an amount far in excess of its value, and that because of that fact there were large sums due from solvent stockholders on account of their stock, and sufficient to pay plaintiffs' claim, and that that fact was known to defendant's president when he made the foregoing statement and was concealed by him from plaintiffs, and was not known to plaintiffs, and that the foregoing statement of defendant's president induced plaintiffs to make said settlement with defendant, then such settlement is not binding on plaintiffs, and the jury must not find against plaintiffs on account thereof.<sup>18</sup>

You are instructed that, in determining, under the other instructions of the court, whether defendant was guilty of such false and fraudulent representations and concealments as to justify your finding, and believing the plaintiffs' receipt of ———, mentioned in the evidence, to be of no force and effect on that account, you are to take into consideration the knowledge, if any, of the plaintiffs, or either of them, or of ———, their father, now deceased, at and before the time of the execution of said receipt of ———, of the facts and circumstances concerning or connected with the contracts mentioned in the evidence, and the grading thereunder and with the method by which the engineer in said contracts measured the overhaul, and with the information and data used in measuring the same, and with the custom prevailing (if you find from the evidence that there was such a custom) in and about the city of ——— as to estimating the haul under grading contracts for subdivision work; and you are to take into consideration the manner in which, and the routes over which, the plaintiffs transported the earth hauled under said contracts; and you are to take into consideration the contentions, if any, which you may find and believe existed between the parties, and the several claims, if any, made by each of the parties; and you are to take into consideration the knowledge which the plaintiffs, or either of them, or their father, had, if any, at the time they executed their receipt of ———, con-

<sup>18</sup> Scott v. Parkview Realty & Improvement Co., 164 S. W. 532, 255 Mo. 76.

cerning the assets and liabilities of the defendant and of its financial condition, and its prospective ability or inability to meet any judgment secured by plaintiffs; or concerning the plan under and manner in which the defendant was organized and its capital stock issued, and the manner in which its capital stock was paid up; and you will also take into consideration the means of knowledge, if any, which were available to plaintiffs, and their father, or either of them, to determine the facts upon which they base their charge of fraud and concealment; and you will take into consideration all other facts, circumstances, and conditions at the time tending to explain the situation of the parties, or which may have any bearing upon your determination whether such fraudulent representations or concealments existed, as defined in other instructions of the court.<sup>14</sup>

The court instructs you that in determining under the other instructions of the court, whether the defendant was guilty of such false and fraudulent representations and concealments as to justify your finding, and believing they are not bound by the receipt of ———, in evidence for that reason, you are to take into consideration the knowledge, if any, which the plaintiffs and their father, or any one of them, may have had concerning the assets and liabilities of defendant, or its financial condition, or of its ability or inability to meet any judgment secured by plaintiffs, or concerning the plan under and the manner in which the defendant corporation was organized, and its capital stock issued, and the manner in which its capital stock was paid up, and you are also to take into consideration, not only the knowledge of the plaintiffs and their father, or either of them, but also the means of knowledge available to them, if any.<sup>15</sup>

§ 1804(2). Oregon

The jury are instructed that, when parties have gone to law about a matter, they may settle between themselves without the intervention of an attorney on either side, or with an attorney on one side, if they see fit to do so; but after an action is commenced, and the parties appear with an attorney in court, any settlement of the claim out of court without the knowledge or consent of the attorney is to be viewed with suspicion. If there is any fraud in the case, such a settlement may be set aside.<sup>16</sup>

<sup>14</sup> Scott v. Parkview Realty & Improvement Co., 164 S. W. 532, 255 Mo. 76.

<sup>15</sup> Scott v. Parkview Realty & Im-

provement Co., 164 S. W. 532, 255 Mo. 76.

<sup>16</sup> Falconio v. Larsen, 48 P. 703, 31 Or. 137, 37 L. R. A. 254.

**§ 1805. Burden of proof where party seeks to impeach settlement**

You are instructed that, when parties who have had business transactions between themselves meet and make settlement of such transactions, the law presumes that such settlement is fair and legal, and one seeking to annul and set aside such settlement by suit, in order to do so successfully, must show by a preponderance of the evidence that a material mistake was made in such settlement to his prejudice, or that there was fraud or coercion, violence, or a threat of such, committed on the part of the other party in making such settlement, and such suit should be brought in a reasonable time.<sup>17</sup>

**§ 1806. Matters considered in determining whether settlement shall stand**

You are instructed that, in arriving at your verdict you are to be governed alone by what was done and said by the parties at the time of the settlement made, if you find that one was made, and the items included in said settlement, which are included in the account sued on herein.<sup>18</sup>

<sup>17</sup> Russell v. Stewart, 94 S. W. 47, 78 Ark. 603.

<sup>18</sup> Russell v. Stewart, 94 S. W. 47, 78 Ark. 603.

## CHAPTER XC

### CONCEALING BIRTH

- § 1807. Elements of offense.  
1808. Defenses.

#### § 1807. Elements of offense

The jury are instructed that if they believe from the evidence, that the defendant, at any time within ——— years next before the finding of this indictment, was pregnant with a female child, and was then and there delivered of said child, and that said defendant, after being so delivered of said child, did, within the time and at the county aforesaid, knowingly and willfully endeavor privately to conceal the birth of said child, by secretly partly burning the body thereof, or by secretly hiding the body of the said child, so that it was not and could not be known, then and there, whether the said child was born alive or not, then they will find her guilty, and, so finding, will assess her punishment at imprisonment in the penitentiary for a term not less than ——— nor more than ——— years.<sup>1</sup>

The jury are instructed that the question as to whether said child was born dead or alive is not submitted to the consideration of the jury; the crime under this indictment being complete, if the jury shall believe from the evidence that defendant, within the time and at the county aforesaid, was pregnant with and delivered of a female child, as charged in the indictment, and that, after being so delivered of said child, she then and there knowingly and willfully—that is to say, understandingly and intentionally—endeavored privately to conceal the birth of said child, by secretly partly burning the body of said child, or by secretly hiding the same, so that it was not and could not be known, then and there, whether the said child was born alive or not.<sup>2</sup>

The jury are instructed that this is not a prosecution for the murder of said child, nor is it material to the finding of a verdict of guilty that the jury should know whether said child was killed, or whether said child was born dead or alive. It is sufficient, under this indictment, if the jury shall believe from the evidence that the defendant was pregnant with and delivered of a child, and after being so delivered, in manner and form as charged in the indictment, endeavored privately to conceal the birth of said child,

<sup>1</sup> State v. White, 76 Mo. 96.

<sup>2</sup> State v. White, 76 Mo. 96.

and that by such endeavor to conceal such birth she then and there destroyed the means of knowing or ascertaining whether said child was born alive or not.<sup>3</sup>

**§ 1808. Defenses**

The jury are instructed that, though the jury may believe from the evidence that defendant felt great shame and mortification at the birth of said child, still such feelings are no defense to this prosecution, and the jury should not acquit on such grounds.<sup>4</sup>

<sup>3</sup> State v. White, 76 Mo. 96.

<sup>4</sup> State v. White, 76 Mo. 96.



## CHAPTER XCI

## CONSPIRACY

- § 1809. Elements of offense.  
1809(1). California.  
1809(2). Colorado.  
1809(3). Illinois.  
1809(4). Indiana.  
1809(5). Oklahoma.
1810. Intent of defendant or knowledge of criminality of acts.  
1811. Persons liable as conspirators.  
1812. Liability for acts of co-conspirators.  
1812(1). California.  
1812(2). Illinois.  
1812(3). Missouri.  
1812(4). South Dakota.
1813. Conspiracy to defraud United States.  
1814. Conspiracy to defraud city.  
1815. Conspiracy to prevent competition in the letting of public contract.  
1816. Liability of members of labor union for acts connected with strikes.  
1817. Right to convict or acquit one or all of defendants.  
1818. Civil liability—Elements of cause of action.  
1819. Weight and sufficiency of evidence.  
1819(1). Indiana.  
1819(2). Iowa.

## § 1809. Elements of offense

## § 1809(1). California

You are instructed that the common design is the essence of the charge, and while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the detail of the plans or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators.<sup>1</sup>

<sup>1</sup> People v. Sacramento Butchers' Protective Ass'n, 107 P. 712, 12 Cal. App. 471.

## § 1809(2). Colorado

You are instructed that, though the jury may believe from the evidence that when the parties came together upon the \_\_\_\_\_ day of \_\_\_\_\_, or at any time prior thereto and within \_\_\_\_\_ years prior to the date of the finding of the indictment herein, they met for some unlawful purpose, yet, if the jury further believe from the evidence beyond a reasonable doubt that they then joined in attempting to accomplish the unlawful purpose stated in the indictment or in any count thereof, in manner and form as herein alleged, then this would be sufficient evidence of a conspiracy to accomplish such purpose, and it is unnecessary to prove any previous plan or understanding to that effect by the parties.<sup>2</sup>

## § 1809(3). Illinois

The jury are instructed that the essence of the crime of conspiracy is the intent and the agreement. Unlawful acts of individuals, no matter how numerous, cannot be called a conspiracy, unless it appears that the minds of the persons committing such acts had previously met and agreed upon a common purpose, contemplating something unlawful, either as the final object of the agreement or as a means of accomplishing it. Therefore, even if you believe from the evidence that lawless acts were committed, still, unless it is proved beyond a reasonable doubt that the defendants, or some of them, had the intent and came to an agreement which tended to result in such acts, it is your duty to acquit the defendants; and, moreover, it is not sufficient, to convict the defendants, to prove even that they conspired to do lawless acts, such as using threats and intimidation. In this case, in order to warrant a conviction, the intent to injure the person by beating, bruising, and wounding must be shown; otherwise, it is your duty to acquit the defendants.<sup>3</sup>

## § 1809(4). Indiana

You are instructed that, while it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose; that such common design may be regarded as proved if the jury believe from the evidence that the parties to such conspiracy were actually pursuing in concert the common design or purpose, whether acting separately or together, by common or different

<sup>2</sup> Imboden v. People, 90 P. 608, 40 Colo. 142.

<sup>3</sup> Johnson v. People, 124 Ill. App. 213.

means, provided they all were leading to the same unlawful result.<sup>4</sup>

**§ 1809(5). Oklahoma**

The court instructs the jury, as a matter of law, that a conspiracy is a combination of two or more persons by some concert of action to accomplish some criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means.<sup>5</sup>

The court instructs the jury that where two or more persons combine or conspire together, by some concert of action, to accomplish some criminal or unlawful purpose or some purpose not in itself criminal or unlawful by criminal or unlawful means, then such combination is what is known in law as a conspiracy to commit crime. The court instructs the jury as a matter of law that while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons by concert of action, to accomplish the criminal or unlawful purpose alleged in the information, yet it is not necessary to prove that the parties ever came together and entered into any formal agreement or arrangement between themselves to effect such purpose. A combination or common design or object may be regarded as proved if the jury believe from the evidence beyond a reasonable doubt that the parties charged were actually pursuing, in concert, the unlawful object stated in the information, whether acting separately or together, by common or different means, provided all were leading to the same unlawful result, and if two or more persons are moved and influenced by a common intent and purpose to feloniously assault another with a deadly weapon and to take his life or to commit such felony upon such person, then the law says that under such circumstances the act of one is the act of all assailants and the shot of one is the shot of all; they are all responsible, under such circumstances, for the acts of each other.<sup>6</sup>

**§ 1810. Intent of defendant or knowledge of criminality of acts**

The claim is made by counsel for the defendant that there is no proof that the defendant had knowledge that the act of certifying the check, if done as claimed in the indictment, was in violation of the law. On this point, I say to you, gentlemen, that a conspiracy cannot exist without a guilty intent being then present in the minds of the conspirators; but this does not mean that the parties must know that they are violating the statutes of the United States. The government is not required to prove, in order to sus-

<sup>4</sup> *Musser v. State*, 61 N. E. 1, 157 Ind. 423.

<sup>5</sup> *Thompson v. State*, 117 P. 216, 6 Okl. Cr. 50.

<sup>6</sup> *Collins v. State*, 175 P. 124, 15 Okl. Cr. 98.

tain a verdict of guilty, that the parties knew that some statute forbade the acts they were performing. If these acts of certifying checks, or any of them as charged in the indictment, were in fact violations of the law, the defendant is to be held guilty if she, as charged in the indictment, conspired with \_\_\_\_\_ or \_\_\_\_\_ in bringing about their certification; and the question of her knowledge or her ignorance of such acts being contrary to law is not a fact which you have a right to consider. The only question for you to pass upon is whether the defendant violated the law; not whether she had any knowledge that she was violating the law.<sup>7</sup>

I am asked by the government to charge, and I do charge in this connection, on the question of intent on the part of the defendant, that the law presumes that every person intends the natural and ordinary consequences of his acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence from which the jury may be satisfied, from declarations of the criminal himself, as to what he intended when he did a certain act. And this question of intent, like all other questions of fact, is solely for the jury to determine from the evidence in the case.<sup>8</sup>

#### § 1811. Persons liable as conspirators

The court instructs the jury as a matter of law that all who take part in a conspiracy after it is formed and while it is in execution, and all who, with the knowledge of the facts, concur in the facts originally formed and aid in executing them, are fellow conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them. They commit the offense when they become partners to the transaction or further the original plan.<sup>9</sup>

#### § 1812. Liability for acts of co-conspirators

##### § 1812(1). California

I instruct you that, where several persons conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law, the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one

<sup>7</sup> Chadwick v. United States (C. C. A. Ohio) 141 F. 225, 72 C. C. A. 343.

<sup>8</sup> Chadwick v. United States (C. C. A. Ohio) 141 F. 225, 72 C. C. A. 343.

<sup>9</sup> People v. Polindexter, 90 N. E. 261, 243 Ill. 68; People v. Strauch, 88 N. E. 155, 240 Ill. 60, 130 Am. St. Rep. 255.

of its probable and natural consequences, even though it was not intended as a part of the original design or common plan.<sup>10</sup>

§ 1812(2). Illinois

The jury are instructed that if you believe, from the evidence in the case beyond a reasonable doubt, that the fact of a conspiracy is established, then in that state of the proof any act of any one of the conspirators in the prosecution of the objects of the conspiracy is considered the act of all.<sup>11</sup>

§ 1812(3). Missouri

The jury are instructed that, if you believe from the evidence that the state has proven a conspiracy between the defendant, her father, and brothers, or with any of them acting with her, to force ——— to marry her, and to take his life if he refused to do so and to live with her thereafter, and that she and her father and brothers, or any of them, acting with her, did so force ——— to marry her, and did so take the life of ——— because he thereafter refused to live with her, then, in considering the guilt or innocence of the defendant, you may take into consideration every act and declaration of each member of the confederacy in pursuance of the original concerted plan, and with reference to the common object, which has been given in evidence before you.<sup>12</sup>

§ 1812(4). South Dakota

I instruct you that, in a case of this kind, where two or more persons enter into a combination or arrangement for the purpose of committing a crime, that each of the persons engaged in that combination is responsible for the acts of all, where those acts lead to the commission of the crime; that each is responsible for the act of the three, and that all are equally liable for the acts of each in that connection.<sup>13</sup>

§ 1813. Conspiracy to defraud United States

May I remind you, gentlemen, that we are regarding, not the statement of this witness or that, but the fact itself. We are looking through the witness to the occurrence, and trying to see what that occurrence was. S. says it was a very corrupt piece of business on the part of defendant. Defendant denies that. What is the fact about it? Upon the defendant's testimony this charge of bribery would rest on what view you took of his intention in the matter of making the payments. Bribery is a crime that, as I told you, rests on corruption. A man must have a corrupt purpose, or he

<sup>10</sup> People v. Ford, 143 P. 1075, 25 Cal. App. 388.

<sup>11</sup> People v. Darr, 179 Ill. App. 130.

<sup>12</sup> State v. Kennedy, 75 S. W. 979, 177 Mo. 98.

<sup>13</sup> State v. Cline, 132 N. W. 160, 27 S. D. 573.

should not be convicted of bribery or of conspiracy. There is no such thing as an innocent bribery. Taking the defendant's testimony, was his purpose in authorizing or approving the payments to ——— and ——— an innocent purpose, or was it a corrupt purpose?

In deciding that question, of course, you are not limited to what he says his purpose was, or to what S. says his purpose was. You are, as I said, to look through the man's expressions and protestations to the fact itself. Why did he authorize the payment? With what motive did he sanction it—with what end in view? A man is presumed to intend the natural results of his act. That presumption is not conclusive; but if a man pays money to a government inspector, and the natural result of that payment would be to influence the inspector's action, there is a presumption that the man realized it at the time when he made the payment, and intended that result. You may, however, disregard that presumption. You may say, "The facts convince me that it was not so in this case, and that in this instance I either am in doubt about the corruption, or I am satisfied there was no corruption," and you should give the defendant the benefit of the doubt and of your finding, if they are his way. In reference to the alleged conspiracies to bribe the inspectors, the defendant should not be convicted there unless both he and S. planned to bribe those men. As I described to you, both the defendant and S. must have had a corrupt plan in making the payments of money to them. And I will add this as to S.: In so far as you consider S.'s evidence, you should not follow it, unless it is corroborated in all material particulars. S.'s evidence, you know, was only a part of the evidence in that case.<sup>14</sup>

#### § 1814. Conspiracy to defraud city

The jury are instructed that, whether or not any gain was made by the defendant, any loss suffered by the city, or whether any loss could have been sustained by the city if the agreement or sale had been carried out, is immaterial, for the actual value of the property is immaterial. The question is, did defendant know, or have reason to believe that the property could be obtained for the use of the city for a much less sum than \$———? If he did, then it was his duty to purchase the property at the best possible price. I instruct you that it was the duty of defendant, in the capacity of alderman and chairman of the sewer committee, to protect the interests of the city, and if he fraudulently and unlawfully entered into any arrangement with ——— whereby through

<sup>14</sup> *Sears v. United States* (C. C. A. Mass.) 264 F. 257.

his knowledge as an officer of the city and through his power in that capacity an attempt was made to cheat or defraud the city by paying for the site in question more than was necessary to pay for it, and more than he knew was necessary to pay for it, then he may be found guilty of the conspiracy as charged in this indictment.<sup>15</sup>

**§ 1815. Conspiracy to prevent competition in the letting of public contract**

The jury are instructed that if A. introduced his son O. to H. with the intention of bringing said H. and said O. into an agreement or understanding which would, in effect, prevent competition in the letting of the contract mentioned in the indictment, and that the said H. and O. did thereafter enter into such unlawful agreement with each other to prevent competition in the letting of the contract in question, then the jury may be justified in finding the said A. guilty of conspiracy.<sup>16</sup>

The jury are instructed that it is sufficient to sustain a conviction if the people have shown by the evidence beyond a reasonable doubt that the defendants or any two of them did unlawfully conspire and agree together to prevent competition in the letting of said contract in the manner and form as charged in the indictment.<sup>17</sup>

**§ 1816. Liability of members of labor union for acts connected with strikes**

The court instructs the jury that, in order to constitute the crime of conspiracy, there must be certainty to a common intent and the object to be accomplished must be an evil one, or it is to be accomplished by evil means. It is not enough, therefore, to show that the defendants on trial may have had a common object to succeed in their strike, such as is common for men on strike to have, and that some one else indicted with them attempted to accomplish that object by evil means. Before any one of these defendants can be found guilty, it must be shown beyond a reasonable doubt that he agreed with such other person, if you believe from the evidence that there was such a person, to accomplish such object by such evil means.<sup>18</sup>

The court instructs the jury that the indictment in this case charges the defendants with the specific crime of conspiracy to injure certain persons, who are designated as brass molders, who do

<sup>15</sup> *People v. Schultz*, 178 N. W. 89, 210 Mich. 297.

<sup>16</sup> *People v. Strauch*, 88 N. E. 155, 240 Ill. 60, 130 Am. St. Rep. 255.

<sup>17</sup> *People v. Strauch*, 88 N. E. 155, 240 Ill. 60, 130 Am. St. Rep. 255.

<sup>18</sup> *Johnson v. People*, 124 Ill. App. 213.



not belong to the unions, working for certain corporations. It is therefore not proper to find the defendants guilty on proof of having formed an executive committee merely for some evil purpose; nor is it proper to convict any one of the defendants merely because he was at one time a member of said executive committee, even if you believe from the evidence that said executive committee was formed for some evil purpose. Before you can convict any one of the defendants it must be clearly proved, beyond all reasonable doubt, that he conspired with some other person indicted with him to commit the identical offense charged.<sup>19</sup>

**§ 1817. Right to convict or acquit one or all of defendants**

The court instructs the jury that under the law and the evidence in this case you may convict either or both of the defendants, provided you find from the evidence, beyond a reasonable doubt, that those, the one or both to be convicted, conspired together or with some other person or persons jointly indicted herein, as hereinabove defined in this instruction, or you may find either or both not guilty.<sup>20</sup>

**§ 1818. Civil liability—Elements of cause of action**

Conspiracy between agent and third person to defraud principal, see post, § 4259.

You are instructed that it is not required for the plaintiff to prove in this case a criminal conspiracy. The only kind of conspiracy that has to be proved is that there was a common purpose and a concert of action with the plain intent in the minds of the different persons to cause the suspension of the plaintiff from membership in the union. If that purpose existed and was successful in causing his suspension, and the members who were participants in that knew that the necessary consequence of the suspension would be the loss of his position, then the jury have a right to find from these conditions that their purpose was to injure him. You are also instructed in this connection that the decision of the case turns upon the question of whether the defendants did anything from malice and ill will, and by a concert of action, with a common purpose to do an injury, or whether they, as members of an association, acting in good faith and without malice and without ill will, acted in accordance with their best judgment to promote the interests of the association.<sup>21</sup>

<sup>19</sup> Johnson v. People, 124 Ill. App. 213.

<sup>20</sup> Imboden v. People, 90 P. 608, 40 Colo. 142.

<sup>21</sup> Campbell v. Johnson (C. C. A. Wash.) 167 F. 102, 92 C. C. A. 554.

**§ 1819. Weight and sufficiency of evidence**

Of conspiracy to murder, see post, § 3074.

**§ 1819(1). Indiana**

You are instructed that evidence in proof of conspiracy will generally be circumstantial, and it is not necessary, for the purpose of showing the existence of the conspiracy, for the state to prove that the defendant and some other person or persons came together and actually agreed upon a common design or purpose, and agreed to pursue such common design and purpose in the manner agreed upon. It is sufficient if such common design and purpose is shown to your satisfaction by circumstantial evidence.<sup>22</sup>

**§ 1819(2). Iowa**

The court instructs the jury that it is not incumbent upon the state to prove the alleged conspiracy by direct evidence. It may be established by circumstantial evidence, or by evidence both direct and circumstantial. In proving the agreement or conspiracy, it is not necessary to prove the language in which it was made nor the exact time in which it was made nor the exact place at which it was formed. A conspiracy may be shown, as stated above, by evidence more or less circumstantial in its character. It may be shown by what is done by each of the parties in furtherance of the common design if any such acts are done, or by what system or concert of action between them appears from their acts when viewed as a whole. In determining whether or not the defendants ——— and ——— entered into a conspiracy between themselves as charged in the indictment, you will consider so far as shown by the evidence all that was said and done by the defendants, whether or not they acted in concert for the accomplishment of a common purpose, what that purpose was, if the same is shown, and from these facts and all facts and circumstances shown by the evidence you must determine whether the defendants did enter into a contract or conspiracy between themselves to do the acts charged in the indictment. The proof as to time and place will be sufficient if it establishes that said conspiracy was entered into in ——— county, ———, and within ——— years next preceding the ——— day of ———.<sup>23</sup>

<sup>22</sup> *Musser v. State*, 61 N. E. 1, 157 Ind. 423.

<sup>23</sup> *State v. Manning*, 128 N. W. 345, 149 Iowa, 205. In this case the court held that under the circumstances it was not necessary, in absence of request, to instruct that the jury could

not consider acts of alleged co-conspirators in their bearing upon the whole case, unless they first found from other testimony prima facie evidence of a combination between defendant and such alleged co-conspirators to do the acts charged.

## CHAPTER XCII

## CONTINUANCE

§ 1820. Effect of stipulation as to facts, made to prevent continuance.

§ 1820. Effect of stipulation as to facts, made to prevent continuance

The court instructs the jury that the facts admitted to be true, as stated in defendant's application for a continuance, the jury will take as true, and they are not authorized to consider any evidence in this case which contradicts the facts admitted to be true; nor will the jury consider any evidence which tends to contradict the facts which are admitted by plaintiff to be true in said written admission of record, which was read in evidence by the defendant.<sup>1</sup>

<sup>1</sup> Galveston, H. & S. A. Ry. Co. v. Lynes (Tex. Civ. App.) 65 S. W. 1119.

## CHAPTER XCIII

## CONTRACTS

## A. AGREEMENT OR MUTUAL ASSENT

- § 1821. Offer and acceptance.  
    1821(1). Delaware.  
    1821(2). Illinois.  
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1822. Acceptance conditionally or on terms varying from offer.  
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- § 1843. Mistake.  
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#### G. VALIDITY OR LEGALITY OF CONTRACT

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1850. Contracts in aid of combination to control prices.  
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1855. Effect of illegality—Contracts connected with illegal contract.  
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#### H. CONSTRUCTION

1857. Construction against party drawing contract.  
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#### I. DISCHARGE BY AGREEMENT

1863. Rescission.  
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#### J. DISCHARGE BY PERFORMANCE

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1867. Effect of exceeding requirements of contract.  
1868. Time of performance.  
1869. Same—Reasonable time.  
1870. Performance of conditional promises.  
1871. Performance by one party rendered ineffective by fault of other party.  
1872. Sufficiency of tender of performance to put other party in default.  
1873. Conclusiveness of decision of person designated by parties to determine disputed questions as to performance.  
1874. Recovery for part performance—Waiver of full performance.  
1875. Same—Severability of contract.

**K. DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE****§ 1876. Prevention of performance by acts of municipal authorities****L. DISCHARGE BY BREACH**

- 1877. In general.
- 1878. Renunciation of contract as giving right to other party to sue.
- 1879. Performance by one party prevented by other.
  - 1879(1). Illinois.
  - 1879(2). Missouri.
  - 1879(3). Virginia.
- 1880. Waiver of performance.
  - 1880(1). Illinois.
  - 1880(2). Rhode Island.
  - 1880(3). Texas.

**M. BREACH OF PARTICULAR CONTRACTS**

- 1881. Breach of contract for threshing.
- 1882. Breach of contract to give prize to winner of popularity contest.
- 1883. Breach of agreement to advance moneys to redeem from foreclosure.
- 1884. Liability for breach of agreement not to do business in certain territory.
- 1885. Right of aggrieved party making advances under contract.

**N. MATTERS PERTAINING TO REMEDIES FOR BREACH**

- 1886. Presumption and burden of proof.
- 1887. Same—As to fraud in procuring signature to contract.
- 1888. Same—As to performance.
- 1889. Directing verdict on merits and submitting only question of damages to jury.

**A. AGREEMENT OR MUTUAL ASSENT****§ 1821. Offer and acceptance****§ 1821(1). Delaware**

You are instructed that in legal contemplation a contract is "an agreement between two or more persons, upon sufficient consideration, to do or not to do a particular thing." In other words to make a contract there must be an offer, by one party, for a sufficient consideration, to do or not to do a particular thing, and there must be an acceptance, by the other party, of that offer, and this offer and acceptance must be equally binding upon both parties to the agreement, and must be to do or not to do a particular thing. In order to determine whether there was or was not a contract between the plaintiff and defendants, you should consider all the negotiations, conversations and dealings of the parties in respect to the subject matter involved in this suit.<sup>1</sup>

**§ 1821(2). Illinois**

The jury are instructed that, before there can be a contract between two parties, the minds of the two parties must come togeth-

<sup>1</sup> Speakman v. Price, 80 A. 627, 2 Boyce, 377.

er upon all the terms and conditions of the contract, or, as it is sometimes said, the minds of the contracting parties must meet.<sup>2</sup>

**§ 1821(3). Virginia**

The court instructs the jury that, before a contract can exist, the parties to it must agree to the same thing at the same time, and the assent of each party must be to the precise terms offered.<sup>3</sup>

**§ 1822. Acceptance conditionally or on terms varying from offer**

You are instructed that, if you believe from the evidence that after the plaintiff made its bid to the defendant to do certain work in connection with the improvements at the ——— Building for a certain specified price, there was an acceptance of that offer by the defendant, then the law of this case is for the plaintiff, and you should so find, unless the acceptance was made with the understanding between the parties that the work was to be done in a certain stipulated time, or that after that acceptance a contract between them should be put in writing and signed by the parties, or a bond should be executed by the plaintiff to defendant. Now, if you believe any of those stipulations or terms were understood and agreed to between the parties, and the plaintiff failed to do those things or any one of them, if it had agreed to it, then the law of this case is for the defendant, and you should so find.<sup>4</sup>

**§ 1823. Condition that others sign—Waiver**

You are instructed that according to the terms of Exhibit ———, it was not to become operative until all the parties thereto had signed same, and you are instructed that this provision is binding on all the parties; but you are further instructed that this provision could, after the instrument was signed by plaintiff and defendant, be modified, and the signature of ——— could be waived; and if the parties who did sign Exhibit ——— afterwards changed same, or waived the signature of ——— and went on and acted under the provisions of Exhibit ——— just as if ——— had signed it, and knowing that he had not signed it, then the provisions of Exhibit ——— are binding on the parties who did sign it.<sup>5</sup>

**§ 1824. Effect of correspondence as constituting contract**

The jury are instructed that, if they believe from the evidence that the plaintiff became an agent for the defendant under a contract, and if the jury further believe from the evidence that the only contract between the plaintiff and defendant is expressed in

<sup>2</sup> *Sears, Roebuck & Co. v. Winchester Repeating Arms Co.*, 178 Ill. App. 318.

<sup>3</sup> *Ney v. Wrenn*, 84 S. E. 1, 117 Va. 85.

<sup>4</sup> *Lynch v. Snead Architectural Iron Works*, 116 S. W. 693, 132 Ky. 241, 21 L. R. A. (N. S.) 852.

<sup>5</sup> *Harris v. Lyons*, 138 N. W. 295, 30 S. D. 272.



letters from the defendant to the plaintiff bearing date on the \_\_\_\_\_ and \_\_\_\_\_ days of \_\_\_\_\_, inclosing a printed circular mentioned therein, and in letters from plaintiff to defendant bearing date on the \_\_\_\_\_ and \_\_\_\_\_ days of \_\_\_\_\_, and if the jury further believe from the evidence that the plaintiff, by a letter dated the \_\_\_\_\_ day of \_\_\_\_\_, accepted the terms proposed to him by the defendant, as shown by the letters and circular aforesaid, without anything other or further in relation thereto between them, then such letters and circular constitute the contract between the plaintiff and the defendant; and the parties are bound by the terms thereof, except so far as the same may have been subsequently modified by mutual agreement of the plaintiff and of the defendant, if, from the evidence, the jury believe that any such modification was subsequently made.<sup>6</sup>

The jury are instructed that, if they believe from the evidence that the plaintiff made a contract with the defendant, and that such contract is expressed in letters, or in several writings, and a printed circular, and is the only contract between them, then the contract between the plaintiff and the defendant is a contract in writing, and the parties are bound by the terms of the written contract.<sup>7</sup>

The jury are instructed that, if they believe that the contract between the plaintiff and the defendant consisted of the letters and the circular mentioned in the last instruction above, then such contract was a contract in writing, and it bears date from the acceptance by the plaintiff of the terms proposed by the defendant, in the year \_\_\_\_\_.<sup>8</sup>

#### § 1825. Power of court to make contract for parties

The jury are instructed that, if there was a contract made between the plaintiff and defendant in this case, and you should so find, and that that contract was for an equal division of the fees recovered in the case, then, regardless of other matters, they should be bound by the contract. That is, courts and juries do not make contracts for people; but, if they ascertain that a contract is made, then it is the duty of the courts and juries to enforce the contract as made by the parties.<sup>9</sup>

<sup>6</sup> Shrewsbury v. Tufts, 23 S. E. 692, 41 W. Va. 212.

<sup>7</sup> Shrewsbury v. Tufts, 23 S. E. 692, 41 W. Va. 212.

<sup>8</sup> Shrewsbury v. Tufts, 23 S. E. 692, 41 W. Va. 212.

<sup>9</sup> Bennett v. Burkhalter, 57 S. E. 231, 128 Ga. 154.

**B. IMPLIED CONTRACTS****§ 1826. In general****§ 1826(1). Alabama**

The jury are instructed that, if they believe from the evidence that the defendant accepted the benefit of contracts made by plaintiff's testator, and money paid out by him, then it would be liable to the plaintiff for the amount of money so paid out by her testator, provided the amount paid was reasonable.<sup>10</sup>

**§ 1826(2). Massachusetts**

The jury are instructed that a promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him to so act without objection, then the jury might infer a promise by defendant to pay the plaintiff.<sup>11</sup>

**§ 1827. Effect of rendition of services which another is legally obligated to perform**

The court instructs the jury that, where one does for another that which the other is legally obligated to do, the law not only implies a previous request that the thing should be done, but a promise to compensate. Therefore, if you find in this case that defendant was driving his car at a reckless and dangerous rate of speed, and thereby struck and injured the witness ———, without any negligence upon the part of the said ———, then defendant would be legally liable for such injuries and the services rendered by plaintiff in this case to witness ———, and if you so find, you will find for the plaintiff in such amount as said services are reasonably worth; notwithstanding you may find from the evidence that defendant did not promise to pay for such services.<sup>12</sup>

**§ 1828. Implication of promise to pay reasonable value of services**  
See, also, Work and Labor.

The jury are instructed that, if you believe from the evidence that the defendant performed labor and services for the plaintiff at his request, and that no price was fixed or agreed upon then the

<sup>10</sup> Berlin v. Sheffield Coal, Iron & Steel Co., 26 So. 933, 124 Ala. 322.

<sup>11</sup> Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347.

<sup>12</sup> Banfield v. Davidson (Tex. Civ. App.) 201 S. W. 442.

law will imply a promise from the plaintiff to pay the defendant for such work what the same is reasonably worth.<sup>13</sup>

**§ 1829. Recovery on implied contract for extra expense in addition to compensation specified in express contract**

The court instructs the jury that under the evidence in this case you will find the issues for plaintiff, and if you believe from the evidence that the plaintiff made a contract with the defendant to move the engine in question for a specified sum with the understanding that said engine was in good condition to move, and if you further believe that when the plaintiff went to the engine he notified the defendant that it was in bad condition and would require extra trouble and expense, and the defendant told him to proceed to move it anyway, and if you further believe that by reason of moving the engine, as required by the plaintiff's contract, he incurred extra expense and spent extra time in addition to what it would have cost him had the engine been in a reasonably good condition to move, then your verdict will be for the plaintiff for whatever may be the balance due on the contract price for such work, and in addition thereto the reasonable value of any extra expense incurred and time spent in repairing the said engine and putting it in condition to move, not to exceed ———. But if you believe that the plaintiff incurred no extra expense and spent no extra time at the request of the defendant, then you will find for the plaintiff for the balance due on his contract, ———.<sup>14</sup>

**§ 1830. Implied contract by insane person to pay for necessities furnished him**

The court instructs you that, where services are rendered and received, a contract of hiring, or obligation to pay, will be presumed, but a presumption may arise, from the relationship of the parties, that the services rendered are acts of gratuitous kindness, and in this case it is a question for you, taking into consideration all the circumstances, including the nature and degree of the relationship of the parties and their circumstances in life, to determine whether there was any implied contract for compensation or not. Now, if you find from the evidence in this cause that plaintiff rendered services to the mother in taking care of her and waiting on her, and that she intended while rendering such services to charge the mother for the same, and that her mother was insane at the time, and that such services were necessary for the comfort and well-being of her mother, then you will find the issues for the plaintiff, and allow her in your verdict such sum as you may believe, from the

<sup>13</sup> Cavitt v. Davis, 93 Ill. App. 519. Implement Co. (Mo. App.) 189 S. W.

<sup>14</sup> Crosby v. Emerson-Brantingham 596.

evidence in the cause, she is entitled to, not exceeding the sum of ——— dollars.<sup>15</sup>

You are instructed, on the other hand, that if you believe and find, from the evidence in this cause, that plaintiff rendered the services sued for as acts of gratuitous kindness to her mother, and as a member of the family, with no intention of charging her for the same, then you must find the issues for the defendant, and in such case it makes no difference how meritorious and valuable her services to her mother may have been.<sup>16</sup>

### C. CONSIDERATION

#### § 1831. Necessity of consideration

##### § 1831(1). Illinois

The jury are instructed that if they find, from the evidence, that a contract existed between the plaintiff and F., to furnish the goods in question for defendant's house, that such contract did not bind defendant to pay plaintiff for them, unless the jury first find, from the evidence, that defendant subsequently assumed F.'s contract, and promised plaintiff to pay him for the same; and if the jury find such to be the case, the defendant cannot be held liable to pay for any goods delivered before defendant made such agreement with plaintiff, for the reason that there is no consideration for such agreement, and the jury should give defendant credit for all money paid by him, to be applied in payment for goods furnished subsequently to such agreement by defendant.<sup>17</sup>

##### § 1831(2). Michigan

The jury are instructed that they must find from the evidence in the case that the defendant received a valuable consideration from the plaintiff, which induced him to make the contract relied upon in this case, as a naked promise is void on general principles of law.<sup>18</sup>

##### § 1831(3). Nebraska

You are instructed that one of the issues in this case is the consideration of the contract sued on in this case. You are instructed in this connection that if you find from the evidence that \$—— was the purchase price of defendant's interest in the partnership property, and that such sale was actual, agreed on and reduced to writing and that said contract contained no inhibition against the defendant engaging in business in ———, and that there was no further

<sup>15</sup> *Reando v. Misplay*, 2 S. W. 405, 90 Mo. 251, 59 Am. Rep. 13.

<sup>16</sup> *Reando v. Misplay*, 2 S. W. 405, 90 Mo. 251, 59 Am. Rep. 13.

<sup>17</sup> *Owen v. Stevens*, 78 Ill. 462.

<sup>18</sup> *Howe v. Hyde*, 50 N. W. 102, 88 Mich. 91.

consideration for the contract sued on in this case, you will return a verdict for the defendant.<sup>19</sup>

**§ 1832. Matters not constituting consideration—Stock having no value**

As to said counterclaim alleged in the answer of the defendants, the court further instructs the jury that, if they believe from the evidence that the shares of stock mentioned in said paper were at the time it was signed by said ———, deceased, of no value, then the court instructs the jury that said paper was and is without consideration, and was and is under the laws of the state of ——— null and void, and constitutes no defense in this case, and constitutes no counterclaim on the part of the defendants, nor any basis for any counterclaim, or defense against the suit on the two promissory notes mentioned in plaintiff's petition.<sup>20</sup>

**§ 1833. Mutuality of obligation**

The court instructs the jury that, in order that a contract be entirely binding and legal, the observance of its terms and conditions must be binding upon all the parties thereto. So, if the jury believe from the preponderance of the testimony in this case that the terms of the contract sued on left it entirely optional with the plaintiff whether or not he would perform his promise, if you find there was a promise, then this contract would not be binding on the defendant, and you should find for the defendant.<sup>21</sup>

**§ 1834. Lack of mutuality supplied by subsequent acts of parties**

You are charged that a contract is incomplete as long as one of the parties has the right to accept or reject the proposition; but if you believe from the evidence that plaintiffs made a proposition to defendant to locate defendant upon state school land at \$——— per section, subject only to the condition that said land suited defendant, and you further believe that defendant acting upon such proposition, inspected said land and that said land did suit defendant, and that defendant did secure awards of said land from the state of ——— you will find for the plaintiffs.<sup>22</sup>

**D. FORMAL REQUISITES**

**§ 1835. Effect of oral assent to unsigned contract**

You are instructed that the unsigned contract offered in evidence cannot be regarded as the contract of the defendant, upon which the

<sup>19</sup> *Hauber v. Leibold*, 107 N. W. 1042, 76 Neb. 706. The contract sued on prohibited defendant from again engaging in business in the vicinity.

<sup>20</sup> *Lindsay v. Sonora Gold Min. & Mill. Co.* (Mo.) 196 S. W. 764.

<sup>21</sup> *Grayling Lumber Co. v. Hemingway*, 187 S. W. 327, 124 Ark. 354.

<sup>22</sup> *Stanford v. Wright & Green*, 92 S. W. 269, 41 Tex. Civ. App. 346.

plaintiff can recover as upon a written contract signed by him. It at the most can only be considered as a part of the transaction at the time of the negotiation and agreement between the parties. If said paper was read over to the defendant accurately and fully, and fairly understood by him, and he assented and agreed to the terms therein stated, he is bound by said terms, and his liability will be determined accordingly.<sup>23</sup>

### E. PARTIES

#### § 1836. Parties entitled to enforce contract

You are instructed that, if the jury believe from the evidence that defendant had a contract with O. to furnish and deliver all the piling between ——— and ———, yet if the evidence shows that the piling in controversy, though delivered by O., was plaintiff's, and had been gotten out by O. for the plaintiff, and this was known by defendant, and acquiesced in by him, then they are bound to pay plaintiff the fair market value for same, if it was thus received from O. and used by them in the construction of the railroad, and no payment to O. would affect plaintiff's right to recover.<sup>24</sup>

#### § 1837. Enforcement against third person

The jury are instructed that, if you find that plaintiff performed the services alleged in the complaint, and you find that the plaintiff was employed by an officer or agent of the ——— Company for and on behalf of said company, and said services were rendered in pursuance of such contract, then the defendant in this case would not be liable, unless he expressly agreed to pay the same.<sup>25</sup>

### F. REALITY OF CONSENT

#### § 1838. Capacity to contract

Capacity of grantor in deed, see post, § 2136.

##### § 1838(1). Alabama

The court charges the jury that the fact that a man makes an improvident bargain, that he is generally unthrifty in his business, or unsuccessful in one or more enterprises, does not of itself prove him to be a non compos mentis.<sup>26</sup>

<sup>23</sup> D. M. Osborn & Co. v. Simner-son, 35 N. W. 615, 73 Iowa, 509.

<sup>24</sup> Central Coal & Coke Co. v. Good, 64 S. W. 677, 4 Ind. T. 74.

<sup>25</sup> Week v. Rawle, 96 N. E. 206, 48 Ind. App. 599.

<sup>26</sup> Dominick v. Randolph, 27 So. 481, 124 Ala. 557.

**§ 1838(2). Georgia**

The jury are instructed that it does not require a high degree of mental power to make a binding agreement. One who has enough of mind and reason equal to a clear and full understanding of the nature and consequences of his act in making a deed or contract is to be considered sane. One who lacks this capacity is to be considered insane.<sup>27</sup>

**§ 1838(3). Illinois**

You are instructed that, to impeach the written contract for want of mental capacity, it must be shown by a preponderance of evidence that the defendant, at the time he executed it, had such a degree of mental weakness that he was incapable of understanding what he was doing, and unable to comprehend and understand the terms and effect of the contract, or that the same was procured by some undue influence.<sup>28</sup>

**§ 1838(4). Iowa**

The jury are instructed that the law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; but, if the defendant was at the time of signing the note so insane or destitute of reason as not to know the consequences of the act, then it is void. If he did know what he was doing, and understood the consequences of his contract, then he is liable, and your verdict should be for the plaintiffs in case you so find.<sup>29</sup>

The jury are instructed that, should you find from the evidence, under the instructions given, that defendant was so insane as to be incapable of making a contract, then the fact that the plaintiffs had no knowledge of such fact would be immaterial, except as showing that the plaintiffs did not exercise any undue influence or fraud upon him.<sup>30</sup>

**§ 1838(5). Texas**

You are instructed that in this case, in determining whether the deceased, R., was mentally incompetent to make the contract and transaction of ———, involved in this suit, when he executed the deed and notes sued on, the question for the jury to decide from the testimony submitted is this: Did the said R. have sufficient mental soundness and capacity to understand the nature, terms, and effect of said contract and transaction in detail, and as a whole to determine and appreciate the rights, benefits, and values he was acquiring and the rights, values and obligations which were ex-

<sup>27</sup> De Nieff v. Howell, 75 S. E. 202, 138 Ga. 248; Norman v. Georgia Loan & Trust Co., 18 S. E. 27, 92 Ga. 295.

<sup>28</sup> Sands v. Potter, 46 N. E. 282, 165 Ill. 397, 56 Am. St. Rep. 253.

<sup>29</sup> Van Patton v. Beals, 46 Iowa, 62.

<sup>30</sup> Van Patton v. Beals, 46 Iowa, 62.



changed therefor, to hold these elements of the details in his mind and reflect upon them rationally, and to exercise his mind in respect to them in a rational way?<sup>31</sup>

### § 1839. Partial insanity or effect of insane delusions

#### § 1839(1). Alabama

The court charges the jury that proof of partial insanity will invalidate contracts generally, and would be sufficient to defeat an action upon a contract which contract was the direct offspring of partial insanity, although the party making the contract, at the time of making it, was sane in other respects upon ordinary subjects.<sup>32</sup>

#### § 1839(2). Illinois

The jury are further instructed that, although they may believe from the evidence that either before, at the time, or after the making of the written contract in question the defendant had insane delusions on some subjects, yet, if the jury further believe from the evidence that such delusion was in no way related to the plaintiff or the subject-matter of the contract here in question, and that in making such contract defendant was in no means influenced thereby, but that in making of said contract he possessed mind, memory, and senses sufficient to know and comprehend the scope, force, and effect of that contract, then he was mentally capable of making said contract, and the jury should so find.<sup>33</sup>

The jury are instructed that it is not every kind or degree of insanity that will relieve a party from the effect or consequences of his acts, but the insanity must either be general, or, if special, have relation to the act from which the party seeks to be relieved; and in case the jury believe, from the evidence, that the insanity of ———, if existing at all, was on account of and confined to domestic troubles, and the real or supposed interference of his wife and friends, and that on the subject of business and property, and of his own condition, relations and necessities in respect thereof, he was of sound mind, then the jury will hold the contract valid, and will find for the plaintiff.<sup>34</sup>

### § 1840. Lucid intervals

The jury are instructed that, if the defendant was at times insane, but had lucid intervals, he would have the right to make a contract, and if he made a contract during a lucid interval, then it would be a binding contract.<sup>35</sup>

<sup>31</sup> Smith v. Guerre (Civ. App.) 175 S. W. 1093.

<sup>32</sup> Dominick v. Randolph, 27 So. 481, 124 Ala. 557.

<sup>33</sup> Sands v. Potter, 46 N. E. 282, 165 Ill. 397, 56 Am. St. Rep. 253.

<sup>34</sup> Emery v. Hoyt, 46 Ill. 258.

<sup>35</sup> Norman v. Georgia Loan & Trust Co., 18 S. E. 27, 92 Ga. 295.

### § 1841. Effect of intoxication

The court instructs the jury that the degree of intoxication which would be sufficient in law to entitle a party to rescind a contract must be such that the party was so completely under the influence of intoxicants as not to have been able to understand the effect and consequences of the business transaction. In the case before you there is no showing that plaintiff was under such degree of intoxication, but if you find that ——— and ———, or either of them, induced plaintiff to drink intoxicating liquors for the purpose of enabling them the more readily to gain advantage over him and enable them the more readily to obtain his signature to the note in controversy by the use of the representations alleged by plaintiff to have been made by them, you have a right to take into consideration for what you may deem it entitled the plaintiff's condition with respect to intoxication, if any, so induced and brought about, in connection with all the other facts and circumstances surrounding the making and signing of the note in controversy for the purpose of determining whether or not the plaintiff was induced to sign the note in controversy by the alleged false representations and statements of ——— and ———, or either of them.<sup>86</sup>

### § 1842. Fraud

Avoidance of mining lease for false representations in procuring it, see post, § 3849.

Cancellation of instrument on ground of fraud, see ante, § 1362.

### § 1842(1). Illinois

As regards the defense set up in this case that the contract sued on was obtained from the defendant by false and fraudulent representations, the court instructs the jury that to defeat a recovery on that ground, the jury must believe, from the evidence, that the alleged representations were made as charged, and that they were false when made, and that the plaintiff knew them to be false, that they were such as a man of ordinary prudence would be likely to rely upon, and that the defendant did rely upon the truth of them, and was induced thereby to execute the contract in question.<sup>87</sup>

The jury are instructed that the law requires every person to exercise reasonable prudence in business affairs, and that before relieving a party from the obligations of a contract upon the ground of fraud, it must appear that he exercised reasonable care and prudence to learn the nature of the contract before executing it, that if the defendant could read and had an opportunity to read the contract be-

<sup>86</sup> *Slevertsen v. Paxton-Eckman Chemical Co.*, 165 N. W. 1016, 182 Iowa, 467.

<sup>87</sup> *Grier v. Puterbaugh*, 108 Ill. 602. In this case the defendant was a business man of more than ordinary intelligence.

fore signing, it was his duty to do so, unless induced not to do so by willfully false statements of the plaintiff as to its being a copy of the original, and if the defendant had full opportunity to read the contract before signing it, and was not induced to sign it by false statements made by plaintiff, the defendant would not be permitted to deny knowledge of the contents thereof.<sup>38</sup>

**§ 1842(2). Kansas**

You are instructed that in this case, if you believe from a preponderance of the evidence that the plaintiff instructed the defendant to purchase stock direct from the ——— Company, and the defendant did not purchase such shares direct from said company, but purchased shares of stock from some other person or persons, the plaintiff, upon discovering such fact, had the right to repudiate such purchase of said shares of stock, tender them back to the defendant, and recover the money given the defendant by plaintiff to purchase said shares of stock.<sup>39</sup>

**§ 1843. Mistake**

The jury are instructed that in making a contract the parties are bound to exercise ordinary care and diligence to inform themselves as to any facts relating to the subject-matter of the contract, and equity will not relieve for any mistake that was solely the result of a want of such care and diligence.<sup>40</sup>

**§ 1844. Duress**

Avoidance of deed on ground of duress, see post, § 2142.

**§ 1844(1). Indiana**

The jury are instructed that a contract made under compulsion may be avoided by the party by whom it was executed. Compulsion, however, to have this effect, must amount to what the law calls duress. Mere angry or profane words, or strong, earnest language, cannot constitute such compulsion as will amount to duress, or enable a party to be relieved from his contract. There may, however, be duress by threats. Duress by threats does not exist wherever a party has entered into a contract under the influence of a threat, but only where such threat excites, "or may reasonably excite," a fear of some grievous wrong, as bodily injury or unlawful imprisonment.<sup>41</sup>

**§ 1844(2). Iowa**

You are instructed that duress in the making of a contract exists when the person making it is induced to make it by reason of being put in fear by means of threats of arresting him and unlawfully

<sup>38</sup> *Livingston v. Strong*, 107 Ill. 295.

<sup>39</sup> *Gillies v. Linscott*, 157 P. 423, 98 Kan. 78.

<sup>40</sup> *Dolvin v. American Harrow Co.*, 62 S. E. 198, 131 Ga. 300.

<sup>41</sup> *Adams v. Stringer*, 78 Ind. 175.

charging him with crime, when the threats and the fear induced thereby are such as would influence a man of reasonable courage and prudence, and do deprive the party making the contract of the exercise of free will in making it. The threatened arrest, however, must be wrongful and unlawful, and apparently about to be enforced.<sup>42</sup>

**§ 1844(3). Minnesota**

The jury are instructed that, in order to find duress in this case, you must find that there was such pressure or constraint as compelled the plaintiff to go against her will, and such as took away her free agency and destroyed her power of refusing to sign the release.<sup>43</sup>

**§ 1845. Same—Threat of prosecution of third person for crime**

The jury are instructed that, if the witness S. stated to the defendant F. in substance, that unless he fixed up the matter of ——— selling mortgaged property by giving notes signed by him and defendant E., the bank would send and get ———, and it would mean from ——— to ——— years in the penitentiary, and that said S. further stated to said F. that if the notes were given, the matter would be dropped, and that said F. was thereby solely induced to sign said notes, such action upon the part of said S. would amount in law to duress by the plaintiff bank upon the defendant F.<sup>44</sup>

**§ 1846. Same—Ratification**

You are instructed that it is claimed by the defendant that the plaintiff, after the execution of said note, ratified the execution of same in the summer of ———. A contract that is fraudulent by reason of same having been procured by means of duress may be ratified and confirmed by the maker thereof if his subsequent acts, with knowledge of all of the facts, are such as to fully indicate that he intends to then agree to and confirm said contract. If it appears from the evidence, by the letter written by plaintiff to his daughter concerning the note in question after same was executed, and by plaintiff's statements concerning the note and its payment by him to the officers of the ——— Bank, that the plaintiff intended at the time of making said statements to assent to and confirm the contract made in said note, and pay the defendant, then such state of facts would amount to a ratification of said note by plaintiff, and would prevent plaintiff from subsequently claiming that said note

<sup>42</sup> Kennedy v. Roberts, 75 N. W. 363, 105 Iowa, 521.

<sup>43</sup> Cox v. Edwards, 139 N. W. 1070, 120 Minn. 512.

<sup>44</sup> Farmers' Nat. Bank of Lincoln v. Francis, 164 P. 146, 100 Kan. 225.

was obtained from him by duress. But, to amount to a ratification of said note, the plaintiff's acts must have been such as to fully indicate an intention on his part at that time to assent to and confirm the contract contained in said note. If the plaintiff's purpose in writing to his daughter and in making statements to the officers of said bank was to get and keep the note within the jurisdiction of this court, so that he could replevin same from defendant, and not to confirm the contract contained in said note, then said acts and statement would not, in any event, amount to a ratification of the note. If said note was obtained by duress, to overcome such duress the burden rests with the defendant to show that plaintiff ratified said note, by a preponderance of the evidence.<sup>45</sup>

**§ 1847. Conditions precedent to rescission for fraud—Restoring status quo**

Condition precedent to cancellation of instrument, see ante, § 1868.

You are instructed that, if the plaintiff received from the defendant the crop of cotton, corn, and oats, together with the place on which the same was grown and possession of the house on said place, and that any of said crop was standing ungathered in the field at the time, and that the defendant had the right of possession of said place until ——— to gather his crop, then, before the plaintiff could recover, after establishing fraud on the part of the defendant, he must show that he tendered back to the defendant the possession of the place, and house and all other property received from the defendant in exchange of said mules, and that also, if at the time the plaintiff claimed to have discovered fraud on the part of the defendant any of said crop was standing ungathered in the field, then the plaintiff could not make a valid tender of same, without tendering possession of the entire place on which the same was standing at the time.<sup>46</sup>

You are instructed that, if the plaintiff retained possession of any of the property received by him from the defendant in exchange, and that said property, or the use of same, was of any value and benefit to him or to the defendant, then the plaintiff would not be entitled to recover, and you must find for the defendant.<sup>47</sup>

**G. VALIDITY OR LEGALITY OF CONTRACT**

**§ 1848. Agreement to pay for supporting promisee's parents**

You are instructed that, if you believe from the evidence that ——— in his lifetime did agree with the claimant, ———, that he

<sup>45</sup> Kennedy v. Roberts, 75 N. W. 863, 105 Iowa, 521.

<sup>46</sup> Cherry v. Cox, 45 S. W. 122, 1 Ind. T. 578.

<sup>47</sup> Cherry v. Cox, 45 S. W. 122, 1 Ind. T. 578.

would pay her a certain sum or sums, if she would stay with and care for her parents, such would be a lawful agreement.<sup>48</sup>

**§ 1849. Agreements against public policy**

**§ 1849(1). United States**

The jury are instructed that a contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general in restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty.<sup>49</sup>

**§ 1849(2). Michigan**

You are instructed that, in the subscription of each person to the capital stock of a corporation every other subscriber has a direct interest. Their respective subscriptions are contributions to a common object. The action of each in his subscription is supposed to be influenced by that of the others, and every subscription to be based upon the ground that the others are what they are represented to be. The fact that one person binds himself to place a certain amount of his money upon the risk involved in the enterprise is an inducement to others to venture in like manner, and any secret agreement between the company and a subscriber or his privies, which changes the condition of the subscription, is a fraud upon the other subscribers, and renders this agreement, and any contract growing out of it, null and void; and any agreement between the company and second parties, which contemplates a deception to be practiced upon others not parties to the agreement is contrary to public policy and void.<sup>50</sup>

**§ 1849(3). Virginia**

The court instructs the jury that, by virtue of the character of railroad companies as common carriers of goods, they are under a general duty to receive and carry, when properly offered, all goods of the kind they undertake or assume to transport, and that a contract by which they undertake to carry for one person or corporation, to the exclusion of others, is contrary to public policy and void; and, if they believe from the evidence that at the time of making the contract in the declaration mentioned, it was known and "contemplated" by and between the parties that the railroad to be built, provided for in said contract, was to become a common carrier of freight and passengers, and that in pursuance of such "contemplation" the General Assembly of ——— granted a charter

<sup>48</sup> Walker v. Alexander, 27 N. E. 41, 136 Ill. 550.

<sup>49</sup> Haven & Clements v. James (D. C. Ga.) 206 F. 683.

<sup>50</sup> Zabel v. New State Tel. Co., 86 N. W. 949, 127 Mich. 402.



of incorporation to ———, ———, and others, under the name of the ——— Railroad Company, whereby it became empowered to construct, operate, and maintain said railroad for the purpose of carrying passengers and freight, and did after the passage of said act of incorporation enter into, in pursuance of the original understanding and contemplation of the parties, a contract dated the ——— day of ———, under which it assumed and agreed to carry out the said contract in the declaration mentioned, then the court instructs the jury that said two contracts are to be considered as one, and they are contrary to public policy and void, and the jury must find for the defendant.<sup>51</sup>

**§ 1849(4). Washington**

You are instructed that, if you should find from the evidence that the defendant was a conservator of the estate of his father, and that the estate of his father owned a portion of the common stock of the ——— Company, which under this written proposition for the employment of plaintiff to procure stock in such company would have to be converted into preferred stock of the said company, and if you should find that defendant, in making such a contract with the plaintiff, if he did make it, was taking advantage of his trust position as conservator of the estate of his father for his personal benefit, then such a contract would be against public policy and would not be recognized by the law, and the law would not enforce it at the instance of defendant, or would not enforce it against him.<sup>52</sup>

**§ 1850. Contracts in aid of combination to control prices**

The jury are instructed that, if you believe from the evidence that the purchase by plaintiff of the lumber business of the defendant, with a condition that the defendant should not re-engage in the lumber business in ——— for a period of ——— years, was made by the plaintiff in aid of or to advance a combination to control the prices of lumber in the city of ———, then such condition was void, as against public policy, and your verdict should be for the defendant.<sup>53</sup>

**§ 1851. Contract for services of one as lobbyist**

You are instructed that, if the contract between the plaintiff and defendants was that plaintiff should attend the session of the

<sup>51</sup> Merriman v. Cover, Drayton & Leonard, 51 S. E. 817, 104 Va. 428.

<sup>52</sup> Calhoun, Denny & Ewing v. Whitcomb, 155 P. 759, 90 Wash. 128. In other instructions the jury were told that the law presumes honesty of action and intent, and that a broker will not be deprived of his commissions for rendering an agreed

service because of some illegality in the main transaction between the principal parties, if the broker did not actively participate in the illegality.

<sup>53</sup> Canfield Lumber Co. v. Kint Lumber Co., 127 N. W. 70, 148 Iowa, 207.



Legislature, and there to lobby with the members thereof against a bill there pending antagonistic to the taking of salmon fish by fish wheels, and by lobby services prevent the passage of such a law, he could not recover thereon.<sup>54</sup>

You are instructed that, if it was the understanding, between the plaintiff and defendants, that plaintiff should attend at the session of the Legislature, and there privately importune, converse with, and persuade members of the Legislature in the interests of the defendants, against any measures pending before the Legislature antagonistic to the taking of salmon fish by means of fish wheels, he cannot recover.<sup>55</sup>

You are instructed that, if it was the understanding between plaintiff and defendants that the plaintiff should attend the session of the Legislature, and by exercising, and seeking to exercise, his personal influence with members of the Legislature in the interests of the defendants, and by means of such influence, and by then lobbying for the defendants, prevent, or aid in preventing, any legislation forbidding the taking of salmon fish by means of fish wheels, he could not recover, nor could he recover for any expenses incurred while engaged in such service.<sup>56</sup>

**§ 1852. Contracts looking towards obstructing justice or fabrication or suppression of testimony**

You are instructed that a contract is void as against public policy by which one of the parties thereto agrees to secure such testimony as will enable the other to win a contemplated suit.<sup>57</sup>

You are instructed that a contract is void as against public policy by which one of the parties agrees to suppress or conceal, or enable another to suppress or conceal, testimony as to the existence of facts or letters, papers, or documents material to a contemplated suit.<sup>58</sup>

**§ 1853. Contracts tending to induce breach of trust**

**§ 1853(1). United States**

The jury are instructed that, if they find that the alleged contract between the plaintiff and the defendant, that the said plaintiff should have permanent employment as an officer of the \_\_\_\_\_ Company, at a salary of not less than \$\_\_\_\_\_ a year, or as much as any other officer of said company received, was made in contemplation that the defendant was to be an officer of said company

<sup>54</sup> Sweeney v. McLeod, 15 P. 275, 15 Or. 330.

<sup>55</sup> Sweeney v. McLeod, 15 P. 275, 15 Or. 330.

<sup>56</sup> Sweeney v. McLeod, 15 P. 275, 15 Or. 330.

<sup>57</sup> Josephs v. Briant, 157 S. W. 136, 108 Ark. 171.

<sup>58</sup> Josephs v. Briant, 157 S. W. 136, 108 Ark. 171.

and to control a majority of its stock, and that, by the use of his official position and of the control of said ownership of stock, he was to retain said plaintiff in office and fix his salary, as admitted by the said plaintiff, then their verdict must be for the defendant upon the issues joined in this case.<sup>59</sup>

§ 1853(2). Virginia

The court instructs the jury that if they believe from the evidence that R. was the agent of the ——— Company, in charge of the land which was the subject of the option given by said company to sell said land or negotiate, in any way, a contract for the sale of said land for said company, and you further believe from the evidence that the plaintiff knew that said R. was such agent with the aforesaid power conferred upon him by said company, and you further believe from the evidence that the plaintiff, with such knowledge, aided in inducing the said R. to obtain the option for the defendant for \$——— per acre, knowing or believing that the said defendant could sell the same at an increased price, in which increased price the said plaintiff and R. would share, then the court instructs you that such arrangement and agreement between the said plaintiff and said R., and the agreement between the plaintiff and the defendant is illegal as to the plaintiff, and cannot be treated by you as a consideration, or any part consideration, for any contract between the plaintiff and defendant.<sup>60</sup>

§ 1854. Compounding felony

As consideration for note, see ante, § 1066.

§ 1854(1). Arkansas

You are instructed that any agreement that tends to stop or prevent a criminal prosecution, and thereby to interfere with the course of justice, is void; whether within the terms of the statute is not, it is against public policy and is void. And in this case, if the jury find from the evidence that the obligations sued on were signed under the agreement that the plaintiffs would not prosecute the maker's sons for the violation of the criminal statutes, state or federal, then and in that event their verdict should be for the defendant.<sup>61</sup>

You are instructed that, although you may believe from the evidence that the sons of defendant were not guilty of any offense for which they could be punished criminally either under the federal or state statutes, and that the ——— Bank and plaintiff did

<sup>59</sup> West v. Camden, 10 S. Ct. 838, 135 U. S. 507, 34 L. Ed. 254.

<sup>60</sup> Williams v. Kendrick, 54 S. E. 865, 105 Va. 791.

<sup>61</sup> Beal-Doyle Dry Goods Co. v. Barton, 97 S. W. 58, 80 Ark. 328.

not intend to prosecute them criminally, yet, if you find that ——— acting either as attorney or agent of the ——— Bank and plaintiff, represented to defendant that, if he signed the obligations sued on, his sons would not be prosecuted criminally, but if he did not sign the said obligations they would be criminally prosecuted, and you believe this was the consideration moving defendant in the execution of said instruments, then in that event the said obligations are void, and your verdict should be for the defendant.<sup>62</sup>

§ 1854(2). **Michigan**

You are instructed that a promissory note given in consideration of an agreement on the part of the one to whom it is given that he will obstruct the course of public justice, or suppress proceedings under a criminal complaint, is void, and cannot be collected or enforced by the one to whom it is given. The law refuses to lend its assistance in the enforcement of a contract of that nature. This, however, is not because the law seeks to favor the defendants in such a transaction. The law looks upon the parties as equally at fault, and refuses to lend its aid to either in a case where both are guilty of trying to impede the course of public justice. It is therefore not sufficient to defeat the plaintiff's action for the defendants to show that they gave the note in question upon their understanding that by so doing the party complained of for a criminal offense would be discharged from custody, and the prosecution against him no further pursued. They must show also that this understanding and arrangement was participated in by the plaintiff, and that this understanding and arrangement was a part of the consideration for which the note was given. The fact that a criminal charge was pending against ——— would not prevent the plaintiff from settling his civil claim against the said ———, and the note given on such settlement would be good and collectible, unless it was a part of his agreement on such settlement, and also a part of the consideration for which the note was given, that he would do or refrain from doing something in the prosecution of the criminal charge.<sup>63</sup>

§ 1855. **Effect of illegality—Contracts connected with illegal contract**

The jury are instructed that an agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration.<sup>64</sup>

<sup>62</sup> *Beal-Doyle Dry Goods Co. v. Barton*, 97 S. W. 58, 80 Ark. 326.

<sup>63</sup> *Fosdick v. Van Arsdale*, 41 N. W. 931, 74 Mich. 302.

<sup>64</sup> *Gibson v. McLane*, 148 P. 288, 17 Ariz. 61.

**§ 1856. Same—On subsequent agreement relating to same subject-matter**

The jury are instructed that, if the jury believe from the evidence that the defendant for safe-keeping received money belonging to the plaintiff, and that a part of said money was illegally collected and delivered to him on Sundays, and that thereafter on week days the defendant admitted to the plaintiff that he had money in his possession belonging to the plaintiff, and on a week day rendered the account offered in evidence, showing a balance in his hands of \$—— belonging to and the property of the plaintiff, and that thereafter the plaintiff, by writing delivered to the defendant on the —— day of ——, duly requested the defendant to pay and deliver said money and all other property in his hands belonging to the plaintiff to the duly authorized agents of the plaintiff, and the defendant neglected and refused to do so, and still remains in possession of said money and all other property belonging to the plaintiff, then the plaintiff is entitled to recover said money, and the jury in their discretion may allow interest on the said amount from said —— day of ——.<sup>65</sup>

**H. CONSTRUCTION**

**§ 1857. Construction against party drawing contract**

You are instructed that, when one of the parties to a contract in writing draws the contract, any ambiguity in its terms is to be construed more strongly against the party so drawing the instrument.<sup>66</sup>

**§ 1858. Meaning of particular phrases in absence of any understanding between parties with regard thereto**

You are instructed that you are to find from the evidence the meaning of the words "drilled to the Mississippi lime." You are instructed that in determining whether or not the well in controversy was drilled to the Mississippi lime you should take into consideration the question what the parties to this controversy meant by and understood to be the Mississippi lime, and, if there was no understanding between them at the time the contract was made, then the general belief and understanding among oil men as to what Mississippi lime is should govern.<sup>67</sup>

**§ 1859. Practical interpretation by parties**

You are instructed that the contract entered into in this case contains provisions as to what defendant was to obtain in lieu of

<sup>65</sup> Haacke v. Knights of Liberty Social & Literary Club, 25 A. 422, 76 Md. 429.

<sup>66</sup> Blankenship v. Decker, 85 P. 1035, 34 Mont. 292.

<sup>67</sup> Barricklow v. Boice, 150 P. 1094, 50 Okl. 260.

salary. These provisions are not clear, and certain doubt remains, after reading the contract, as to its proper interpretation. Evidence has been introduced tending to show defendant's method of keeping the corporation's books required to be kept by the contract, and that monthly statements of the business were rendered to ———, and that the method of keeping the books and rendering monthly statements was based upon an interpretation of the contract in accordance with the claim of the defendant herein. If you find such evidence to be true, and that the parties to the contract adopted a construction and interpretation thereof, by their actions, then I instruct you that such interpretation should be also adopted by you in rendering your verdict.<sup>68</sup>

You are instructed that, if you find that defendant's method of keeping the books, required to be kept under the contract, was known to the corporation, and assented to by it, and that he rendered monthly statements to the corporation as he has testified, which were accepted without question by the corporation, and if you further find that the method of keeping such books and rendering such statements showed that the parties themselves had adopted a method of construing this contract, as to how his commissions should be figured, then I instruct you that you should adopt the same method of construing the contract, in arriving at your verdict.<sup>69</sup>

#### § 1860. Construing instruments together

The court charges the jury that if the contract sued on in this complaint was in existence at the time the bond was signed, whether it was in writing or not, and signed by ———, the contract and bond are to be construed together, and the sureties on the said bond are responsible with the principals.<sup>70</sup>

#### § 1861. Implied terms

You are instructed that if, by reason or pursuant to a uniform practice, extending through years, it was mutually understood by the defendant company and the plaintiff that the plaintiff was to have until "pay day" of the succeeding month in which to pay for goods purchased during the month preceding, then he was entitled to such time, though it was never expressly and in so many words agreed between the parties; in other words, an agreement for time may be implied from the acts of the parties, the circumstances and conditions of their business relations, though express words may not have been employed to indicate their agreement.<sup>71</sup>

<sup>68</sup> Moore v. Andrews, 168 N. W. 1037, 203 Mich. 219.

<sup>69</sup> Moore v. Andrews, 168 N. W. 1037, 203 Mich. 219.

<sup>70</sup> Forst v. Leonard, 22 So. 483, 116 Ala. 82.

<sup>71</sup> Hayes v. Union Mercantile Co., 70 P. 975, 27 Mont. 264.

**§ 1862. Province of jury**

The court instructs the jury that it is the duty of the jury to determine whether or not the whole of the contract between the plaintiff and the defendants, or either of them, was embraced in the paper writing offered in evidence, signed by defendant and dated ———, and if they shall find that the whole of the contract was not embraced in said paper writing, then it will be their duty further to find from all the evidence in the case what the said contract was.<sup>72</sup>

**I. DISCHARGE BY AGREEMENT****§ 1863. Rescission**

You are instructed that it takes at least two persons to make a contract, and if a contract is once made, it cannot be rescinded or undone at the instance of only one of the parties thereto, and in this case, if you find that there was an agreement between B. and any or all of the said assignors that one or all of the claims in suit should be assigned to him for collection, and if said B. in the execution of said agency incurred any expense or liability, then and in that case it would require his consent to a rescission of such contract; in other words, it would require a new contract between the parties to undo the old or first contract.<sup>73</sup>

**§ 1864. Modification by parol**

You are instructed that, if the jury believe from the evidence that after the making of the written contract introduced in evidence, and after placing the stock and assignment in escrow, the plaintiff and defendant by parol agreement modified the same as to the time of performance by mutual agreement between each other, and that the plaintiff performed said contract as so modified, then both parties should be bound by the contract as thus modified.<sup>74</sup>

**J. DISCHARGE BY PERFORMANCE****§ 1865. In general**

You are instructed that, upon the first cause of action it is for you to determine from the evidence whether the contract was entered into between the defendant ——— and ——— on behalf of the plaintiff firm ———; and, if you find that the contract was entered into, then you will next have to determine whether the

<sup>72</sup> Meyer v. Frenkel, 77 A. 369, 113 Md. 36.

<sup>73</sup> Broadbent v. Denver & R. G. Ry. Co., 160 P. 1185, 48 Utah, 598.

<sup>74</sup> Pounds v. Coburn, 107 S. W. 1080, 210 Mo. 115.



services described in the contract were performed by the plaintiffs, and, if you find that the contract was entered into and that the services were performed, then the plaintiffs should be entitled to a verdict upon that cause of action in the sum of \$——— against the defendants, both of them.<sup>75</sup>

### § 1866. Substantial performance

Performance of contract for construction of sewer, see post, § 3889.

Substantial performance of building contract, see ante, § 1285.

#### § 1866(1). Iowa

You are instructed that the claim of the defendant is that the plaintiff failed to perform his contract in four different particulars: (1) That the die on said monument was one-half inch thicker than the —— monument. (2) That the carving on said monument was an eighth of an inch less in depth than that on the —— monument. (3) That the base of said monument was not of the same height or thickness as the —— monument. (4) That the foundation was not constructed in compliance with the terms of the contract, in that the crushed sidewalk concrete and rock was used, instead of material provided in the contract. As to the first three complaints of the defendant, you are instructed that, if they substantially conform to the requirements of the contract as hereinafter explained, then defendant cannot avail himself of such matters as a defense, and he cannot excuse his failure to pay by reason of such matters.<sup>76</sup>

You are instructed that it is the law that, where one contracts for the erection of a certain structure, he is entitled to have it erected in conformity with the provisions of his contract; but in the application of this rule the law requires only a substantial compliance therewith. By the use of this term "substantial compliance" you are to understand that it does not require absolute accuracy. Slight variations or deviations from the contract as are inadvertent or unintentional, and not due to bad faith, and which in no way impair the structure as a whole, and in no way affect its symmetry, general appearance, or usefulness, are excusable, and as applied to this case, if the defects complained of are only slight, and in no way detract from the general appearance, symmetry, and style of said monument, or impair the structure as a whole, and the plaintiff acted in good faith in relation thereto, then defendant cannot complain of said defects. But, on the other hand, if the variations from the terms of the contract are not of a slight

<sup>75</sup> Peacock v. Ratliff, 114 P. 507, 62 Wash. 653.

<sup>76</sup> Stratmeyer v. Hoyt, 174 N. W. 243. This instruction should be ac-

companied by one to the effect that, if there were slight deviations in performance, plaintiff's recovery should be reduced on account thereof.



nature, or if they in any way affect the structure as a whole, its general appearance, symmetry, or style, or its use for the purpose for which it was intended, or if in making said changes the plaintiff did not act in good faith, then your verdict herein should be for the defendant.<sup>77</sup>

You are instructed that it is one of the claims of the defendant that the base stone for said monument is not of the dimensions provided in the contract, and that the same lacks two inches in thickness of being of the same dimension as the ——— monument. If you find this is true, and in addition thereto you find that this in any way impaired the structure as a whole, or in any way detracts from the general appearance, symmetry, or style of said monument, or its usefulness for the purpose for which it was intended, then the plaintiff cannot recover.<sup>78</sup>

§ 1866(2). **Pennsylvania**

You are instructed that this is an action brought by ——— against W. and the ——— Plate Glass Company to recover \$——, with interest from ———, for the manufacture of certain plates to be used on tables for the polishing and grinding of glass. The contract in this case relates simply to the plates, which were to be manufactured and made in accordance with patterns furnished by the defendants in the case. The ——— Plate Glass Company is one of the defendants, because it had guaranteed the contract of W., the other defendant; the real contract involved here being between plaintiff and W., and that contract being guaranteed by the ——— Plate Glass Company. In that way, the ——— Plate Glass Company having intervened in the action, the action is against the two defendants. These plates were to be manufactured, as the testimony shows, in accordance with patterns which were offered in evidence here, so that the case, in one sense, is reasonably simple. You may have some difficulty, or you may not, in reaching a conclusion out of the conflict of testimony; but the points which you must settle from this testimony are simple. In the first place, what was the contract which plaintiff made with W., the defendant? When you have determined that, then the next step in the case is, was that contract substantially performed in accordance with its terms? The contract was to manufacture plates in accordance with the patterns; and if I misstate the testimony in any sense, of course you will correct me, for you have heard the whole testimony. The testimony is that they were to be cut according to these patterns; that the plates were rolled in the mill of plaintiff, and, after they were rolled, or shortly after, the patterns

<sup>77</sup> Stratmeyer v. Hoyt, 174 N. W. 243.

<sup>78</sup> Stratmeyer v. Hoyt, 174 N. W. 243.

were fitted on to the plates, and a chalk line run around the margin of the patterns on the plate; that each plate was to be cut on the inner line of that chalk line. That is substantially the contract, and the question for you to determine is, were the plates so cut? It is true that the ——— Plate Glass Company was to receive these plates, but the ——— Plate Glass Company did not make this contract. It was W. who made the contract, and the ——— Plate Glass Company guaranteed it. They guaranteed it in accordance with the written guaranty which was sent, directing the manufacture in accordance with certain sizes and with certain plans; and, in order to hold the ——— Plate Glass Company, as guarantor, you will have to find from the evidence that the contract was substantially performed. If there was a failure in any material sense—that is, if there was any material variation between the plates as manufactured and the plates as called for under the contract—there could be no recovery at all against the guarantor. That is clear. And there could be no recovery against W. if you find from the weight of all the evidence that he did not get what he contracted with plaintiff to get. That is, if there was a material variation between what he contracted for and what they furnished, there could be no recovery. In that case there could be no recovery, even for a part. This was an entire contract, under which plaintiff agreed to furnish ——— plates, and the defendant was not bound to accept part of those plates and pay for part of them. He was entitled to a performance of the contract as a whole. If you find, for instance, from the evidence, that some of the plates were satisfactory, still the defendant would not be bound to pay for them, as he was entitled to the full performance of the whole contract. The evidence of the plaintiff is that the plates were to be finished to a rolling mill finish, and I presume you gentlemen will not differ about that. I think the weight of the undisputed testimony is that it was not expected the plates would be rolled or cut other than in accordance with a good rolling mill finish, and the plaintiff, by a number of witnesses— ——— himself, the shearman, the inspector, the roller, and a number of gentlemen employed in the mill, all testify that they were carefully rolled, up to a good rolling mill finish, and that they were properly cut. That is their side of the case. On the other hand, the defendants admit that these plates reached them, but they claim they were not according to the patterns. Now, of course, a slight variation would not relieve the defendants from paying; that is, if it was a hairline, or some simple little variation, that really did not amount to any substantial thing in fitting the plates together. That would not relieve

the defendants, and they would have to take the plates, and pay for them. A number of witnesses upon the part of the defense testify that when these plates were shipped to them they attempted to put them together. This they had a right to do, for they could not determine, until they would run the plates together, whether they were all right. The defendants testify that the plates varied in size—in the shearing, perhaps, or in some other ways; but I think if there was any substantial difference it was in the shearing. They testify that the plates would not fit together. Now, if that means, as I think the testimony would warrant it meaning, that they did not substantially fit together as the patterns would fit together—and it is not so much a question as to whether they would fit into the table out there, because plaintiff did not have that table—but did plaintiff manufacture these plates in accordance with the patterns, substantially, so that they would be serviceable in fitting in out there? If there was no material variation, then the plaintiff would be entitled to recover the full amount of the contract. If there was a material variation—and you will have to determine that from all of the evidence—then there could be no recovery against either of the defendants. This is all I have to say to you in the general charge. Having heard all of this testimony, you will fit it together, and use your good common sense as business men in reasoning it out, just as you would in relation to a business matter. The question is: Was this contract fairly performed by plaintiff in a fair business way, in accordance with the contract?<sup>79</sup>

§ 1866(3). Texas

You are instructed that if plaintiff had fairly and substantially completed his contract with defendant, except as to wiring in certain arc and incandescent lights, and that the work, so far as it had progressed, and the material furnished, was all of the character and quality contracted for, but that plaintiff had failed to wire in certain arc and incandescent lights, as claimed by defendant, the plaintiff would in such event be entitled to recover the contract price sued for, less such diminution in the value of said plant as was represented by the part unfinished; also defendant would be entitled to recover such loss, by reason of the noncompliance by plaintiff with his contract, as grew out of and arose from such failure, or was fairly and reasonably within the contemplation of the parties at the time said contract was made.<sup>80</sup>

<sup>79</sup> Phillips v. Wayman, 50 A. 767, 201 Pa. 249.

<sup>80</sup> A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 57 S. W. 575, 23 Tex. Civ. App. 328.

### § 1867. Effect of exceeding requirements of contract

The court instructs the jury that under the contract defendant was not bound to take more than one-fourth of the ties delivered seven-inch ties, but if the jury shall find that in performing the contract plaintiffs delivered three-fourths of the number of ties required to fill such contract eight-inch specification ties, and the balance seven-inch ties, and that of the ——— ties required to be delivered on defendant's right of way each month three-fourths of such number were eight-inch specification ties, the jury will not find against plaintiffs on the ground that of all the ties delivered each month there was in fact a greater number than one-fourth seven-inch specification ties.<sup>81</sup>

### § 1868. Time of performance

You are instructed that time is of the essence of the memorandum of agreement between defendant company and ———, dated ———, and accepted with modifications by defendant company, through its legal board of directors, ———, and that said contract provided for the sale and delivery by defendant company to said ——— of legal bonds of defendant company; that, owing to a want of power in its charter, defendant company was unable to deliver to said ——— \$——— of its legal first mortgage bonds stipulated for in said agreement; and that said ——— were not bound to receive or accept under said agreement other than legal bonds of defendant company, and were not bound to receive, under said agreement, any bonds of defendant company after the time fixed in said agreement for the delivery of such bonds.<sup>82</sup>

### § 1869. Same—Reasonable time

Reasonable time for performance of contract of sale, see post, § 4653.

You are instructed that, where a contract authorizes plaintiff to insert in his newspaper defendant's advertisement on certain days, to be used during one year, as per copy furnished by defendant, it will be construed as an agreement to furnish the copy within a reasonable time.<sup>83</sup>

### § 1870. Performance of conditional promises

You are instructed that on the ——— day of ———, the plaintiff and defendants entered into a contract, by the terms of which, among other things, it was agreed that the defendants should burn not less than ——— and not more than ——— kilns of clay prod-

<sup>81</sup> Chapman v. Kansas City, C. & S. Ry. Co., 48 S. W. 646, 146 Mo. 481.

<sup>82</sup> Berg v. San Antonio St. Ry. Co., 42 S. W. 647, 17 Tex. Civ. App. 291.

<sup>83</sup> Mail & Express Co. v. Wood, 103 N. W. 864, 140 Mich. 505.

ucts by the Lambert process at the plaintiff's plant near the city of ———, and if the fuel cost of burning said kilns should not exceed ——— cents per ——— bricks, the plaintiff was to pay to the defendants, among other things, \$——— for the use of said process; but if the fuel cost of burning said kilns should exceed ——— cents per ——— brick, then the contract in that respect was to be terminated, and the plaintiff was not to pay any part of said \$———. You are instructed that in burning the kilns of brick under the contract for the purpose of determining whether the fuel cost should exceed or be less than ——— cents per ——— brick, the defendants were bound to act in good faith and to burn merchantable brick, acceptable in the local market if they were able to do so by the use of the Lambert process. If, therefore, you find from the evidence that defendants could have burned merchantable brick acceptable in the local market by the use of the Lambert process, but that, instead of completing the burning of said brick, they carelessly or negligently cut short the supply of oil and turned out the fires before the kilns were burned, and thereby ruined the kilns so that the brick were worthless, and inflicted a loss upon plaintiff, then your verdict should be for the plaintiff, on this issue, for the amount of the damage which the evidence may show it sustained.<sup>84</sup>

**§ 1871. Performance by one party rendered ineffective by fault of other party**

You are instructed that, if you find that the plaintiff faithfully performed his work, and that this paper came off, not through his fault, but through the fault of the defendant, ———, by not having the walls properly dried, either by himself or his agents, and by directing the work of the paper hanger and the decorator to go on when the walls were not in condition to receive the work, then, as a matter of law, gentlemen, you cannot charge the plaintiff with that fault of the defendant.<sup>85</sup>

**§ 1872. Sufficiency of tender of performance to put other party in default**

To summarize the case, gentlemen, I charge you as a matter of law that plaintiff tendered to the defendants on the ——— all that they were entitled to receive under the contract, and if his tender was made in good faith, and he continued for a reasonable time ready, able, and willing to deliver to the defendants that which he tendered, and the defendants failed to come forward with an offer to accept the same, and to perform the contract on their part.

<sup>84</sup> Luce v. Arkansas Brick & Mfg. Co., 188 S. W. 566, 125 Ark. 219.

<sup>85</sup> Fagerholm v. Nielson, 106 A. 333, 93 Conn. 380.

then the defendants have violated their contract and the plaintiff is entitled to recover. On the other hand, if the plaintiff's tender was not made in good faith, or if the plaintiff withdrew from the tender or failed to stand ready, able, and willing for a reasonable time to deliver the things tendered to the defendants upon their delivering to him a deed, then this tender was insufficient and he is not entitled to recover.<sup>86</sup>

**§ 1873. Conclusiveness of decision of person designated by parties to determine disputed questions as to performance**

Conclusiveness of decision of engineer or architect, see ante, § 1317.

Conclusiveness of decision of engineer on question of performance of municipal contract, see post, § 3891.

The court instructs the jury that the decision of the inspectors sent by defendant to inspect the ties delivered by plaintiffs was binding on both parties to the contract as to the quality of the ties, and in determining the number of seven and eight inch ties delivered by plaintiffs you will be governed by the number of ties received by such inspectors.<sup>87</sup>

The jury are instructed that in determining the number of seven and eight inch specification ties furnished by plaintiffs a month they will be governed by the inspection made by defendant's inspectors, and those inspecting by authority of defendant.<sup>88</sup>

**§ 1874. Recovery for part performance—Waiver of full performance**

The jury are instructed that, if the jury believe from all the evidence that defendants did not revoke the contract in evidence, but released the plaintiffs from a complete compliance with said contract, and agreed to pay plaintiffs whatever was due for work and labor actually performed, and if the jury further believe from all the evidence that there is a balance due and unpaid for work and labor actually performed, they should find for the plaintiffs for said balance, with interest from the time it was due.<sup>89</sup>

**§ 1875. Same—Severability of contract**

The jury are instructed that, if they believe from the evidence that, by the terms of the contract, the defendant agreed to pay the plaintiff \$—— for doing the grading or leveling therein described, at the times and in the manner therein stated, and that the defendant neglected and refused to make such payments at the time the plaintiff was entitled to receive the same (if they should believe

<sup>86</sup> Belseker v. Moore (C. C. A. N. D.) 174 F. 368, 98 C. C. A. 272.

<sup>87</sup> Chapman v. Kansas City, C. & S. Ry. Co., 48 S. W. 646, 146 Mo. 481.

<sup>88</sup> Chapman v. Kansas City, C. & S. Ry. Co., 48 S. W. 646, 146 Mo. 481.

<sup>89</sup> Andrews v. Tucker, 29 So. 34, 127 Ala. 602.



from the evidence that the plaintiff was so entitled), then that the plaintiff was justified in abandoning his contract, and was entitled to recover for whatever amount of the grading or leveling the jury might believe from the evidence he had performed at the time he ceased work, less the amount of any sums shown by the evidence to have been paid by said defendant; but that the jury, in estimating the amount he was entitled to recover, should compute the same according to the price fixed by the contract.<sup>90</sup>

#### K. DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

##### § 1876. Prevention of performance by acts of municipal authorities

The jury are instructed that the plaintiff claimed that he was notified that he must either put a broad stone foundation under the wall, or else dig a foot deeper than the plan called for, or otherwise not build at all. Now if that was the act of the city, and not willfully caused by the plaintiff, he would have a right to abandon the contract, and having abandoned it, he would have a right to recover the reasonable value of what he had previously done and which had not been paid for.<sup>91</sup>

#### L. DISCHARGE BY BREACH

##### § 1877. In general

The jury are instructed that if you believe from the evidence that, as a part of the contract entered into between the plaintiff and the defendant for the sale by the defendant to the plaintiff of his lumber business, it was agreed by the plaintiff that it would take and receive the lumber which had then been ordered by the defendant to be shipped to him at ———, and that he refused to accept two cars of lumber which had been so ordered, then your verdict should be for the defendant, unless you find from the evidence, under the instruction hereinafter given, that the plaintiff was justified in refusing to accept the same.<sup>92</sup>

##### § 1878. Renunciation of contract as giving right to other party to sue

The court instructs the jury that when the defendant mailed to plaintiff the letter in evidence, declaring that he declined to have anything more to do with the contract, then the plaintiff had noth-

<sup>90</sup> Keeler v. Clifford, 46 N. E. 248, 165 Ill. 544.

<sup>91</sup> Di Biasio v. Ross (R. I.) 110 A. 415.

<sup>92</sup> Canfield Lumber Co. v. Kint Lumber Co., 127 N. W. 70, 148 Iowa, 207.



ing further to do in the premises; this was a renunciation of the contract upon which the suit is founded. And the plaintiff is entitled to such damages as the jury may believe from the evidence he has sustained by reason thereof, not exceeding the sum of \$——, the amount claimed in the petition.<sup>93</sup>

### § 1879. Performance by one party prevented by other

#### § 1879(1). Illinois

The jury are instructed that, where two parties enter into a lawful contract upon sufficient consideration, and one of the parties is ready and willing to perform, and makes preparations to perform on his part, but is prevented from performing by the other party, the party so ready and willing to perform can recover all damages suffered by him by reason of the default of the other party, including necessary expenses incurred in making such preparations.<sup>94</sup>

#### § 1879(2). Missouri

The jury are instructed that by the terms of the contract sued on the defendant was required to receive railroad cross-ties from the plaintiffs during the year ——, upon conditions that the plaintiffs should complete the contract of C. to deliver to the defendant —— ties, seven and eight inch specifications, not more than —— per cent. to be seven-inch ties, by delivering to the defendant not less than —— such ties per month from the ——, until said C. contract was filled, all the ties to be subject to inspection by any inspector the defendant might see fit to send; and upon the further condition that plaintiffs, after the completion of the C. contract, should continue to deliver to defendant, on its right of way, not less than —— first-class ties per month during the year ——; that the ties defendant was required to receive were to be seven and eight inch specification ties, not more than —— per cent. of them to be seven-inch ties, and all of said ties to be subject to inspection by any inspector the defendant might see fit to send, and to be paid for at the rate of —— cents each for eight-inch ties, and —— cents each for seven-inch ties. The plaintiffs allege and claim damages for the following breach of said contract: That the defendant, on or about the ——, notified plaintiffs not to get out any more ties, and refused to permit plaintiffs to deliver any more ties or to receive and pay for the same. You are therefore instructed that if you believe from the evidence plaintiffs performed their part of said contract up to the ——, and were then in the performance of their said contract, and were ready, willing,

<sup>93</sup> Wallingford v. Aitkins, 72 S. W. 794, 24 Ky. Law Rep. 1995.

<sup>94</sup> Kenwood Bridge Co. v. Dunderdale, 50 Ill. App. 581.

and able to continue the performance of the same, then the defendant had no right to rescind such contract, or prevent the plaintiffs from performing their part thereof for the remainder of the year ———; and if the jury find from the evidence that the defendant, on or about the ———, while the plaintiffs were performing their part of said contract, and were ready, willing, and able to continue the performance of the same, did stop and prevent the plaintiffs from performing their part of said contract, then the plaintiffs are entitled to recover as for breach of said contract on the part of defendant, and you will assess the damage, if any, to the plaintiffs, at the difference between the contract price of each tie and the cost to plaintiffs of getting out and delivering such ties on defendant's right of way, as to all ties, if any, which the jury may believe from the evidence plaintiffs could have gotten out and delivered on defendant's right of way in compliance with said contract from the said ——— to the end of the year, not to exceed the amount claimed in the petition, which is \$———, with ——— per cent. interest therefor from the expiration of said contract until the present time.<sup>95</sup>

**§ 1879(3). Virginia**

The court instructs the jury that, if they believe from the evidence that the contract mentioned in the declaration was entered into between the plaintiff and defendant, and that the plaintiff was ready, willing, and able to perform the same, and that performance thereof was prevented by defendant without fault of the plaintiff, then there was a breach of the contract by defendants.<sup>96</sup>

**§ 1880. Waiver of performance**

**§ 1880(1). Illinois**

The jury are instructed that if they should believe, from the evidence, that the defendant accepted the work as done by the plaintiffs, without having an opportunity of inspection, and made no complaint at the time, yet the defendant may show the actual condition of the defects of the machine, and carelessness of the plaintiffs; and if the jury are satisfied, from the evidence, that the defendant was injured or damaged, and such damage was the result of defective machinery, or a careless manner of working such machine, the jury may deduct the amount of such damage from the value of the threshing, as fixed by the parties.<sup>97</sup>

<sup>95</sup> Chapman v. Kansas City, C. & S. Ry. Co., 48 S. W. 646, 146 Mo. 481.

<sup>96</sup> Norfolk Hosiery & Underwear

Mills Co. v. Aetna Hosiery Co., 98 S. E. 43, 124 Va. 221.

<sup>97</sup> Garfield v. Huls, 54 Ill. 427.

§ 1880(2). *Rhode Island*

You will remember that according to the testimony the boat was, the next morning after the defendant arrived in town, taken away. That matter has been called to your attention. I will charge you as to the law governing the acceptance of the work. If you are sold an article, and that article is not as represented it would be, it would be your duty to return that article in a reasonable time, rather than to keep it a long time, and finally, when suit was brought against you, complain that the article sold you was not such an article as you agreed to buy, such an article as was represented to you. That may apply to certain items of the bill, certain articles which were delivered, which could be returned. Of course, the labor which was expended on this boat could not be returned as such, and the varnish and paint could not be taken and handed over bodily to the plaintiff. It is a physical impossibility. But, if you have work of this nature done, and you accept the work, in other words, by your conduct you tacitly agree that the work is all right, you cannot, at some later date, when a man would like to have his pay for the labor, complain that the work which you once accepted was not all right, or not proper work and labor furnished to you. That is one question for you to take into consideration, whether or not the defendant, by his conduct, did apparently accept the work; not whether he took the boat and went away with it—it is admitted that he did have the boat and went away with it—but whether or not the work was acceptable to him at that time.<sup>98</sup>

§ 1880(3). *Texas*

The jury are instructed that if they believe from the evidence that the machinery furnished by plaintiff was not tested by running some fifteen days, and producing forty tons of ice per day, as provided in the contract, then plaintiff cannot recover the contract price of same, unless you find from the evidence that defendant accepted same as being of the capacity called for in the contract; but if you believe that plaintiff did erect machinery which did not comply with the contract, and if you further believe from the evidence that defendant has taken possession of and used the same, then defendant must be charged with the reasonable value of the machine, instead of the one contracted for.<sup>99</sup>

<sup>98</sup> *Nock v. Lloyd*, 79 A. 832, 32 R. I. 313.

<sup>99</sup> *Alamo Mills Co. v. Hercules Iron Works*, 22 S. W. 1097, 1 Tex. Civ. App. 683

**M. BREACH OF PARTICULAR CONTRACTS****§ 1881. Breach of contract for threshing**

The jury are instructed that if the jury should believe, from the evidence, that the plaintiffs were the owners of a clover machine, which they ran about the county for hire, and that the defendant employed them to thresh his clover seed at ——— dollars per bushel, and that they, the plaintiffs, knowingly undertook and performed said threshing with a machine, defective and out of repair, either in the huller or otherwise, whereby the defendant was damaged in an amount equal to or greater than the sum claimed for the threshing, then the law is for the defendant, and the jury should so find.<sup>1</sup>

The jury are instructed that if the jury believe, from the evidence, that the defendant employed the plaintiffs to thresh his clover seed for ——— dollars per bushel, then they, the plaintiffs, were bound in law to do it in a workmanlike manner, and should the jury further believe, from the evidence, that the plaintiffs, through negligence, want of care or skill, performed such threshing in a wasteful, slovenly manner, whereby the defendant was damaged in an amount equal to or greater than the sum claimed for the threshing, then the law is for the defendant, and the jury should so find.<sup>2</sup>

**§ 1882. Breach of contract to give prize to winner of popularity contest**

You are instructed that if the jury find from the evidence that the plaintiff entered into an oral contract or agreement with the defendant to work to secure votes in the contest for an automobile with the understanding that, if she secured the highest number of legal votes, she was to receive said automobile, and further find that the plaintiff fully complied with all the conditions on her part to be performed, and secured the highest number of legal votes, but that defendant breached the contract between the plaintiff and defendant, and on account of said breach the plaintiff was not declared the winner of said contest and failed to secure said automobile, you will find for the plaintiff for the value of said automobile, as shown by the testimony.<sup>3</sup>

**§ 1883. Breach of agreement to advance moneys to redeem from foreclosure**

The jury are instructed that, if the jury shall believe from the evidence that the plaintiff's farm in ———, was about to be sold

<sup>1</sup> Garfield v. Huls, 54 Ill. 427.

<sup>2</sup> Garfield v. Huls, 54 Ill. 427.

<sup>3</sup> Millsaps v. Urban, 171 S. W, 1198,  
116 Ark. 90.

under a decree of the ——— court for ——— county, in equity, passed in the cause of ———, mortgagees, against the said plaintiff, and which said farm the plaintiff was anxious to retain and keep, and that the defendants' testator, the said H., offered the said plaintiff that if he, the said plaintiff, was desirous of saving said farm, and bought it in at the sale thereof, under the said decree aforesaid, that he the said H., would loan and advance to him, the said plaintiff, in cash, the sum of ——— dollars, to pay upon the first or cash payment, and the balance of the first or cash payment when the same should be required by the trustee, and would endorse the said plaintiff's notes, or join with said plaintiff in notes to said trustee, appointed under said decree aforesaid, for the deferred or credit payments, and would loan and advance to the said plaintiff the several sums of money necessary to pay off and take up the said several promissory notes as and when they should mature and become payable, and would see him, the said plaintiff, out, and save him from loss by such loans and advances until after the said plaintiff could sell and dispose of said property without loss, if he, the said plaintiff, would confess judgment in favor of the said H., upon a certain joint and several promissory note, dated the ———, for the sum of \$——, payable one day after date, to the order of said H., together with the accumulated interest and costs upon said note, amounting in the aggregate to the sum of \$——, which said note had theretofore been made by a certain ——— and the plaintiff, for the accommodation of the said H., and against which said note, or any action thereon by the said H., the said plaintiff then and there had a just and perfect defense, (if the jury shall find said plaintiff had a just and perfect defense against said note,) as also the said sum of \$—— advanced, or to be advanced to said plaintiff, to pay upon said first or cash payment aforesaid; that if the jury find from the evidence the foregoing facts, and shall further find from the evidence that the said plaintiff, upon the said agreements and promises aforesaid, if they shall find said promises and agreements, bought in the said property at the said sale, and confessed the said judgment (offered in evidence) in favor of the said H., for the sum of \$—— and costs, and that said judgment included as well the sum of \$——, the amount of said promissory note for \$——, with interest and costs, as the said sum of \$—— advanced by said H. to said plaintiff, and that the said H. did loan and advance to the said plaintiff the said sum of \$——, to pay upon the said first or cash payment for said property, and did join with the said plaintiff in promissory notes to the said trustee for the deferred or credit payments for said property; that if the jury find from the evidence

these acts of performance on the part of the plaintiff and the said H., and shall further find that the said H. afterwards refused to loan and advance to the said plaintiff the balance of the cash or first payment when demanded by the said trustee, and to loan and advance to the said plaintiff the several sums of money necessary to take up and pay off the said promissory notes for the deferred or credit payments, according to his agreement with the said plaintiff, if they shall find such agreement, and that the said plaintiff was unable at that time to pay said balance of said cash or first payment, or the said last mentioned promissory notes, or either of them, if they shall so find, and that by reason of said refusal of said H. to comply with the said agreement and loan, and advance to the said plaintiff the moneys to pay off the said promissory notes for the deferred or credit payments, and balance of the cash or first payment aforesaid, if they shall so find, the said property aforesaid was resold under order of the ——— court for ——— county, in equity, at the risk of the plaintiff, and that the said plaintiff thereby suffered loss, if they shall so find, then their verdict must be for the plaintiff on the first count of the declaration for such amount as they shall find from the evidence the plaintiff sustained by reason of said default on the part of said H.<sup>4</sup>

**§ 1884. Liability for breach of agreement not to do business in certain territory**

You are instructed that selling at his farm, outside of the town of C., milk produced by cows kept by the defendant outside of the town of C., to persons residing outside of the town of C., knowing that the persons to whom it was sold intended to and did take it within the town of C. for sale, and did in said town sell the same, would not be selling to a person to be sold in the town of C. To constitute a selling to be sold within said town of C., there must have been an understanding or agreement between the defendant and the person to whom the milk was sold, that the milk should be sold within the town of C. To make it a selling to be sold within said town, the understanding or agreement between the defendant and the person to whom the milk was sold must have been such that the person to whom the milk was sold could not sell it at any other place than in the town of C., without violating his agreement with the defendant. If the person to whom the milk was sold was at liberty to and could, without acting in bad faith with the defendant, sell the milk to whoever he might choose, it would not be a selling to be sold in the town of C.<sup>5</sup>

<sup>4</sup> Horner v. Frazier, 4 A. 133, 65 Md. 1.

<sup>5</sup> Smith v. Martin, 80 Ind. 260, 41 Am. Rep. 806.



You are instructed that the defendant had a right to sell at his farm, outside of the town of ———, milk produced by cows kept outside of the town of ———, to persons living outside of the town of ———, although he knew at the time of such sale that the persons to whom he sold the milk intended to and did sell the milk in the town of ———.<sup>6</sup>

**§ 1885. Right of aggrieved party making advances under contract**

The court instructs the jury that if you find and believe from the evidence that defendant failed within a reasonable time after the execution of the contract offered in evidence to deliver the cabinets as provided for therein, and if you further find and believe from the evidence that plaintiff advanced to defendant from time to time varying sums of money on account of the cost of manufacturing said cabinets, and if you further find and believe from the evidence that such advancements, if you find any were made, equaled or exceeded the actual cost of the ——— doors, ——— door frames, ——— frames and backs for doors, and ——— reinforcing irons, and also the actual cost of the cabinets and the parts thereof delivered by defendant to plaintiff before the institution of this suit, and the actual cost of the tools, dies, labor, and materials used in such manufacture, then plaintiff became the owner of and entitled to the possession of said ——— doors, ——— frames, ——— frames and backs for doors, and ——— reinforcing irons; and if you further find and believe from the evidence that said articles were in possession of the defendant at the commencement of the suit, and that it refused to deliver the same to the plaintiff after demand made therefor, if you find such demand was made, then you will find a verdict in favor of plaintiff and against defendant under the second count of its petition for the possession of said ——— doors, ——— frames, and ——— frames and backs for doors, and ——— reinforcing irons.<sup>7</sup>

**N. MATTERS PERTAINING TO REMEDIES FOR BREACH**

**§ 1886. Presumption and burden of proof**

You are instructed that, to entitle the plaintiff to recover in this action, the burden of proof is upon him to show to the satisfaction of the jury the existence of the contract sued on, and also such a breach thereof as entailed loss upon the plaintiff.<sup>8</sup>

<sup>6</sup> Smith v. Martin, 80 Ind. 260, 41 Am. Rep. 806.

<sup>7</sup> Ideal Reversible Hinge & Cabinet

Co. v. Metallic Specialty Mfg. Co. (Mo. App.) 207 S. W. 271.

<sup>8</sup> Burt v. Myer, 18 A. 796, 71 Md. 467.



**§ 1887. Same—As to fraud in procuring signature to contract**

The jury are instructed that the law places the burden of proof upon the plaintiff to establish the fraud which he alleges the defendant perpetrated against him in getting his signature to the contract or papers offered in evidence, marked Exhibits ——— and ———, and that before he can recover from defendant he must clearly prove such fraud by a preponderance of the evidence.<sup>9</sup>

The jury are instructed that in this case it is the presumption of law that, when the defendant read the papers or contracts, offered in evidence and marked Exhibits ——— and ———, he read them correctly and in full, and he is entitled to the benefit of such presumption as a matter of evidence until it is clearly overthrown by proof.<sup>10</sup>

**§ 1888. Same—As to performance**

The jury are instructed that, if you believe from the evidence that the defendant contracted with the plaintiff to deliver to plaintiff a certain number of fat hogs at the time and in the manner stated in plaintiff's declaration, and also that plaintiff was ready and willing to receive and pay for the hogs at the time and place and at the price agreed upon, as the plaintiff has alleged in his declaration, then it is incumbent on the defendant to show an offer to perform, or some sufficient excuse for nonperformance on his part, if you believe he did not perform in order to escape liability to pay damages.<sup>11</sup>

**§ 1889. Directing verdict on merits and submitting only question of damages to jury**

You are instructed that the plaintiffs are entitled to recover, and the jury should find for them the damages, if any, they may have sustained because of the defendant's failure to construct and maintain a side track and depot station on the strip of ground ——— feet wide referred to in the pleadings; and, in addition thereto, the damages, if any, they may have sustained by the building of the defendant's railroad through their lands on the strip of land ——— feet wide referred to in the pleadings.<sup>12</sup>

<sup>9</sup> Riley v. Melquist, 36 N. W. 657, 23 Neb. 474.

<sup>10</sup> Riley v. Melquist, 36 N. W. 657, 23 Neb. 474.

<sup>11</sup> Bird v. Forceman, 62 Ill. 212.

<sup>12</sup> Louisville, St. L. & T. Ry. Co. v. Neafus, 18 S. W. 1030, 93 Ky. 53, 13 Ky. Law Rep. 951.

## CHAPTER XCIV

## CORPORATIONS

- § 1890. Promoters—Right of recovery for services in securing lands for corporation.
- 1891. Same—Duty to account for profits from land turned over to corporation.
- 1892. By-laws—Estoppel to deny validity.
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- 1910. Same—Acceptance of benefits.
- 1911. Liability on contract entered into with promoters prior to incorporation.
- 1912. Same—Adoption.
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- 1915. Liability of manager to corporation on account of ultra vires acts—Damages.
- 1916. Notice to corporation—Knowledge of agent not acquired in course of business.
- 1917. Personal liability of officer of corporation on its note.
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- 1919. Same—Right to prefer officer as creditor.

Liability for slander, see post, § 3346.

Liability of corporation for ultra vires acts of agent, see post, § 2439.

**§ 1890. Promoters—Right of recovery for services in securing lands for corporation**

The court instructs the jury that if they believe from the evidence that plaintiffs were associates of ———, as described in the prospectus, that they so regarded themselves, and were so regarded by the defendant company, that the property, the securing of which is there described, embraces the property bought of F., and that the defendant company paid the sum of \$———, or about that sum, to each of the plaintiffs, and intended that sum to cover the plaintiffs' charges for getting the F. property, now inquired about, and the plaintiffs knew that the defendant company so intended the said sum of \$——— to each of the plaintiffs to cover said charge, and they received said sums knowing that the said defendant company intended said payment to cover the claim sued on here, then the plaintiffs are not entitled to recover in this action.<sup>1</sup>

The court instructs the jury that if they believe from the evidence that plaintiffs were instrumental in the organization or creation of defendant, and secured the option from F. for the purpose of aiding in the organization of a company for the purchase of the lands from F., and that the defendant was subsequently organized by their efforts, with the assistance of others, then the jury are instructed that the said plaintiffs stood in a fiduciary relation to the said defendant as its promoters and trustees, and said plaintiffs are not entitled to make a profit on the sale of said F. lands to the company, unless the company, with knowledge of all the facts, agreed that the said plaintiffs might make said profit; and if the jury believe from the evidence that when the defendant adopted the prospectus and agreed to accept the option of F., it was also intended by said company that the ——— per cent. clause in said prospectus was to cover all compensation to the promoters, then the jury are instructed that the plaintiffs are not entitled to recover in this action.<sup>2</sup>

The court instructs the jury that, if they believe from the evidence that plaintiffs were appointed upon an option committee at a public meeting held in the town of ——— for the purpose of promoting the organization of a company for the development of the town of ——— and vicinity, before taking the option or power of attorney from F. and wife, and that the object of the appointment of said option committee was to secure options upon or control of the lands upon which subsequently to form said company, and that the defendant company was afterwards organized by plaintiffs and others, as was contemplated at such meeting, and that the option

<sup>1</sup> Central Land Co. of Buchanan v. Obenchain, 22 S. E. 876, 92 Va. 130.

<sup>2</sup> Central Land Co. of Buchanan v. Obenchain, 22 S. E. 876, 92 Va. 130.

or power of attorney of F. and wife, offered in evidence in their case, was turned over to and accepted by the defendant company, and that plaintiffs received compensation from the defendant company for having secured the property and for having been instrumental in the organization of the said company, the jury must find for the defendant, unless the jury further believe from the evidence that the defendant company, after being informed that the plaintiffs claimed commissions from F. and wife and also from the said company, under the agreement in the prospectus, consented that plaintiffs might receive compensation for taking the said power of attorney from the said F. and wife, as well as from the said company.<sup>3</sup>

**§ 1891. Same—Duty to account for profits from land turned over to corporation**

The court instructs the jury that, if they believe from the evidence that plaintiffs had associated themselves with others for the purpose of organizing a company, before they secured the power of attorney from F. and wife, and that the defendant was subsequently formed in pursuance of such purpose, and that said plaintiffs were afterwards paid by the said defendant for their services in securing the property, then the court instructs the jury that any profit or pay which the said plaintiffs may have contracted for to be paid to them by the said F. growing out of the sale of his property to said company inures to and becomes the property of the defendant, unless the jury believes from the evidence that said company, with full knowledge of all the facts, agreed that said plaintiffs should receive such pay, profit, or commission from said F. in addition to the compensation paid them by said company for securing the property.<sup>4</sup>

**§ 1892. By-laws—Estoppel to deny validity**

The jury are instructed that, if you find from the evidence, that the plaintiffs are the receivers of the ——— Company of ———, and shall further find that the said company was incorporated, as shown by the certificate of incorporation offered in evidence in this case; and shall also find that on or about the ——— day of ———, the said corporation was organized, and proceeded to transact business authorized by its certificate of incorporation, purchased property, and incurred debts and liabilities; and if you shall further find that on or about the same time the defendant agreed to take ——— shares of the stock of the said ——— Company, of ———, and that he paid to said company, either in person or by his agent, an en-

<sup>3</sup> Central Land Co. of Buchanan v. Obenchain, 22 S. E. 876, 92 Va. 130.

<sup>4</sup> Central Land Co. of Buchanan v. Obenchain, 22 S. E. 876, 92 Va. 130.

trance fee of \_\_\_\_\_ cents per share on each of said shares of stock, and also an installment of one dollar on each share, on or about the time of taking the same, and that on or about the same time he or his agent received from said company, a book containing by-laws, purporting to be the by-laws of said company, and also a receipt for the installment and entrance fee so paid, written on the same line with the number of shares so taken by him, and also that the said \_\_\_\_\_ was, on or about the same time, the secretary of said association, and that, acting as such secretary in the transaction of the business of said company, he entered the name of the said defendant on the stock ledger of said company, as the holder of \_\_\_\_\_ shares of its stock, and that the said defendant continued for more than \_\_\_\_\_ years thereafter, to pay the weekly installments of \_\_\_\_\_ on said \_\_\_\_\_ shares of stock, either in person or by agent, at the rooms of said association, and retained the said book, or one containing said by-laws, shares and entries of credits given him by said corporation, in his possession or in the possession of his agent during the whole time, he or his agent paying the weekly installment upon \_\_\_\_\_ shares of stock, and that he received dividends upon the amount paid in by him on said \_\_\_\_\_ shares of stock, and receipted in his own proper handwriting for the dividend paid to him in \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, then the said defendant became and was a member and stockholder in said corporation, and is now estopped from saying that the by-laws contained in the book offered in evidence by the plaintiffs, and produced by the defendant, are not the by-laws of said corporation, and he is bound by the by-laws in the same manner as if they had been regularly adopted by the stockholders of the said corporation, even if the jury believe they had never been adopted, and the said plaintiffs are entitled to recover the weekly installments upon said \_\_\_\_\_ shares of stock, from the \_\_\_\_\_ day of \_\_\_\_\_, with interest, in the discretion of the jury.<sup>5</sup>

**§ 1893. Liability on subscription to stock—Failure of consideration**

The jury are instructed that the execution of the written instruments in suit are admitted, and if you find from the evidence that the \_\_\_\_\_ Railroad was built and completed from A. to K., and the cars running thereon to the depot at K., within \_\_\_\_\_ years from the \_\_\_\_\_, then the plaintiff is entitled to recover the full amount named in said instruments, with interest thereon at the rate of \_\_\_\_\_ per cent. per annum from the time the road was thus completed to the present time, unless you find that the defendant

<sup>5</sup> Frank v. Morrison, 58 Md. 423.

has maintained his defense of failure of consideration, as hereinafter explained, by a preponderance of testimony.<sup>6</sup>

**§ 1894. Same—Effect of illegal issue of stock**

The jury are instructed that, if the defendant has shown that since the execution of the notes in suit the ——— Railroad Company issued a large amount of illegal stock certificates, and which are beyond the control of such corporation or the plaintiff, and that the illegal stock thus issued cannot be distinguished from the genuine stock, and that it is now beyond the power of the plaintiff or the railroad company to deliver to defendant valid stock upon his payment of the notes, this would be a good defense.<sup>7</sup>

The jury are instructed that the illegal issue of stock constitutes no defense to the notes in suit, unless it is further shown that the illegal stock so issued cannot be distinguished from the genuine, and are outstanding; that is to say, unless it is shown by the evidence that the defendant cannot get genuine stock on the payment of the notes.<sup>8</sup>

The issues of fact which you are to determine in this case are therefore very few and simple. If you find from the evidence that the road was built to K. within ——— years, as hereinbefore explained, and if the illegal stock has been canceled and destroyed, and the plaintiff is able and willing to deliver genuine stock to the defendant when the defendant shall pay the notes in suit, then the defense has failed, and your verdict must be for the plaintiff. All other issues that have been discussed in your hearing should be disregarded by you, as they are immaterial to the determination of this suit.<sup>9</sup>

**§ 1895. Same—Avoidance of contract for false representations**

**§ 1895(1). Maryland**

The jury are instructed that, even if the jury find that the defendant subscribed to ——— shares of the stock of the ——— Company and paid thereon \$———, still, if they further find that said subscription was made upon the terms and conditions contained in the prospectus, offered in evidence, and upon the faith of representations contained therein and verbally made to him by a certain ———, a director of said company, as to facts of a nature to induce said subscription, and shall further find that said representations were false and fraudulent as to said facts, and that the defendant learned of the fraudulent nature of said representations and of said prospectus, and within a reasonable time thereafter and while the company was still a going concern, notified the said

<sup>6</sup> Merrill v. Reaver, 50 Iowa, 404.

<sup>7</sup> Merrill v. Reaver, 50 Iowa, 404.

<sup>8</sup> Merrill v. Reaver, 50 Iowa, 404.

<sup>9</sup> Merrill v. Reaver, 50 Iowa, 404.

company that he would make no further payments upon his said subscription, then their verdict should be for the defendant, unless they shall further find that the defendant failed to exercise reasonable diligence under all the circumstances of the case in ascertaining the fraudulent nature of said representations, or that he failed to finally repudiate his said contract after acquiring knowledge of said fraudulent representations.<sup>10</sup>

**§ 1895(2). Virginia**

The court instructs the jury that, if they believe from the evidence that at the time the defendant entered into the contract by which he subscribed to ——— shares of stock in a company to be incorporated in accordance with the terms of the prospectus and contract introduced in evidence, it was represented to said defendant by the party procuring his subscription that the whole proceeds of the capital stock of said company should be invested in the payment for and improvement of certain real estate, but that in fact it had already been agreed between the parties engaged in procuring the organization of said company to pay over the sum of \$——— to said parties as promoters, or otherwise, then said false representation rendered said contract of subscription voidable at the instance of said defendant, and they must find for said defendant on this issue, unless, after full knowledge of the falsity of said misrepresentation, said defendant elected to ratify and confirm his subscription as aforesaid. Confirmation must be a solemn and deliberate act. When the original transaction is infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the court watches with the utmost strictness, and does not allow it to stand but on the clearest evidence.<sup>11</sup>

**§ 1896. Same—Avoidance for subsequent alteration of subscription paper**

The jury are instructed that, if the jury shall believe from the evidence that at the time the defendant signed the subscription paper the capital of the plaintiff was to be but ——— dollars, and that it was then so written in said paper, and the same was at any time afterwards changed by an interlineation so as to make it read ——— dollars, and that the defendant did not know of said change and never assented to the same, then the defendant cannot be required to pay the same, and is exonerated from his subscription, and the verdict is to be found for him.<sup>12</sup>

<sup>10</sup> Urner v. Sollenberger, 89 Md. 316, 43 A. 810.

<sup>11</sup> West End Real Estate Co. of

Norfolk v. Claiborne, 34 S. E. 900, 97 Va. 734.

<sup>12</sup> Hughes v. Antietam Mfg. Co., 34 Md. 316.



**§ 1897. Same—Waiver of ground for rescission**

The jury are instructed that if they find that the defendant, after discovery that there were such profits, treated the contract of subscription as a subsisting contract by him, they must deem that the defendant waived his right of repudiation, and that a promise to pay a call after such a discovery is an act showing that he did treat the contract as a subsisting contract, and is a waiver of his right to repudiate it, and they must find for the plaintiff on special plea No. \_\_\_\_\_.<sup>13</sup>

**§ 1898. Liability of corporation or its president for refusal to issue certificates of stock**

The court instructs the jury that the defendant is a corporation organized under the laws of the state of \_\_\_\_\_ by articles of association duly executed by \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and certificate of the secretary of state regularly issued thereon on the \_\_\_\_\_ day of \_\_\_\_\_, and that from and after said \_\_\_\_\_ day of \_\_\_\_\_, said corporation was fully completed and established as a corporation with all the rights and liabilities of a corporation under the law and as mentioned in these instructions.<sup>14</sup>

The court instructs the jury that the capital stock or stock of said corporation consisted of a portion or all of the plant and business theretofore owned and operated by defendant E. as a planing mill and lumber company, the portion of said business so taken as and for the stock of said corporation being taken and accepted by it at a valuation of \$\_\_\_\_\_, and in this connection it is a question for you to determine from the evidence whether the corporation took all of the assets of said former business, or all of said assets less \$\_\_\_\_\_. Whichever way you may find that fact to be, however, for the purpose of this case you are to consider that the company owned the assets constituting its stock regardless of whether or not proper transfers had been made to it of said assets, and that all of said stock was fully paid in. By the articles of association organizing said corporation it was stipulated and agreed that the \$\_\_\_\_\_ in value of said stock or assets of said corporation should be divided into \_\_\_\_\_ portions or shares, each share representing and being of the value of \$\_\_\_\_\_. The articles of association when executed became and were a contract between plaintiff and the other shareholders and the corporation that plaintiff was the owner of and entitled to \_\_\_\_\_ of

<sup>13</sup> West End Real Estate Co. of Norfolk v. Claiborne, 34 S. E. 900, 97 Va. 734.

<sup>14</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

said shares, of the face or par value of \$——, and in the absence of agreement or understanding, qualifying facts and circumstances, and the admission of plaintiff as hereinafter mentioned, plaintiff is to be considered by you as the lawful owner thereof. Plaintiff admits that —— of the shares taken by him, that is, \$—— of said stock, was taken by him to be held on condition, and that he was not the sole beneficial owner thereof at the time of the organization of the corporation, and admits that as to —— shares or \$—— of said \$—— stock he never complied with the conditions so as to be or become the absolute owner thereof, and he makes no claim in this action for or on account thereof.<sup>15</sup>

The court instructs the jury that the question of the right of the plaintiff to or absolute ownership of the —— shares or \$—— stock in controversy is to be determined by you from the evidence. And on that question the court instructs you that, if at the time of the execution of the articles of association the defendant E. and plaintiff understood and agreed that plaintiff was to have \$—— of the stock absolutely as his own then that amount became and was his stock absolutely, although the same was paid for by the property and assets of said E. And if you further find from the evidence that plaintiff and defendant E. agreed and understood that as to —— shares of said stock plaintiff was to have —— shares thereof for each and every year he remained with said company as an officer and employé thereof, and that under said contract and agreement plaintiff did stay with said corporation for a period of —— full years as an employé and officer thereof, then and in that event plaintiff became and was the absolute owner of —— of the shares or \$—— of said stock so held by him on condition as above mentioned.<sup>16</sup>

The court further instructs the jury that defendant E. alone had no power or authority on the —— day of ——, at the first meeting of the corporation to in any wise limit or curtail the rights of plaintiff in and to any stock of which the plaintiff was the absolute owner, if he was the owner of any at that time.<sup>17</sup>

The court instructs you that the signing and execution of the articles of association read in evidence and the filing of them with the secretary of state would create the corporation, the ——, and the plaintiff, in the absence of an understanding between himself and E. to the contrary, would be the owner of the stock of which in such articles of association he appeared as owner, but you are

<sup>15</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

<sup>16</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

<sup>17</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

instructed that these parties might have varied the effect of the contract contained in the articles of association by an agreement, or a mutual understanding existing at the time of the execution of these articles of association, and if you find and believe from the evidence that at the time such articles of association were executed it was the understanding between E. and the plaintiff that the latter was not at that time to become the absolute owner of the stock which appeared in these articles of association in his name, and if you further find from the evidence that the defendant E. in ———, drew up the writing offered in evidence dated ———, and that by its terms the plaintiff was to become the owner of the stock only on condition that he remain in the service of the defendant company for ——— years from ———, unless compelled to quit by permanent sickness, or death, and that the plaintiff agreed or assented to such conditions, then such agreement became binding upon both the plaintiff and defendant, and if you further find and believe from the evidence that the plaintiff, before the expiration of ——— years from ———, voluntarily quit the service of the defendant company, then he never became the owner of the stock sued for, and your verdict should be for the defendants.<sup>18</sup>

The court further instructs the jury that, the absolute or unconditional owner of stock in a corporation has the right to have issued to him a certificate of the corporation showing the amount of stock owned by him, and that a refusal or unreasonable failure by the corporation to issue to him such certificate in a reasonable time after a demand by him therefor is a conversion of said stock by said corporation to its own use, and such corporation immediately becomes and is liable to the owner of said stock for the reasonable value thereof.<sup>19</sup>

The court further instructs the jury that, if the absolute owner of stock in a corporation demands of the president thereof the issuance of a certificate thereof, then it becomes and is the duty of such president within a reasonable time to take such steps as will cause the issuance of said certificate to such owner; and if said president fails or refuses to take such steps in a reasonable time after such demand, and if such failure or refusal on his part is with the intention and for the purpose of depriving such owner of the benefits of said stock and for the purpose of enhancing the value of such president's own stock in said company, then and in that event such president becomes and is liable along with said cor-

<sup>18</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

<sup>19</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

poration as and for a conversion of said stock to his and its own use.<sup>20</sup>

The court instructs the jury that, if you find from the evidence that plaintiff was the absolute owner of any of the stock of defendant corporation, and that he demanded of defendant E. the issuance to him of certificates thereof, on or prior to the \_\_\_\_\_ day of \_\_\_\_\_, then the failure to issue to him said certificates up to the time of filing this suit was an unreasonable failure, and constituted a conversion of said stock by said corporation to its own use, and in such case you will find the issues in favor of the plaintiff and against the defendant corporation for the reasonable value of said stock at the time of such conversion. And if you further find from the evidence that defendant E. purposely caused such conversion with the intention and for the purpose of enhancing the value of his own stock in said corporation, then and in that event you will find the issues in favor of plaintiff and against both defendants for the reasonable value of the stock so converted to their own use.<sup>21</sup>

**§ 1899. Same—Sufficiency of demand for stock**

The court further instructs the jury that no set form of words are necessary to constitute a demand, but that an unqualified request or any language showing a present desire to have a thing to which one is entitled immediately done is a demand, and for the purposes of this case, if plaintiff was entitled to the certificates, and if he communicated to defendants a desire to have such certificates immediately issued, then that would be a demand in the meaning of these instructions.<sup>22</sup>

**§ 1900. Same—Amount of recovery**

The court further instructs the jury that, if you find the issues in favor of the plaintiff, then in estimating the reasonable value of the stock you will take into consideration all of the facts and circumstances in the case, but will not allow him more than \$\_\_\_\_\_, the amount sued for.<sup>23</sup>

**§ 1901. Lost certificates of stock—Action to establish title**

The court instructs the jury that the burden of proof is on the plaintiffs to establish their present ownership of the lost certificate by a preponderance of the evidence, and if they have done so they are entitled to recover, unless defeated by the statute of limitations as hereinafter instructed. But if they have not done so,

<sup>20</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

<sup>21</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

<sup>22</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

<sup>23</sup> Williams v. Everett (Mo.) 200 S. W. 1045.

then the law is for the defendants. In determining this question of ownership, as in determining every fact in the case, you will look to all the facts and circumstances relating thereto in evidence, applying thereto your best judgment and your experience in the affairs of common life.<sup>24</sup>

**§ 1902. Same—Limitation of action to establish title**

The court instructs the jury that, if you believe from the evidence that the petition signed by ———, and purporting to be signed also by ———, admitted to be in the handwriting of ———, an attorney at law, since dead, referred or related to the certificate in controversy, and that the resolution on the minutes of the company of the ——— of ———, was adopted in response to said petition, and further believe that the parties signing the same or their attorney had knowledge or actual notice of the same at or about the time of its adoption, then the law is for the defendants on the issue of limitation. But if you do not believe that said petition related or referred to said certificate, or do not believe that said resolution related or referred thereto, or if you do not believe that the parties thereto had knowledge or notice thereof, then the law on this issue is for the plaintiffs.<sup>25</sup>

**§ 1903. Relation between directors and individual stockholders—  
Purchase by directors of stock**

**§ 1903(1). Iowa**

You are instructed that a director and managing officer of a corporation doing business as a life insurance company stands in a relation of a fiduciary to all the stockholders who are not themselves engaged in the active management of the company, and before any such director and officer of the company, who is acquainted with its conditions and affairs, can rightfully purchase the stock of such company from stockholders who are not actively engaged in the management and operation of the corporation, such managing officer and director must inform such stockholders of the true condition of the company and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such officer himself possesses; and a purchase from a stockholder who is not acquainted with the condition and affairs of the company of his stock in such company, by one of the directors and managing officers, without first having informed such stockholder of the true condition of the company and value of its assets, is a fraud on the part of such officer and director, and renders

<sup>24</sup> Converse v. Galveston City Co. (Tex. Civ. App.) 189 S. W. 539.

<sup>25</sup> Converse v. Galveston City Co. (Tex. Civ. App.) 189 S. W. 539.

him or her liable to pay the stockholders the full value of the stock, without reference to the price agreed on at the time of the sale, provided the stockholder does not himself know the value of the stock.<sup>26</sup>

**§ 1903(2). Kansas**

*Stewart v. Harris*, 77 P. 277, 69 Kan. 498, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, cited in *Dawson v. National Life Ins. Co. of United States*, 157 N. W. 929, 176 Iowa, 362, L. R. A. 1916E, 878, Ann. Cas. 1918B, 230. See § 1903(1).

**§ 1903(3). West Virginia**

The court instructs the jury that a director or managing officer of a corporation having a knowledge of the true condition of affairs of such corporation, or any exclusive information affecting the value of the stock of such corporation, because of the trust relation and the superior opportunities afforded for acquiring information, before he can rightfully purchase the stock of one not actively engaged in the management of its affairs, and who is without the exclusive information possessed by the former, must inform such stockholder of everything peculiarly and exclusively within his knowledge which would affect the value of the stock. And the court further instructs the jury that, if such director or managing officer undertakes to speak or become active in inducing the sale, he must speak fully, frankly, and honestly, and conceal nothing to the disadvantage of the selling stockholder.<sup>27</sup>

**§ 1904. Interest of stockholder in profits**

You are instructed that the interest of a stockholder in the net profits of a corporation means his dividends declared and paid by the corporation on his shares of stock, that a shareholder in a corporation has no property interest in the profits of the business carried on by the corporation until a dividend has been declared out of such profits.<sup>28</sup>

**§ 1905. Authority of corporate agents to make contracts on its behalf**

**§ 1905(1). Connecticut**

The jury are instructed that, if you find that ———, the treasurer, had express authority to sign the notes and checks and effect the loan in question, or if you find that these acts were within the apparent scope of his authority, or within the scope of the authority which he was accustomed to exercise without objection by these

<sup>26</sup> *Dawson v. National Life Ins. Co. of United States*, 157 N. W. 929, 176 Iowa, 362, L. R. A. 1916E, 878, Ann. Cas. 1918B, 230.

<sup>27</sup> *Staker v. Reese*, 97 S. E. 641, 82 W. Va. 764.

<sup>28</sup> *Pyle v. Gallagher* (Del.) 75 A. 873, 6 Pennewill, 407.



defendants, your verdict should be for the plaintiff; but if you find that borrowing this money in the way testified to and giving this paper was not within the authority expressly given to him, or within the apparent scope of the authority which he was accustomed to exercise, then your verdict should be for the defendants; and if you should find that this money borrowed, or received for the paper in suit, was not for the use of the defendants, and the plaintiff knew or had good cause to know the fact, or if for any other reason the plaintiff did not in good faith trust the credit of the defendants, then your verdict should be for the defendants.<sup>29</sup>

§ 1905(2). **Missouri**

You are instructed that, as adjuster or creditman for the defendant company, the witness R. possessed such powers only as were specifically delegated to him by the defendant company by by-law or action of its board of directors, or as are ordinarily exercised by persons holding a like or similar position, and, if you believe from the evidence that it was not usual or customary for persons holding a like or similar position to that held by the said R. with the defendant company to execute on behalf of their corporation employers contracts like or similar to the contract introduced in evidence as Plaintiff's Exhibit ———, or contracts obligating such corporation employers to pay money, under circumstances similar to those shown in this case, and that no special authority had been delegated to the said R. to execute such contracts, and that he had not prior to that time executed on behalf of the defendant other like or similar contracts with its knowledge and approval, then your verdict will be for the defendant.<sup>30</sup>

§ 1905(3). **Pennsylvania**

You are instructed that, to charge a corporation upon the act of an officer or agent, it must be shown, directly or presumptively, either that the act was performed while in the discharge of his ordinary duty in the usual course of business, and was within the general scope and apparent sphere of such duty, or that it was expressly authorized, or that it was performed with the knowledge and implied assent of the directors or of the corporation, or its authorized officer, or was subsequently ratified by them.<sup>31</sup>

§ 1905(4). **Texas**

You are instructed that, if you find from the evidence that any or all of the contracts mentioned in section No. ——— of this

<sup>29</sup> Rowland v. Apothecaries' Hall Co., 47 Conn. 384.

<sup>30</sup> Fuller v. Tootle-Campbell Dry

Goods Co., 176 S. W. 1091, 189 Mo. App. 514.

<sup>31</sup> Pennsylvania Ins. Co. v. Carter, 11 A. 102.



charge were made and carried out by the defendant company, acting through its agents, with the parties therein named, but you do not find that said agents were authorized by the governing body of said corporation to make said contracts, nor that said contracts were made in the scope of the duty and employment of such agents, and do not find that said contracts, if any were made, were known to, or acquiesced in or consented to by, the governing body of said corporation, after being made by said agents, then you will return a verdict for the defendant company.<sup>32</sup>

**§ 1905(5). Washington**

You are instructed that, if you believe by the preponderance of the evidence that the defendants ——— and ——— were the vice president and secretary, respectively, of the defendant corporation, and that they were in full charge of the office of the corporation in the West, and that the corporation was in the business of buying timber and timber lands in connection with other business, and that these officers, ——— and ———, were apparently clothed with authority to transact the business of the corporation, and among other things to make such bargains as that alleged by the plaintiff in his complaint, such facts, if proved, would be prima facie evidence of authority from the corporation to such officers to make such a contract for it.<sup>33</sup>

**§ 1906. Same—Employment of others to perform services**

**§ 1906(1). Michigan**

You are instructed that plaintiff claims that he was hired by the president of the company; that he was told to go to work there by the president of the company, and never received any notice but what he was at work for the company; and that he received his pay from the president of the company. Plaintiff claims that he was hired by the president of the company, acting in his capacity as president or general manager of the company, and that as long as he was employed there he had no notice or information that he was not in the employ of the company. If you find that plaintiff was so employed, that is, hired by ———, acting as president of the company, to work for the company, he remained and was the employé of the company until he had notice of the arrangement, or independent contract, which the defendant company sets up as existing between itself and ———.<sup>34</sup>

<sup>32</sup> *Waters-Pierce Oil Co. v. State*, 44 S. W. 936, 19 Tex. Civ. App. 1.

<sup>33</sup> *Cameron v. Stack-Gibbs Lumber Co.*, 123 P. 1001, 68 Wash. 539.

<sup>34</sup> *Druck v. Antrim Lime Co.*, 143 N. W. 59, 177 Mich. 364.

**§ 1906(2). Texas**

You are instructed that if you believe from the evidence in this case that on the \_\_\_\_\_ day of \_\_\_\_\_, the plaintiff made and entered into a contract with \_\_\_\_\_, as manager of the defendant corporation, and that the said \_\_\_\_\_ was at that time manager of the said company, and that by the terms of the said contract the said \_\_\_\_\_ contracted and agreed to pay the plaintiff the sum of \$\_\_\_\_\_ per month for his services, then, in estimating and ascertaining what, if anything, is due this plaintiff, you will allow him the sum of \$\_\_\_\_\_ per month for such time as you may find from the evidence he worked under and by virtue of the said contract, unless you find from the evidence that the plaintiff and the defendant company had a settlement of all matters and things between them on the \_\_\_\_\_ day of \_\_\_\_\_, about which you are instructed in a following paragraph of this charge.<sup>35</sup>

**§ 1907. Evidence as to authority of corporate agents**

You are instructed that, in determining whether or not the agents of defendant company were authorized to make the contracts alleged, if any were so made, or whether same were known to or acquiesced in by defendant company's governing officers, the same does not necessarily have to be shown by positive or direct testimony, but may be shown by circumstances; and you will take into consideration all the facts and circumstances in evidence before you in determining this question.<sup>36</sup>

**§ 1908. Effect of conflicting interest of officer of corporation negotiating contract on its behalf**

The jury are instructed that comment has been made in this case upon the fact that M., the president of the defendant company, was a member of the firm of \_\_\_\_\_, the selling agents of the plaintiff company, and that he signed the contract on behalf of the defendant company and on behalf of the selling firm as well. The fact that such was the case, and that he acted in a dual capacity—that is, acted on behalf of the defendant company and on behalf of the plaintiff—does not necessarily and of itself invalidate the contract. The undisputed facts are that the firm of \_\_\_\_\_ were the owners of about one-fifth of the capital stock of the defendant company; that they were creditors of said company, to the extent of some \_\_\_\_\_ dollars; that their commission on the \_\_\_\_\_ ore sale of \_\_\_\_\_ cents a ton was not fixed or determined by the price of the ore, and that the ore was sold at the regular mar-

<sup>35</sup> Red Mineral Springs Development Co. v. Davis (Tex. Civ. App.) 164 S. W. 427.

<sup>36</sup> Waters-Pierce Oil Co. v. State, 44 S. W. 936, 19 Tex. Civ. App. 1.

ket price for the year ——— deliveries, and that the contract contained a provision that the price should be reduced to the lowest price at which the plaintiff company should sell to any one ——— ore during that year. Under these facts—which we do not understand are questioned—we are of opinion that, in view of the dual capacity in which M. stood and acted, the contract, if valid in other respects, was not void, but voidable only by the defendant company on this particular ground alone of M.'s dual relation, unless the jury should find that M. took advantage of his position to impose upon the defendant company a contract which was unfair, oppressive, or fraudulent.<sup>87</sup>

### § 1909. Ratification

#### § 1909(1). United States

The jury are instructed that, if a contract within the power of that corporation to make—that is, with reference to the facts in this case, a contract for the supply of ore for its furnace—if such contract be made by the president or an executive committee, assuming to act for the company, but without express authority to so contract, it is the duty of the directors of the company, upon receiving notice of such contract having been made, to promptly disavow the same as binding upon the corporation; and, in case they fail to do so within a reasonable time, the law will hold them to have ratified the contract, and allow it to then become binding upon the company. The law does not, in the case of a purchase, permit a delay, where the directors know of such purchase, to enable the company to speculate upon the chances of deciding profitably, after a lapse of time, as to whether or not they will disavow and refuse to accept the contract. Applying these general principles to the case before us, we instruct you that, if the jury find from the evidence that the fact of the purchase of this ——— ore was made known to the directors of the company, and that they knew that such purchase was made in the usual course of business and in the mode customarily followed by the company's officers and hitherto recognized by the company, and they did not, within a reasonable time, express their dissent, their knowledge of the facts and their inaction in the face of such facts might amount to a ratification of such purchase by the defendant company. What would be a reasonable time for such repudiation is, under the proofs in this case, a question for the jury, and to them we submit it.<sup>88</sup>

<sup>87</sup> Salem Iron Co. v. Lake Superior Consol. Iron Mines (C. C. A. Pa.) 112 F. 239, 50 C. C. A. 213.

<sup>88</sup> Salem Iron Co. v. Lake Superior Consol. Iron Mines (C. C. A. Pa.) 112 F. 239, 50 C. C. A. 213.

**§ 1909(2). Texas**

You are instructed that, if you find said contracts mentioned in section No. ——— of this charge were entered into by the defendant company, acting through its agents, and that said agents were acting in the scope of their employment and agency in making said contracts, or, if said contracts were not authorized by the governing body of said corporation, that it acquiesced in or consented to or ratified said acts, after knowing the same had been entered into, then said defendant company would be liable for such acts.<sup>39</sup>

You are further instructed that a corporation can only act through its agents and servants, but a corporation is not liable for all the acts of its agents or servants. It is liable, however, for the acts of its agents, done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents which have been acquiesced in, or ratified by, the governing body of said corporation.<sup>40</sup>

**§ 1910. Same—Acceptance of benefits**

You are instructed that if you find from the evidence that any officer of defendant, purporting or pretending to act for defendant, did employ plaintiff, and defendant did receive and accept the benefit of plaintiff's services, although you may find that plaintiff was not employed in a formal way by the defendant corporation, or by any one having authority from the defendant corporation to employ her in said matter, still said defendant is liable to plaintiff for the reasonable value of the services so rendered by her and accepted by the defendant.<sup>41</sup>

**§ 1911. Liability on contract entered into with promoters prior to incorporation**

You are instructed that, if the jury believe and find from the evidence that prior to the incorporation of defendant the plaintiff, at the request of the organizers and incorporators of the defendant corporation, performed certain services as a lawyer in the matter of the preparation of the articles of incorporation and procuring the defendant's incorporation; that there was at no time any agreement or promise on the part of plaintiff not to charge for such services, and at the time of the rendition of such services plaintiff intended to charge therefor; and that such services were rendered under such circumstances that the said organizers and incorpora-

<sup>39</sup> *Waters-Pierce Oil Co. v. State*,  
44 S. W. 936, 19 Tex. Civ. App. 1.

<sup>40</sup> *Waters-Pierce Oil Co. v. State*,  
44 S. W. 936, 19 Tex. Civ. App. 1.

<sup>41</sup> *Brooks v. Geo. Q. Cannon Ass'n*,  
178 P. 589, 53 Utah, 304.

tors expected, or ought to have expected, that they were to be paid for—then the jury are authorized to find that there was an implied promise to pay the reasonable value of such services, even though there was no express promise or agreement on the part of said organizers or incorporators, or on the part of the defendant, to pay for such services. And if you find that there was such implied promise, and that the defendant accepted and operated under the certificate of incorporation procured by the plaintiff, then the defendant is liable to plaintiff for the reasonable value of the services rendered by him in preparing the articles of incorporation and procuring the incorporation of the defendant, not exceeding \$——, and you will include what you may believe to be the reasonable value of this service (not exceeding \$——) in the plaintiff's damages if you conclude to find for the plaintiff, notwithstanding said services were rendered before the defendant was incorporated. But you should bear in mind that this item here mentioned is part of the entire bill mentioned in the preceding instruction, and not in addition thereto.<sup>42</sup>

**§ 1912. Same—Adoption**

You are instructed that it was not necessary that the adoption, if there was an adoption by the —— corporation of the promoter's agreement with defendants, if there was such an agreement, be made in express terms. It was not necessary that it should be done by any formal action of its board of directors, or in writing or oral resolutions adopted by its board of directors.<sup>43</sup>

**§ 1913. Defense to action by officer for salary—Removal**

You are instructed that under the articles of incorporation and by-laws of defendant corporation the board of directors of defendant had a right to remove the plaintiff from his office of vice president and member of the board of directors for good cause, and you are instructed that, if they did remove him after ——, when it came to their attention that the plaintiff had disposed of his stock, then, and in that case, plaintiff would not be entitled to recover anything in this action for the period of time after the ——.<sup>44</sup>

**§ 1914. Recovery by officer and director for services as attorney**

You are instructed that, although the plaintiff was an officer and director of the defendant corporation, yet if the jury believe and find from the evidence that at the request of the directors or at the request of the general manager of the defendant corporation he

<sup>42</sup> Taussig v. St. Louis & K. R. Co., 85 S. W. 378, 186 Mo. 269.

<sup>43</sup> Bond v. Pike, 111 N. W. 916, 101 Minn. 127.

<sup>44</sup> Selley v. American Lubricator Co., 93 N. W. 590, 119 Iowa, 591.

rendered service to such corporation as a lawyer, and that there was at no time any agreement or promise on the part of plaintiff not to charge for such services, and that at the time of the rendition of such services plaintiff intended to charge therefor, and that such services were rendered under such circumstances that the defendant expected or ought to have expected that they were to be paid for, then the jury are authorized to find that there was an implied promise to pay a reasonable value for such service, even though there was no express contract or agreement by defendant to pay for such services; and if you find that there was such implied promise, then your verdict should be for the plaintiff, and you should assess his damages at such sum, not exceeding \$—— as you may believe from the evidence such services were fairly worth, with interest thereon at —— per cent. per annum from the date of the institution of this suit, ——, to the present time <sup>45</sup>

**§ 1915. Liability of manager to corporation on account of ultra vires acts—Damages**

You are instructed that the mere fact that there was such unauthorized increase of indebtedness is not, however, sufficient to make defendant responsible for any losses which befell the corporation, but, if the creation of such indebtedness should be determined by the jury as the direct and natural cause of the stringency of the affairs of the corporation, which it is conceded existed on ——, and that such a condition would not have existed had it not been for such increased indebtedness, and if the jury further find it to be a fact that the corporation was at that time pressed for money with which to meet its obligations, and on account of such excess indebtedness and such pressure was under the reasonable necessity of disposing of its assets immediately, without waiting to do so in the usual course of business, and that by reason of these facts the value of the plaintiff's assets at that time before it made this trust deed for the benefit of creditors was diminished, defendant would then be liable to the company—the plaintiff, unless his acts were afterwards ratified by the company, for such loss, which would be the difference in the value of such assets at the time, ——, before the making of the trust deed, as such value would have been had not this necessity of an immediate sale of its assets existed, and their actual value as affected by such necessity, except that such damages could not in any event exceed the actual loss to the company as determined by subtracting what was afterwards realized by the trustees out of the assets from the value of the assets as it would have been had not such value been affected by the necessity of an early or forced sale. If, however, the jury should determine that the

<sup>45</sup> Taussig v. St. Louis & K. R. Co., 85 S. W. 378, 186 Mo. 269.



increase of the company's indebtedness was not the cause of the condition which existed in the company's affairs on ———, or that no reasonable necessity then existed for forcing the sale of the assets either because the difficulties and embarrassments of the company might have been otherwise met, or for any other reason, or if the same situation would have existed had the defendant increased the company's indebtedness only to the extent allowed by the charter, ———, or if the value of the assets was not diminished by this situation, in any one of these events the defendant would not be responsible for the company's losses, and you would in any such case return a verdict for the defendant.<sup>46</sup>

**§ 1916. Notice to corporation—Knowledge of agent not acquired in course of business**

You are further instructed that knowledge obtained by an officer of a corporation in his private or social affairs is not imputed to the corporation, and is not the knowledge of that corporation, unless such knowledge was present and in the mind of the officer while transacting the corporation's business, or such knowledge was communicated to the officer under such circumstances as to lead a reasonable person to conclude that such knowledge must have been present to his mind and memory when transacting the corporation's business, and if you find from the testimony that the plaintiff told E., the president of the defendant company, that he had a lien on ———'s crop for his rent, and that such conversation took place as a casual conversation at ——— in ———, and not in the office of the company, nor during the transaction of said company's business, then such conversation was not notice to the defendant company, unless you further find that it is reasonably probable that such conversation was present in his mind and memory at the time said E. bought the wheat for the defendant company, and your verdict should be for the defendant.<sup>47</sup>

**§ 1917. Personal liability of officer of corporation on its note**

You are instructed that, if the jury shall find from the evidence that the name of the defendant, was by said defendant written on the face of the note sued on in this case, at the time said note was issued, by the said defendant, if the jury shall so find, and if the jury shall further find that said note was by said defendant placed in an envelope, wrapped in a blank sheet of paper, and forwarded to said payee, ———, the plaintiff, without any explanation or qualification of said signature, then the verdict of the jury must be for the plaintiff, unless the jury shall find from the preponder-

<sup>46</sup> Fergus Falls Woolen Mills Co. v. Boyum, 162 N. W. 516, 136 Minn. 411, L. R. A. 1918A, 919.

<sup>47</sup> Oliver v. Grande Ronde Grain Co., 142 P. 541, 72 Or. 46.



ance of evidence, that said defendant signed said note as president of the ——— Company to authenticate the signature of said company, and not a joint maker with said ——— Company, and such was the understanding between the parties at or before said note was issued.<sup>48</sup>

**§ 1918. Insolvency—Right to prefer creditors**

The court instructs you, the jury, that a corporation in failing circumstances has a right to prefer one or more creditors over other creditors, and to that end execute a chattel deed of trust, securing one or more of its creditors to the exclusion of others, and such conveyance is not rendered invalid because, in effect, it hinders and delays creditors not so preferred.<sup>49</sup>

The court instructs you, the jury, that a corporation in failing circumstances may prefer one or more creditors in preference to others in discharging its obligations, if such preference is made in good faith, while the property of the company is in its possession; and the mere insolvency of a corporation does not, of itself transfer its assets into a trust fund for the benefit of all its creditors; nor can it be said that such a chattel deed of trust, though it conveys all the property of the corporation to a trustee for the benefit of particular creditors in preference to other creditors, is an assignment, within the meaning of the statute of assignments, for the benefit of creditors. There is a clear distinction between such a conveyance by deed of trust and an assignment for the benefit of creditors generally. A corporation may convey its property in trust by chattel deed of trust, preferring one or more creditors in preference to others, precisely the same as an individual or partnership may do.<sup>50</sup>

**§ 1919. Same—Right to prefer officer as creditor**

The court further instructs you, the jury, that if you believe and find from the evidence that the debts secured in favor of R. and L., by the terms of said deed of trust, read in evidence, were both bona fide indebtedness for money actually lent in good faith to the ——— Company, to the full extent of the claims secured to said R. and said L., then the mere fact that R. was one of the directors and an officer of the said Company, and that ——— was another director and officer of said company, and was interested in the indebtedness secured in favor of said L., would not affect the validity of said deed of trust.<sup>51</sup>

<sup>48</sup> Belmont Dairy Co. v. Thrasher, 92 A. 768, 124 Md. 320.

<sup>49</sup> State ex. rel. Grimm v. Manhattan Rubber Mfg. Co., 50 S. W. 321, 149 Mo. 181.

<sup>50</sup> State ex. rel. Grimm v. Manhattan Rubber Mfg. Co., 50 S. W. 321, 149 Mo. 181.

<sup>51</sup> State ex. rel. Grimm v. Manhattan Rubber Mfg. Co., 50 S. W. 321, 149 Mo. 181.

## CHAPTER XCV

## COUNTIES

§ 1920. Contracts—Reservation by county of percentage of contract price until completion of work.

1921. Same—Mode of discharging obligation.

1922. Liability for negligence of agents.

1923. Audit and allowance of claims—What claims allowable.

1924. Conditions precedent to actions against county—Demand.

See, also, Bridges; Municipal Corporations; Streets and Highways.

§ 1920. Contracts—Reservation by county of percentage of contract price until completion of work

The court instructs the jury that, if you are reasonably satisfied from the evidence that the plaintiff performed work and labor and furnished material in constructing sewers, curbing, and culverts on ——— avenue, and that the work so done was accepted by ——— county, and that said work and labor was performed and said material furnished under a contract with ——— county, by which contract said county undertook and promised to pay for 75 per cent. of the work each month on monthly estimates by the county engineer, and by which said contract said county undertook and promised to pay the remaining 25 per cent. when the work was completed and the property holders paid in, then plaintiff was entitled to recover 100 per cent. of all work so done and materials so furnished by him under the contract, and accepted by plaintiff.<sup>1</sup>

§ 1921. Same—Mode of discharging obligation

The court instructs the jury that an agreement by a county to pay for work and material in warrants of the county is equivalent to an agreement by the county to pay in money.<sup>2</sup>

§ 1922. Liability for negligence of agents

The jury are instructed that there is no law authorizing a recovery, by a private individual in a suit against a county, for injuries committed by the servants of the county. While railroads and other private corporations are liable for the negligence of their servants, a county is not so liable.<sup>3</sup>

The court instructs the jury, for defendant, that no action by a private individual against the county can be maintained for injuries resulting from the careless or negligent conduct of any

<sup>1</sup> Mobile County v. Lynch, 73 So. 423, 198 Ala. 57.

<sup>2</sup> Mobile County v. Lynch, 73 So. 423, 198 Ala. 57.

<sup>3</sup> Symonds v. Board of Sup'rs of Clay County, 71 Ill. 355.

agent of the county; and in this case, though the jury should believe, from the evidence, that the property of plaintiff was burned by fire, originating on the poor farm, carelessly left by the agent or agents of the defendant, yet such facts do not establish the liability of the defendant.<sup>4</sup>

**§ 1923. Audit and allowance of claims—What claims allowable**

The court instructs the jury that the board of revenue and road commissioners of ——— county has no authority to audit and allow claims which do not constitute an indebtedness of the said county.<sup>5</sup>

**§ 1924. Conditions precedent to actions against county—Demand**

The jury are instructed that under our statute, before any action can be brought against any county upon an unliquidated demand, the same must have been presented to the board of supervisors of such county and payment demanded. In the case at bar the claim is an unliquidated claim, and, there being no evidence showing or tending to show that the claim was presented to the board of supervisors of the county of ——— before the commencement of this suit and payment demanded, you are directed to return a verdict for the defendant.<sup>6</sup>

<sup>4</sup> Symonds v. Board of Sup'rs of Clay County, 71 Ill. 355.

<sup>5</sup> Mobile County v. Lynch, 73 So. 423, 198 Ala. 57.

<sup>6</sup> County of Cerro Gordo v. County of Wright, 50 Iowa, 439.

## CHAPTER XCVI

## COVENANTS

- § 1925. Liability for breach of warranty—Matters constituting eviction.  
1926. Same—Effect on covenant or of judgment recovered against covenantee by third person.  
1927. Breach of covenant against incumbrances—Existence of railroad right of way.  
1928. Same—Damages.  
1929. Same—Losses incurred through delinquency of covenantee.

§ 1925. Liability for breach of warranty—Matters constituting eviction

You are instructed that the deed in evidence, executed by the defendant and his wife to the plaintiff, contains a covenant of warranty, and if you find from the evidence that the plaintiff, after the delivery of said deed, was unable to obtain possession of the land conveyed by said deed, and that it became necessary to prosecute a suit against a person then in possession to recover the same, and that the plaintiff did prosecute such suit and notified the defendant of the claim of the person who was in possession of said land, and that such person claimed the title to the same; and if you believe from the evidence that, before the commencement of said suit by the plaintiff against B., the plaintiff notified the defendant of his intention to prosecute such suit, and requested the defendant to aid in the prosecution of the same, or to take charge of the prosecution and conduct it, and that such request was given in time to enable the said defendant to prosecute such suit, then you are instructed that, if you find from the evidence that, by judgment of the Supreme Court of ———, the plaintiff's title to said land was denied on an appeal taken by B. to the said Supreme Court, then you are instructed that such facts constitute an eviction of the plaintiff as to the lands involved and a breach of the covenant of warranty executed by the defendant, and your verdict should be for the plaintiff.<sup>1</sup>

§ 1926. Same—Effect on covenantor of judgment recovered against covenantee by third person

The court instructs the jury that the evidence in this case shows that the title of defendant to the land was a good title, and that he conveyed a good title to the plaintiff, and that the plaintiff still holds the land under the deed from the defendant; and the defendant is not bound by the opinion of the Supreme Court in the

<sup>1</sup> Stonebaker v. Ault, 158 P. 570, 59 Okl. 189.

case of ——— v. ———, unless you find from a preponderance of the evidence that the plaintiff notified the defendant of the pendency of said cause of action before the same was tried in the district court, and requested or demanded the defendant to come into said suit and protect his title therein.<sup>2</sup>

**§ 1927. Breach of covenant against incumbrances—Existence of railroad right of way**

The court instructs the jury that the deed introduced in evidence by the plaintiff contains full and complete covenants against incumbrance on the land, and this covenant is broken, if at the time the deed was made and delivered, the railroad company had a valid right of way for its track over and across the farm or any part of it, but under the issue the burden is on the plaintiff to show by the evidence that such a right of way was then owned by said company.<sup>3</sup>

The court instructs the jury that it would not be sufficient to show that the company used and exercised ownership over such a privilege, but it must be shown that it had a valid right to do so, and when the deed was made and delivered.<sup>4</sup>

**§ 1928. Same—Damages**

You are instructed that the deed introduced in evidence from defendant to plaintiff contains a covenant against incumbrances permitted by defendant, and if the jury believe from the evidence that at the time said deed was executed, defendant had permitted said land to be sold for nonpayment of taxes, and that, without the knowledge or fault of plaintiff, said forfeiture became final, and that plaintiff lost said land by reason of said incumbrance, you will find for the plaintiff, and assess his damage at the value of the land at the time said deed was executed; provided, that said damages can in no event exceed the value of the consideration given by the plaintiff to the defendant for said land, and interest thereon at ——— per cent. from date of deed; and the amount of the consideration paid for the land by plaintiff is for the jury to determine, from the facts and circumstances in proof in the case. In other words, if the consideration given by the plaintiff to the defendant for said land, with interest from date of deed, be less than the value of the land, the jury, instead of assessing the damages at the value of the land, will allow only the amount of the consid-

<sup>2</sup> Stonebaker v. Ault, 158 P. 570, 59 Okl. 189.

<sup>3</sup> Jerald v. Elly, 1 N. W. 639, 51 Iowa, 321.

<sup>4</sup> Jerald v. Elly, 1 N. W. 639, 51 Iowa, 321.

eration paid by the plaintiff to defendant for said land, with \_\_\_\_\_ per cent. from date of deed.<sup>5</sup>

**§ 1929. Same—Losses incurred through delinquency of covenantee**

You are instructed that in this action the plaintiff sues defendant on a covenant against incumbrances done or suffered by defendant. Plaintiff alleges that defendant executed a deed to him for certain lands, described in complaint, with a covenant against incumbrances done or suffered by defendant; that, at the time said deed was executed, said defendant had, unknown to plaintiff, permitted said lands to be sold for taxes, and failed to redeem the same, and the purchaser obtained a deed to said land, to plaintiff's damage.<sup>6</sup>

You are instructed that if, before the execution of the deed from defendant to plaintiff, the title of the land, or any portion thereof, had already been lost, by virtue of the foreclosure under a mortgage executed by plaintiff to a third party, then plaintiff cannot recover for loss of such portion of land, for the reason that the covenant of defendant is only for incumbrances done or suffered by himself; but if the property in question has been redeemed by the plaintiff by a tender of the amount of sale, and \_\_\_\_\_ per cent. interest thereon, then the mere fact that the land had been sold would not prevent a recovery by plaintiff after its redemption.<sup>7</sup>

<sup>5</sup> Alexander v. Bridgford, 27 S. W. 69, 59 Ark. 195.

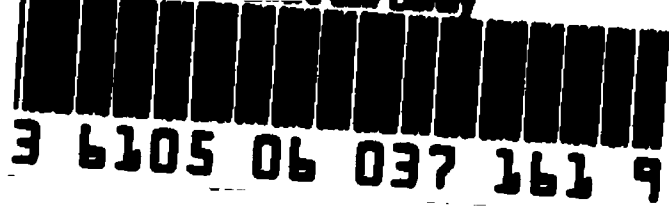
<sup>6</sup> Alexander v. Bridgford, 27 S. W. 69, 59 Ark. 195.

<sup>7</sup> Alexander v. Bridgford, 27 S. W. 69, 59 Ark. 195.

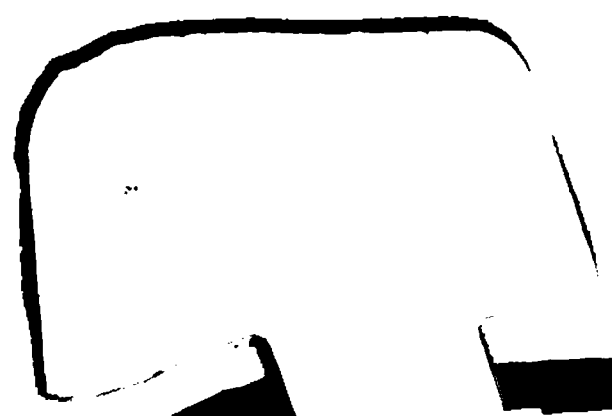








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